1326) SCSL-03-01-A (1215 – 2270) 1215

THE SPECIAL COURT FOR SIERRA LEONE

THE APPEALS CHAMBER

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

Registrar: Ms. Binta Mansaray

Date: 1 October 2012

Case No.: SCSL-2003-01-A

THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC WITH CONFIDENTIAL ANNEX A AND PUBLIC ANNEXES B AND C

APPELLANT'S SUBMISSIONS OF CHARLES GHANKAY TAYLOR

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

Counsel for Charles G. Taylor:
Mr. Morris Anyah
Mr. Eugene O'Sullivan
Mr. Christopher Gosnell
Ms. Kate Gibson
Ms. Magda Karagiannakis

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I. INTRODUCTION

1. This is the Appellant's Submissions of Charles Ghankay Taylor, filed pursuant to Rule 111 of the Rules[1] and Article 20 of the Statute[2] ("Appeal Brief" or "Brief").

2. The subject-matter of these submissions are the Judgement and Sentencing Judgement rendered by Trial Chamber II of the Special Court for Sierra Leone ("Trial Chamber" or "Chamber"), respectively on 18 May 2012[3] and 30 May 2012[4] in case number SCSL-03-01-T. These submissions are in support of the *Notice of Appeal of Charles Ghankay Taylor*, filed on 19 July 2012,[5] as well as the Corrigendum thereto of 23 July 2012.[6]

3. Mr. Taylor was charged with an 11 count indictment.[7] Having heard the evidence of 94 Prosecution witnesses,[8] many of whom received substantial payments and benefits as a result of their testimony,[9] the Chamber found that the Prosecution had failed to prove that Mr. Taylor instigated, ordered, or committed (either directly or through a joint criminal enterprise) these 11 counts. The Prosecution also failed to prove that Mr. Taylor commanded members of the RUF, AFRC and/or Liberian fighters, and as such he was acquitted of all counts in the Indictment on the basis of superior responsibility. Rather, he was convicted of having "planned" the crimes committed by members of the RUF/AFRC in the attacks on Kono and Makeni and the invasion of Freetown and subsequent retreat between December 1998 and February 1999,[10] and having "aided and abetted" all crimes committed by the RUF/AFRC between 1997 and 2002.[11]

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[1] Rules of Procedure and Evidence of the Special Court for Sierra Leone, as amended on 31 May 2012 ("Rules")
[2] Statute of the Special Court for Sierra Leone ("Statute").
[3] *Prosecutor v. Taylor*, SCSL-03-01-T-1283, Judgement, dated 18 May 2012, filed 30 May 2012 ("Judgement"); see, also, *Prosecutor v. Taylor*, SCSL-03-01-T-1284, Corrigendum to Judgement Filed on 18 May 2012, 30 May 2012 ("Judgement Corrigendum").
[4] *Prosecutor v. Taylor*, SCSL-03-01-T-1285, Sentencing Judgement, 30 May 2012 ("Sentencing Judgement").
[5] *Prosecutor v. Taylor*, SCSL-03-01-A-1301, Notice of Appeal of Charles Ghankay Taylor, 19 July 2012 ("*Taylor* Defence NoA").
[6] *Prosecutor v. Taylor*, SCSL-03-01-A-1304, Corrigendum to Notice of Appeal of Charles Ghankay Taylor, 23 July 2012.
[7] *Prosecutor v. Taylor*, SCSL-03-01-T-263, Prosecution's Second Amended Indictment, 29 May 2007 ("Indictment").
[8] Judgement, Annex B, para. 26.
[9] See Grounds of Appeal 5 and 40 below.
[10] Judgement, para. 6971.
[11] Judgement, para. 6953.

4. No reasonable trier of fact, applying the standard of proof beyond reasonable doubt, could have reached these conclusions. The colossal Judgement, over 2,500 pages in length, is plagued throughout by internal inconsistencies, misstatements of evidence and conflicting findings.

5. Numerous errors of law and fact infect these findings, invalidating the convictions, or occasioning a miscarriage of justice in respect of findings that could have been reached by no reasonable trial chamber. The planning convictions are built upon an impermissible reversal of a critical adjudicated fact. They are undermined in full by the Chamber's failure to find that Mr. Taylor planned the commission of any crime; the *actus reus* of planning is accordingly missing. The convictions for aiding and abetting are based on an improper legal standard that is not compatible with customary international law. The factual findings are built on a disregard of the usual caution to be exercised in respect of hearsay and uncorroborated evidence, and on errors in the assessment of the evidence that could not have been committed by a reasonable trier of fact.

6. These many errors reflect the weakness of the case against Mr. Taylor, at whose feet the Chamber has laid responsibility for crimes committed by foreign forces over whom he had no effective control, did not command or instigate, with manifest disregard to his physical and legal remoteness from the events in question. These errors are explored in full in the Grounds of Appeal below.

(i) Interlocutory Filings and Decisions

7. In compliance with Article 6(b) of the Practice Direction on the Structure of Grounds of Appeal before the Special Court,[12] the Defence hereby provides a list of interlocutory filings and decisions relevant to the appeal in the footnote below.[13]

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[12] Entered into force on 1 July 2011.

[13] **Interlocutory Appeals Chamber filings and decisions:** *Prosecutor v. Taylor*, SCSL-03-01-A-1-1324, Separate Opinion of Justice George Gelaga King on Decision on Charles Ghankay Taylor's Motion for Partial Voluntary Withdrawal or Disqualification of Appeals Judges, 13 September 2012; *Prosecutor v. Taylor*, SCSL-03-01-A-1-1323, Decision on Charles Ghankay Taylor's Motion for Partial Voluntary Withdrawal or Disqualification of Appeals Judges, 13 September 2012; *Prosecutor v. Taylor*, SCSL-03-01-T-775, Decision on "Defence Notice of Appeal and Submissions Regarding the Majority Decision Concerning the Pleading of JCE in the Second Amended Indictment", 1 May 2009. **Interlocutory Trial Chamber filings and decisions:** *Prosecutor v. Taylor*, SCSL-03-01-1282, Order Authorising Court Photography on 30 May 2012, 30 May 2012; *Prosecutor v. Taylor*, SCSL-03-01-1279, Order Authorising Court Photography on 16 May 2012, 11 May 2012; *Prosecutor v. Taylor*, SCSL-03-01-T-1234, Order re: Defence Motion Seeking Termination of the Disciplinary Hearing for Failure to Properly Constitute the Trial Chamber and/or Leave to Appeal the Remaining Judges' Decision to Adjourn the Disciplinary Hearing, 18 March 2011; *Prosecutor v. Taylor*, SCSL-03-01-T-1193, Decision on Defence Motion Seeking Leave to Appeal the Decision on Urgent and Public with Annexes A-N Defence Motion for Disclosure and/or Investigation of United States Government

(ii) Standards of Review on Appeal

8. Article 20(1) of the Statute and Rule 106 of the Rules provide that the Appeals Chamber shall hear appeals on the following grounds: (a) a procedural error; (b) an error on a question of law invalidating the decision; or (c) an error of fact which has occasioned a miscarriage of justice. The standards of review in respect of these grounds are outlined below and are incorporated by reference, as appropriate, whenever error is alleged in the submissions in this Brief.

9. Errors of law must invalidate the decision of the Chamber.[14] The appellant must provide details of the alleged error and state with precision how the legal error invalidates the decision.[15] In exceptional circumstances, an Appeals Chamber may consider legal issues which may not lead to the invalidation of the Trial Chamber's decision if such issues are of general significance to the Tribunal's jurisprudence.[16]

Sources within the Trial Chamber, the Prosecution and the Registry based on Leaked USG Cables, 7 February 2011; *Prosecutor v. Taylor*, SCSL-03-01-T-1174, Decision on 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, 28 January 2011; *Prosecutor v. Taylor*, SCSL-03-01-T-1171, Decision on Urgent and Public with Annexes A-C Defence Motion to Re-open its Case in Order to Seek Admission of Documents Relating to the Relationship Between the United States Government and the Prosecution of Charles Taylor, 28 January 2011; *Prosecutor v. Taylor*, SCSL-03-01-T-1143, 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, 10 January 2011; *Prosecutor v. Taylor*, SCSL-03-01-T-1118, 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, 12 November 2010; *Prosecutor v. Taylor*, SCSL-03-01-A-1104, Decision on Public with Confidential Annexes A-D Defence Motion for Disclosure of Exculpatory Information relating to DCT-032, 20 October 2010; *Prosecutor v. Taylor*, SCSL-03-01-T-1090, 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 Prosecution and its Investigators, 27 October 2010; *Prosecutor v. Taylor*, SCSL-03-01-T-1084, Decision on Defence Motion for Disclosure of Statement and Prosecution Payments made to DCT-097, 23 September 2010; *Prosecutor v. Taylor*, SCSL-03-1-T-765, Decision on Defence Application for Judicial Notice of Adjudicated Facts from the AFRC Trial Judgement pursuant to Rule 94(B), 23 March 2009; *Prosecutor v. Taylor*, SCSL-03-01-T-752, Decision on Urgent Defence Motion regarding a Fatal Defect in the Prosecution's Second Amended Indictment relating to the Pleading of JCE, 27 February 2009; *Prosecutor v. Taylor*, SCSL-03-01-T-751, Decision on Public Urgent Defence Motion regarding a Fatal Defect in the Prosecution's Second Amended Indictment relating to the Pleading of JCE – Dissenting Opinion of Justice Richard Lussick, 27 February 2009; *Prosecutor v. Taylor*, SCSL-03-1-T-370, *Decision on Judicial Notice*, 23 March 2009; *Prosecutor v. Taylor*, SCSL-03-01-PT-249, Decision on Defence Application for Leave to Appeal the 25 April 2007 'Decision on Defence Motion Requesting Reconsideration of "Joint Defence Motions on Adequate Facilities and Adequate Time for the Preparation of Mr. Taylor's Defence," Dated 23 January,' 22 May 2007; *Prosecutor v Taylor*, SCSL-03-1-PT-240, Order Designating Alternate Judge, 18 May 2007.

[14] *RUF* AJ, para. 31; *CDF* AJ, para. 32.

[15] *RUF* AJ, para. 31.

[16] *RUF* AJ, para. 31, citing *CDF* AJ, para. 32; *Galić* AJ, para. 6; *Stakić* AJ, para. 7; *Kupreškić* AJ, para. 22 and *Tadić* AJ, para. 247.

10. In order to overturn a trial chamber's finding of fact, the error of fact must have resulted in a miscarriage of justice.[17] A miscarriage of justice is defined as "[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."[18] For an error to be one that occasioned a miscarriage of justice it must have been "critical to the verdict reached."[19] 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.[20]

11. Only procedural errors that occasion a miscarriage of justice would vitiate the proceedings.[21] Such are procedural errors that would affect the fairness of the trial. Procedural errors that could be waived or ignored (as immaterial or inconsequential) without injustice or prejudice to the parties would not be regarded as procedural errors occasioning a miscarriage of justice.[22]

12. The Chamber's exercise of discretion will be overturned if the challenged decision was based: (i) on an error of law; or (ii) on a patently incorrect conclusion of fact; or (iii) if the exercise of discretion was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.[23] Where the issue on appeal is whether the Chamber correctly exercised its discretion in reaching its decision, the Appeals Chamber will only disturb the decision if an appellant has demonstrated that the Trial Chamber made a discernible error in the exercise of discretion.[24] A Trial Chamber would have made a discernible error if it misdirected itself as to the legal principle or law to be applied, took irrelevant factors into consideration, failed to consider relevant factors or failed to give them sufficient weight, or made an error as to the facts upon which it has exercised its discretion.[25]

13. Each error of law alleged in this Brief invalidates the decision of the Chamber. Likewise, each error of fact alleged herein, individually and cumulatively, gives rise to a miscarriage of justice. In respect of each error of fact, it is maintained that no reasonable trier of fact would have rendered the particular finding of fact beyond

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[17] *RUF* AJ, para. 32, citing *CDF* AJ, para. 33; *Kupreškić* AJ, para. 29.
[18] *RUF* AJ, para. 32, citing *Kupreškić* AJ, para. 29; *Furundžija* AJ, para. 37.
[19] *RUF* AJ, para. 32, citing *Kupreškić* AJ, para. 29.
[20] *RUF* AJ, para. 32, citing *CDF* AJ, para. 33; *Ntakirutimana* AJ, para. 12; *Kupreškić* AJ, para. 30.
[21] *RUF* AJ, para. 34.
[22] *RUF* AJ, para. 34; *CDF* AJ, para. 35.
[23] *RUF* AJ, para. 35; *CDF* AJ, para. 36.
[24] *RUF* AJ, para. 35; *CDF* AJ, para. 36.
[25] *RUF* AJ, para. 35; *CDF* AJ, para. 36.

reasonable doubt. Each procedural error alleged which affects the fairness of the trial occasions a miscarriage of justice.

(iii) Article 20(3) of the Statute

14. The Defence has relied extensively on jurisprudence from the ICTY and ICTR in light of Article 20(3) of the Statute, which provides, *inter alia*, that: "[t]he 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."

15. Undergirding the mandatory terms of Article 20(3) is a recognition of the importance of having resort to the jurisprudence of the *ad hoc* tribunals. The importance to apply persuasively decisions taken at the ICTY and ICTR has been a principle long-recognised by the Special Court, as was indicated by Trial Chamber I when it stated:

> Like the Special Court, the ICTY and ICTR are bound to apply customary international law, and their decisions do, as a matter of principle, apply customary international law. It is for this reason that this Court applies persuasively decisions taken at the ICTY and ICTR.[26]

(iv) Rule 115 of the Rules

16. The arguments in support of all the grounds of appeal are contained in Section III of this Brief. In respect of some grounds, however, the Defence hereby gives notice of its intent to present additional evidence to the Appeals Chamber as per Rule 115 of the Rules in support of those grounds. These grounds include, but are not

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[26] *Prosecutor v. Brima et al.*, SCSL-04-16-PT-46, Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment, 1 April 2004, para. 24. Paras. 22-4 provide, *inter alia*: "[t]here is...a special relationship envisioned between the Special Court and the International Tribunals, as each institution is established to permit prosecutions for *inter alia* "serious violations of international humanitarian law". As such, the International Tribunals, the Special Court and the International Criminal Court belong to a unique, and still emerging, system of international criminal justice.

"This special relationship is reflected not only in Article 20 of the Statute but also through the fact that, under the Statute of the Special Court, the Rules of Procedure and Evidence of the ICTR applied mutatis mutandis to the conduct of legal proceedings before this Court. It can therefore be concluded that the drafters of the Statute of the Special Court not only envisioned that this Court would follow the procedures established by the ICTR – with necessary modifications – but furthermore, that the Rules of Procedure and Evidence of the ICTR can be construed as reflective of the general principles of law applicable to criminal proceedings in which the principles of international criminal law and international humanitarian law are applied.

"Like the Special Court, the ICTY and ICTR are bound to apply customary international law, and their decisions do, as a matter of principle, apply customary international law. It is for this reason that this Court applies persuasively decisions taken at the ICTY and ICTR. While noting that the obligations upon the ICTY and ICTR, as well as the Special Court, in relation to the application of customary international law and respect for the principle of *nullum crimen sine lege* are specifically related to the subject-matter of these institutions, the Trial Chamber finds that the two Tribunals also apply general principles of law on matters related to evidence and procedure."

limited to: Grounds 7-9, 15-16, 23, 32-33 and 36-38. In seeking to introduce additional evidence, the Defence will naturally comply with Articles 21-23 of the Practice Direction on the Structure of Grounds of Appeal before the Special Court[27] and any relevant provisions of the Rules.

(v) Miscellaneous

17. Appended to this Brief are three annexes. The first is Confidential Annex A, which contains submissions forming part of Grounds of Appeal 12 and 23. These submissions are being filed confidentally because they implicate and could disclose the identities of protected witnesses. The second is Public Annex B, which is a copy of the video footage of the last 11 minutes and 48 seconds of the Taylor Delivery of Judgement as retained by Court Management Section. The third is Public Annex C, which is Justice El Hadji Malick Sow's statement in court on 26 April 2012.

18. The Defence has also provided a list of abbreviations and short form citations in the Book of Authorities of many of the decisions cited in this Brief.

19. In several instances, the Defence has relied on certain documents that are not in the working language of the Special Court.[28] Where possible, uncertified translations have been provided. The Defence will enegage with the Registry to facilitate the provision of certified translations of the documents not in the working language of the Court.[29]

(vi) Relief Sought

20. Unless otherwise specified, the relief sought in relation to each error of law, fact or procedure below, is the reversal of the relevant finding(s) of the Trial Chamber, the quashing of any resulting convictions and, where appropriate, vacatur of the Judgement.

21. On the basis of the grounds of appeal set out below, Mr. Taylor respectfully requests that the Appeals Chamber reverse the convictions of Counts 1-11 entered against him by the Trial Chamber and quash the sentence of 50 years thereby imposed.

II. STATEMENT OF ISSUES PRESENTED

[27] See, Practice Direction on the Structure of Grounds of Appeal before the Special Court, as amended on 23 May 2012.
[28] Rule 3 of the Rules provides that the working language of the Special Court shall be English.
[29] See, Practice Direction on the Structure of Grounds of Appeal before the Special Court, as amended on 23 May 2012, paras. 17 and 18.

22. The issues presented in this Brief are reflected in the body of each ground of appeal, and concern, in sum:

(i) the errors of fact and/or law which led the Chamber to erroneously convict Mr. Taylor for planning the crimes set out in Counts 1-11 of the Indictment;

(ii) the errors of fact and/or law which led the Chamber to erroneously convict Mr. Taylor for aiding and abetting the crimes set out in Counts 1-11 of the Indictment;

(iii) (iii) the errors of fact and/or law which led the Chamber to erroneously sentence Mr. Taylor to 50 years imprisonment on the basis of the convictions for aiding and abetting and planning the crimes set out in Counts 1-11 of the Indictment.

III. ARGUMENTS IN SUPPORT OF EACH GROUND OF APPEAL

A. PART I: SYSTEMIC ERRORS IN THE EVALUATION OF EVIDENCE THAT AMOUNT TO ERRORS OF LAW

i. GROUND OF APPEAL 1: The Chamber erred in law by relying on uncorroborated hearsay evidence as the sole basis for specific incriminating findings of fact.

23. The conviction of Charles Taylor rests largely on hearsay evidence, often uncorroborated. The extent of the Chamber's reliance on this type of evidence is unprecedented relative to any other international case, and is often used to make directly incriminating findings.

24. The Chamber failed to recognize not only that it was required by law to approach hearsay with due caution, but that it is legally impermissible to base a particular conviction only on uncorroborated hearsay. The ICTY Appeals Chamber, relying on the European Court of Human Rights, has held:

> A different matter is, of course, what weight a trier of fact is allowed to give to evidence not subjected to the testing of cross-examination. It is in this matter that the jurisprudence of the ECtHR is valuable, as it has authoritatively stated the principle that 'all the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence.' Unacceptable infringements of the rights of the defence, in this sense, occur *when a conviction is based solely, or in a decisive manner, on the depositions of a witness whom the accused*

> *has had no opportunity to examine or have examined either during the investigations or at trial.*[30]

25. This discussion concerned "depositions" elicited by a judicial officer or lawyer, under oath, and recorded by stenographers. The rationale for this prohibition is that no matter how accurate the recording, the reliability of the source cannot be adequately tested so as to justify relying on it to determine a directly incriminating fact. The presence of three, five or ten stenographers does not enhance reliability; the issue remains that a defendant must not be deprived of the opportunity to cross-examine the *source* of the evidence, and the Chamber must not place *decisive* reliance on it. *A fortiori*, the prohibition must apply with even greater force in respect of hearsay with much lesser guarantees of accuracy and reliability.

26. Whether a Chamber has relied on particular evidence "in a decisive manner" is necessarily a fact-specific inquiry; however, once an appellate tribunal has made that factual assessment, the trier of fact's reliance on that hearsay evidence to make a directly incriminating finding is an error of law. A trier of fact has no discretion to rely decisively on hearsay evidence to make a directly incriminating finding – i.e. a finding on which a conviction is based.

27. This error was committed repeatedly. A simple example concerns the Chamber's finding that Mr. Taylor instructed Bockarie to release the Freetown Pandemba Road prisoners to Buedu. The basis for this finding was on one witness's uncorroborated fourth-hand hearsay to the effect that Mr. Taylor told Benjamin Yeaten in Monrovia, who told Sam Bockarie via satellite phone in Buedu, who told Mohamed Kabbah, in a conversation which was overheard by the witness, to release the Pademba Road prisoners.[31] This factual finding led directly to a conclusion about Mr. Taylor's responsibility for planning and aiding and abetting crimes in and around Freetown. Reliance on this evidence shows a lack of proper caution to the assessment of evidence, but is also a distinct example of relying on uncross-examinable information to reach highly incriminating findings against Mr. Taylor.

28. A more complex, but no less distinct, example is the Chamber's finding that Mr. Taylor supplied arms to Bockarie in 1998. The Chamber relies on two categories of evidence to make this finding: (1) the hearsay evidence of eight witnesses who

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[30] *Prlić* Decision Relating to Admitting Transcript, para. 53 (italics added).
[31] Judgement, para. 3588.

testified that Mr. Taylor had supplied Bockarie with arms;[32] and (2) circumstantial indications that Mr. Taylor knew of this supply.[33] The Chamber found that the circumstantial evidence "supports the conclusion" that Taylor "had knowledge and sanctioned" Bockarie's acquisition of arms, but did not find, and could not have found, that the circumstantial evidence established that.[34] A close inspection of the evidence shows that of the eight witnesses who gave hearsay evidence, seven and possibly all eight simply recounted what they had been told by Bockarie.[35] The Chamber's finding is therefore based on the same, lone uncross-examined source. The fact that eight witnesses reported the same hearsay does not entitle it to any greater weight than if Sam Bockarie had made this allegation in a room with eight stenographers.

29. The Chamber at the beginning of the Judgement purpoted to instruct itself that it must approach hearsay evidence with "caution," but also declares that "the testimony of a single witness on a material fact does not require corroboration."[36] The latter assertion is wrong in law when the testimony is based on hearsay, and the former principle was not applied. As the previous example illustrates, a cautious approach to the evidence would have required the Chamber to articulate that it was relying on the same hearsay source, and to consider whether it was permissible to rely on that sole source given the directly incriminating nature of the conclusion. Had the Chamber properly instructed itself on the law, given those circumstances, it would have understood that it could not make the finding. Either through lack of due caution of the circumstances, or based on an unawareness of the legal limits of reliance on hearsay, the Chamber entered an improper and impermissible finding.

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[32] Judgement, para. 5021.
[33] Judgement, para. 5022.
[34] Judgement, para. 5022. The Chamber cited three circumstantial factors: (i) that Tamba was involved; (ii) that Bockarie was escorted by members of the SSS upon his return from these trips; and (iii) that Bockarie did not obtain travel documents before his visits to Liberia. These factors, alone or in combination, do not come close to meeting the threshold of circumstantial proof, which requires that the alleged fact be "the only reasonable conclusion that could be drawn from the evidence presented." *Bagosora* AJ, para. 515. None of these facts, alone or in combination, come close to meeting that threshold and the Chamber did not purport to find that they did.
[35] Judgement, para. 5021 (the eight witnesses are Kargbo, Mallah, Kanneh, TF1-371, TF1-585, Fornie, and Perry Kamara and Saidu). Saidu's testimony was that he was told by one of Bockarie's bodyguards that they "went and got" supplies "[f]rom Charles Taylor in Liberia" (Albert Saidu, Transcript 4 June 2008, pp. 11021-2); but the Prosecution adduced no evidence concerning the source of this bodyguard's information, raising the possibility that the source of this information, as with all other witnesses, was Bockarie himself.
[36] Judgement, paras. 166-9.

30. Whether a chamber has committed this error of law by relying "in a decisive manner" on an uncross-examined statement depends to some extent on the notion of "corroboration." The Chamber frequently invokes the notion of "corroboration" without ever explaining its understanding of the concept. The term has been defined by ICTR Appeals Chamber:

> [T]wo 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.[37]

31. This definition implies that corroboration involves some correspondance of detail in respect of the same event. A description concerning two different events,[38] or a description that contains no correspondence of detail, does not constitute corroboration.

32. The Chamber frequently applies an erroneous notion of "corroboration". A striking example involves the Chamber's finding that Mr. Taylor instructed koroma to take Kono during his disorderly flight from Freetown towards Buedu in mid-1998.[39] The Chamber bases this finding on one witness's hearsay testimony—Samuel Kargbo.[40] Yet the Chamber purpots to invoke the notion of "corroboration" on the basis that Kargbo's general description of the retreat from Freetown generally corresponds to the testimony of other witnesses.[41] This is not corroboration. Even worse, a review of the evidence relied on by the Chamber shows that Kargbo's assertion that Koroma ordered the second, successful attack on Kono is contradicted by another witness whom the Chamber deemed credible, Bobson Sesay, and was

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[37] *Nahimana* AJ, para. 428. See *Karera* AJ, para. 173.

[38] See, for example, *Bagosora*TJ, para. 1978 ("Witness CE, a soldier, recalled seeing Kabiligi and hearing soldiers cheer his arrival at Camp Kigali in a military jeep "a few days" after the death of the President.2165 Ruggiu, a journalist with the RTLM, recalled seeing Kabiligi arrive between 14 and 17 April by helicopter near the officers mess at Camp Kigali.2166 Although the witnesses provided different dates for Kabiligi's arrival, the Prosecution contends in its Closing Brief that these two witnesses "materially" corroborate one other.2167 There is, however, no convincing way to explain the significant discrepancy between their testimonies about Kabiligi's arrival, and it appears that they are referring to separate incidents at different times").

[39] Judgement, para. 2855.

[40] Judgement, paras. 2832, 2840, 2855.

[41] Judgement, para. 2855 ("The Trial Chamber notes that Kargbo's evidence is substantially corroborated in various aspects.")

undermined by the testimony of five witnesses who testified that the second attack arose spontaneously on the front-line.[42] The Chamber downplayed this contradiction on the basis that the testimony did not "preclude an order having been given by Koroma",[43] even though the evidence certainly suggested that it was less likely. The Chamber's own review of the evidence shows, in fact, that Kargbo's testimony was contradicted to a much greater degree than it was confirmed except in respect of the most general details. Finding on this basis that Kargbo's assertion concerning Mr. Taylor's involvement was "corroborated" in any degree reflects a serious misapplication of the concept, which, in turn, led the Chamber to make a finding that violates the principle of law that uncorroborated hearsay evidence may not be relied upon to make incriminating findings.

33. The Chamber applies this excessively general approach repeatedly. The Chamber wrongly considered that Taylor's involvement in sending "herbalists" to Sierra Leone was corroborated by two completely non-overlapping accounts of the presence of "herbalists" in Sierra Leone.[44] The Chamber similarly found that Mongor and Kargbo's testimony corroborated each other because they both asserted that Taylor was involved in the Magburaka shipment, even though they describe two sets of events that did not correspond in any salient detail, and that required the Chamber to reject both of their accounts almost entirely.[45] This is not corroboration, and could have been treated as such.[46]

34. Although the application of corroboration to facts is an issue of fact that falls to the Chamber's determination, the definition of corroboration is a matter of law. The failure to define corroboration, combined with the repeated application of a concept bearing no relation to a proper definition of corroboration, was a systematic error of law that is entitled to no deference by the Appeals Chamber. All erroneous applications of the concept, as further specific in the grounds below, should be treated as an error of law and reversed as such. The specific findings that are invalidated as a result of this legal error are addressed in the context of the individual grounds as addressed below.

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[42] Judgement, paras. 2840-2.
[43] Judgement, para. 2842.
[44] See Ground 29.
[45] See Ground 23, Section (ii)(b).
[46] See also Judgement, para. 4470 (describing two completely non-overlapping events supposedly indicating mr. Taylor's direct involvement in facilitating the provision of military personnel).

35. The over-broad conception of corroboration not only led to improper reliance in reaching incriminating findings, but also on the level of "caution" exercised by the Chamber in respect of evidence in general. The Chamber explained that it only needed to approach testimonial evidence with "particular care" where it was uncorroborated, and that corroboration would be a factor favouring reliance on hearsay testimony.[47] The Chamber's over-broad definition of corroboration affected its analysis of both of these categories of evidence.

36. A review of the Judgement as a whole suggests that the Chamber systematically failed to exercise due caution in respect of hearsay evidence. Reliance on hearsay evidence alone is common, not rare.[48] The Chamber even appears to have adopted a mechanical formula by which it would only reject uncorroborated hearsay from witnesses deemed categorically *unreliable*.[49] This contrasts sharply with the rarity of such findings in the judgements of the other *ad hoc* tribunals.[50] The Chamber's mechanical discount of hearsay only for witnesses who were unreliable, combined with an overly broad definition of corroboration, led the Chamber to abandon any proper caution in respect of hearsay evidence.

37. The Chamber's erroneous approach to hearsay evidence, given its systematic and persuasive nature, constitutes an error of law. The Chamber consistently relied on uncross-examined out of court statements for incriminating findings, and otherwise erred as to the definition of corroboration and in adopting a mechanically credulous approach to hearsay. How these errors affected the Chamber's specific findings does call for a case-by-case evaluation, and is addressed as appropriate in Parts II and III below.

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[47] Judgement, paras. 166, 169.

[48] See e.g. Judgement, paras. 3827, 3828, 3830, 3908, 3932-3, 4800, 4842, 5022, 5121-9, 5380, 5390-4, 5588, 5624, 5706, 5921,6135, 6223.

[49] Judgement, para. 268 ("In light of the numerous inconsistencies and implausibilities in Marzah's testimony, the Trial Chamber finds that his evidence ... must be considered with caution and cannot be relied upon without corroboration"); para. 303 ("[i]n light of the foregoing, the Trial Chamber finds that TF1-539's evidence, particularly as it relates to his personal interaction and communication with the Accused, must be considered with caution and cannot be relied upon without corroboration"); para. 325 ("in light of his evasiveness, and the incidents in which TF1-579 was clearly untruthful, the Trial Chamber finds that the testimony of the witness must be considered with caution and cannot be relied upon without corroboration.")

[50] See e.g. *Karera* AJ, para. 204 (finding that "no reasonable trier of fact could have accepted this witness's uncorroborated hearsay testimony that the policemen who killed Ndingutse were the policemen who guarded the Appellant's house. Furthermore, no reasonable trier of fact could have concluded on the basis of that circumstantial evidence that the only reasonable inference was that Ndingutse had been killed pursuant to the Appellant's orders to kill Tutsis"); *Bagosora* TJ, para. 1462 (rejecting "uncorroborated hearsay"); *Bizimungu* TJ, paras. 203, 693, 712, 764, 1018 (rejecting "uncorroborated hearsay"); *Gotovina* TJ Vol. II, para. 2448 (rejecting "uncorroborated hearsay").

ii. GROUND OF APPEAL 2: The Trial Chamber erred in law by systematically failing to assess the reliability of the sources of hearsay information.

38. The reliability of hearsay evidence, by definition, involves two separate issues: the reliability of the person before the court; and the reliability of the person who conveyed the information to the person before the court. Remarkably, the Chamber almost *never* addressed the latter question, apparently believing that its assessment of reliability of the person before the court was sufficient. The systematic failure to have done so was an error of law.

39. Previous jurisprudence has underlined the importance of knowing the precise content of the hersay source's information, their identity, and the circumstances under which it arose.[51] Chambers have evaluated the source's aptitude to know the fact, their potential biases, and any other available indicia of reliability.[52] Hearsay evidence from an anonymous source can almost never be accorded any independent evidential weight, because its reliability is unknowable.[53] Group membership or identity of the hearsay source can be as important for assessing the weight of hearsay evidence as is the reliability of the witness on the stand. In *Boškoski*, for example, the Trial Chamber discounted the probative value of information provided by a reliable witness because of the circumstantial indications that they had a motive to lie or exaggerate:

> Further, the HRW report on the relevant events in Ljuboten, to which he was the main contributor, and which is a cornerstone of his evidence, is sourced

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[51] *Delalić* TJ, para. 27. See *Hadžihasanović* TJ, para. 272 ("in cases where testimony was based on hearsay, the Chamber noted that to assess its probative value, it wished to know the source of the information, that is, insofar as possible, the identity of the intial source, how he might have learned of the facts, and the number of intermediaries through which the testimony had passed").

[52] *Nahimana* AJ, para. 831 ("In the instant case, the Trial Chamber noted that "Des Forges specifies in detail that her source of information about Nahimana's interaction with the French Government is a diplomat who was himself present in meetings between Nahimana and French Ambassador Yannick Gérard, who had a documentary record of the interaction in the form of a diplomatic telegram", and it considered that this piece of information was reliable. The Appeals Chamber finds that this conclusion was reasonable").

[53] *Ndindabahizi* AJ, para. 115 ("Thus, Witness CGC never explained (nor was he asked how he learned that Mr. Nors was killed at the roadblock about five minutes after he (Witness CGC) had left. Thus, the Trial Chamber did not know how the person – or persons – who told Witness CGC about the killing knew about it; also, the Trial Chamber did not know on which basis the person – or persons – came to the conclusion that the killing happened some minutes after his departure. The finding that Mr. Nors was killed shortly after the Appellant's visit was thus based only on vague and unverifiable hearsay"); *Bagasora* TJ, para. 890 ("Witness ET heard that Father Mahame was on a list as early as 1992. His evidence on this point is hearsay and, furthermore, does not clearly demonstrate the basis and reliability of his source's information"); *Gotovina* TJ Vol. I, para. 241 ("the evidence from Boško Brkić and Kata Čuk insufficiently establishes their source of knowledge in relation to the incident."); *Hardinaj* TJ, para. 317 ("Moreover, it is multiple hearsay and Witness 68 does not specify her source. *For these reasons the Trial Chamber will not rely on Witness 68's hearsay account of the alleged abduction and subsequent events*").

> primarily by unchallenged accounts of ethnic Albanian residents from Ljuboten which have not been tested against the other differing accounts which the Chamber has heard.[54]

40. The Chamber failed to engage in any such analysis in the Judgement, notably in respect of statements made by Sam Bockarie to his underlings about alleged support by or instructions from Mr. Taylor. Bockarie had an obvious motivation to give this impression. He wanted his followers to believe that he had the support of an ostensibly powerful ally, especially in times of low morale or when engaged in power struggles with rivals. The error alleged here is not that the Chamber reached an incorrect determination as to Bockarie's reliability or that it gave insufficient weight to this consideration in weighing probative value; rather that the Chamber made no such analysis whatsoever.

41. The lack of such analysis is striking given that the Chamber was generally aware that people had motives to falsely invoke Mr. Taylor's support. The Chamber heard evidence from a witness whom it deemed generally reliable that "RUF members 'would always *boast* that they get their arms and ammunition from Liberia'".[55] The circumstantial evidence shows that Bockarie also had a motiviation to exaggerate or lie about Mr. Taylor's backing in order to bolster his position. One indication of this attempt to invoke Mr. Taylor's name for his own purposes was his implausible assertion before the start of the Kono and Makeni offensive in late 1998 that Mr. Taylor had allegedly told him that "any commander who disobeyed that instruction was to be executed."[56] Only the most credulous trier of fact could have overlooked the evident personal motive underlying such a claim.

42. The Chamber at one point explains that it would accept hearsay evidence of Mr. Taylor's involvement in providing a particular form of support because "the witnesses who testified were ... present in Buedu and/or Kono when the herbalists arrived. They would not conceivably have been present when the Accused would allegedly have made the requisite arrangements. The Trial Chamber considers the lack of direct evidence to be a natural consequence of these circumstances."[57] This

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[54] *Boškoski* TJ, para. 134. See also *Boškoski* TJ, paras. 260, 262-264 (discounting a witness's hearsay evidence based on the ethnicity and probable biases of the sources); *Hadžihasanović* TJ, para. 456 ("While Croatian sources seem to have had information on the structure of the ABiH, at times they seemed unwilling to give a faithful description of the facts.")
[55] Judgement, para. 5583.
[56] Judgement, para. 5420.
[57] Judgement, para. 4085.

reasonsing is the opposite of cautious, implying that a more flexible approach should be adopted in respect of hearsay, based purely on the Prosecution's choice of witnesses. The reasoning reflects a profound lack of regard for the legal framework that is supposed to keep reliance on hearsay evidence within proper limits. Those limits were obviously not respected, as is reflected in the plethora of findings throughout the Judgement based on hearsay. The extent to which this pervasively erroneous approach invalidates the Judgement is discussed below in respect of specific findings addressed in Parts II and III. The factual manifestations of this error do not undermine the fundamentally legal and systematic nature of the legal error committed by the Chamber in respect of hearsay evidence. This error had an extensive impact throughout the Judgement, and invalidates all findings based on that erroneous approach.

iii. GROUND OF APPEAL 3: The Trial Chamber erred in law in its approach to credibility of witnesses.

43. At the outset of the Judgement, the Chamber selected 22 witnesses deemed to be "significant" and purported to assess their credibility. It found some to be "generally credible", and others not. [58] No explanation was given as to what was meant by "significant", but 20 of the 22 witnesses had been called by the Prosecution. Of these Prosecution witnesses, 16 were categorised as "generally credible".[59]

44. Having made these overall credibility findings, the Chamber undertook to perform "assessments of credibility **in relation to specific events**" throughout the Judgement.[60] Despite this undertaking, this was not consistently done. When the Chamber did assess credibility in relation to specific events, it found some "generally credible" witnesses either untruthful or unreliable for specific events, but then reverted to their original "generally credible" categorisations for other events. [61]...

45. There are three significant problems with the Chamber's approach to witness credibility which, either together or separately, constitute an error of law. First, the Chamber's approach of selecting "significant" witnesses for individual credibility assessments is erroneous. The Chamber was required to evaluate the credibility of all witnesses and the reliability relevant aspects of their testimony, regardless of whether

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[58] Judgement, paras. 212 -380.
[59] Judgement, paras. 219, 226, 236, 243, 253, 262, 274, 284, 289, 295, 307, 317, 329, 333, 338, 358.
[60] Judgement, para. 212.
[61] See, for example, Judgement, paras. 2367, 2559, 2934, 2941, 2367-73, 3091, 3104, 3119, 3383-4, 3412, 4123-5, 4145-4146, 4377, 5090, 5384-5, 5384-5, 5395-6, 5975, 6548-52.

or not the parties raised specific challenges to portions of their testimony, or their credibility as a whole. Adopting a different approach to the credibility assessments of these "significant" witnesses cannot be reconciled with this overarching duty, particularly in light of its seemingly arbitrary selection of these witnesses. This is significant given that, explained further below, once these witnesses were given a "generally credible" rating, the Chamber consistently relied on their evidence in support of findings on the basis of this assessment, and in the absence of further scrutiny. As such, the fact that 20 of the 22 "significant" witnesses were Prosecution witnesses, was prejudicial to the Defence.

46. Second, generalised credibility assessments are insufficient to determine whether individual aspects of witnesses' testimony can be relied upon. The fact that a witness gives evidence honestly is not, in itself, sufficient to establish the reliability of that evidence. As held by the Trial Chamber in the *RUF* case, relying on ICTY pronouncements, the issue is not merely whether the evidence of a witness is honest; it is also whether the evidence is objectively reliable.[62]

47. By contrast, the Chamber in the present case relied on its general credibility assessments as a basis for accepting that **particular evidence** was credible. The general credibility categorisations were, in effect, dispositive. In assessing evidence, the Chamber repeatedly relied on nothing more than the fact that the witness was "generally credible", stating that it "found TF1-516 to be a generally credible witness and accepts his testimony on this point"[63] or "[r]ecalling its finding that Bobson Sesay is generally credible, the Trial Chamber finds his testimony in this regard to be consistent and reliable"[64] or "[r]ecalling its finding that Karmoh Kanneh is a generally credible witness, the Trial Chamber accepts his testimony regarding the provision of $USD 10,000 by Taylor to Bockarie."[65] As such, the overall credibility rating of a witness was used by the Chamber to impute reliability to individual aspects of their evidence, irrespective, in some instances, of other evidence to the contrary. This cannot be reconciled with the requirement that a trier of fact determine whether the evidence (as opposed to the witness) is objectively reliable.[66]

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[62] *RUF* TJ, para. 487, citing *Brđanin* TJ, para. 25; *Delalić* AJ, paras. 491, 506.
[63] Judgement, para. 5921.
[64] Judgement, para. 4370.
[65] Judgement, para. 3951.
[66] *RUF* TJ, para. 487, citing *Brđanin* TJ, para. 25; *Delalić* TJ, paras. 491, 506.

48. This formulaic approach allowed the Chamber to skip over the step of determining whether a witness' evidence on specific issues and events in dispute was credible, by simply asserting that the evidence came from a "generally credible" witness.[67]

49. Moreover, if an aspect of a Prosecution witness' testimony had been challenged by the Defence, the Chamber would recall that the witness in question was "generally credible" to explain away inconsistencies and accept the evidence,[68] often with nothing more than "recalling that Kamara is a generally reliable witness, the Trial Chamber found this response credible and accepts Kamara's explanation."[69]

50. This approach was erroneous, particularly given that the Chamber's credibility formula was unsound. Having made its preliminary assessments, the Chamber went on to find on several occasions that some witnesses who had been characterised as "generally credible", were not only unreliable but had not told the truth in respect of certain events.[70] The Chamber then systematically failed to re-evaluate its assessment of credibility in the light of findings that could and should have had a major impact on overall credibility.[71] This constitutes the Chamber's third systematic error.

51. Take, for example, TF1-371, a "generally credible" witness as found by the Chamber.[72] Having relied on his evidence extensively, the Chamber was unable to accept TF1-371's testimony without doubt when he testified that Taylor participated in a meeting in March 1991 to plan the invasion of Sierra Leone.[73] Nor did the Chamber accept his testimony identifying Gullit as being present at a critical meeting in December 1998.[74] Despite these findings, the Chamber then reverted to its original credibility assessment, and went on to rely on the TFI-371 for significant adverse findings against the accused on the basis that he was "generally credible".[75]

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[67] See, for example, Judgement, paras. 2372, 2524, 2557, 2624, 2628, 2703-4, 2747, 2768, 3572, 3951, 4086, 4106, 4365, 4370, 4796, 5089, 5921, 5989, 6043, 6449.
[68] See, for example, Judgement, para 6092. See also paras. 2768, 2943, 3420, 3447, 3962, 4832, 5933, 6037, 6092, 6130, 6341.
[69] Judgement, para. 5933.
[70] See, for example, Judgement, paras. 2367, 2559, 2934, 2941, 2367-73, 3091, 3104, 3119, 3383-4, 3412, 4123-5, 4145-4146, 4377, 5090, 5384-5, 5384-5, 5395-6, 5975, 6548-52.
[71] See, for example, Judgement, paras. 3392, 3798, 3800, 4378, 4473-4474, 5381, 4950-4951, 5085, 5390-5394, 5398-5401, 6186-6187, 6403.
[72] Judgement, paras. 220-6.
[73] Judgement, para. 2373.
[74] Judgement, para. 3091.
[75] See, for example, Judgement, paras. 2754, 2885, 4611, 4796, 5089, 5928.

52. It is uncontroversial that a Chamber may find a witness to be credible and reliable about some aspects of his testimony, and not with respect to others.[76] The Chamber's error was in failing to re-calibrate its original credibility conclusion in light of findings that a witness was untruthful or unreliable on certain specific points. The Chamber would have committed no error had it assessed the credibility of each aspect of TF1-371's testimony regarding the relevant issue in question, instead of falling back on a finding of "generally credibility" and relying on that finding, irrespective of the specific issue under consideration. As such, the Chamber's approach of continuing to rely on evidence on the basis that the witness was "generally credible", having made findings to the contrary, is a wholly unsafe and erroneous approach to the assessment of evidence, and constitutes a failure to give reasons.

53. The errors identified above invalidate the Chamber's findings in respect of the credibility of the affected witnesses. How these errors affect the Chamber's specific findings requires a case-by-case evaluation, and is addressed as appropriate in Parts II and III below.

iv. GROUND OF APPEAL 4: The Trial Chamber erred in law in pervasively and systematically reversing the burden of proof concerning material facts.

54. The presumption of innocence enshrined in Article 17(3) of the Statute and in customary international law imposes a continuous burden of proof on the Prosecution to prove all "findings required for conviction, such as those which make up the elements of the crime charged."[77] Each fact essential to conviction[78] must be proven "beyond a reasonable doubt," which means that the evidence must exclude any reasonable possibility to the contrary.[79] The latin maxim *in dubio pro reo* is a corollary of this principle.[80]

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[76] *RUF* TJ, para. 488, citing *Kupreškić* TJ, para. 333.
[77] *Limaj* AJ, para. 21. See *Bagosora* AJ, para. 17; *Bikindi* AJ, para. 11; *Blagojević* AJ, para. 8.
[78] *Delalić* TJ para. 599 ("It is a fundamental requirement of any judicial system that the person who has invoked its jurisdiction and desires the tribunal or court to take action on his behalf must prove his case to its satisfaction. As a matter of common sense, therefore, the legal burden or proving all fact essential to their claims normally rests upon the plaintiff in a civil suit or the prosecutor in criminal proceedings").
[79] *CDF* AJ, para. 200 ("It is common place that a criminal tribunal may convict on circumstantial evidence provided that the only reasonable inference to be drawn from such evidence leads only to the guilt of the accused. When such evidence is capable of any other reasonable inference it is not reliable for the purposes of convicting an accused").
[80] *Galić* AJ, para. 77 ("The principle of *in dubio pro reo* dictates that any doubt should be resolved in

55. The precise language used in a judgement is the only way to determine whether, in its deliberations behind closed doors, the judges applied the correct burden of proof. Some inaccuracy of expression can be tolerated but "[i]n considering the manner in which the Trial Chamber applied the burden and standard of proof, the Appeals Chamber must start off by assuming that the words used in the Trial Judgement accurately describe the approach adopted by the Trial Chamber."[81] The boilerplate language used at the beginning of a trial judgement is often a poor indicator of the actual standard applied by the judges to the evidence; appellate review therefore requires a close examination of the language used and reasoning adopted in respect of specific factual findings. As the ICTR Appeals Chamber summarized its own jurisprudence on its way to overturning a conviction based on a misapplication of the burden of proof:

> The Appeals Chamber has recognized that language which suggests, *inter alia,* that an accused must "negate" the Prosecution's evidence, "exonerate" himself, or "refute the possibility" that he participated in a crime indicates that the Trial Chamber misapplied the burden of proof.[82]...

56. The Judgement is replete with such language. The language used sometimes deviates blatantly from the appropriate standard, whereas on other occasions the deviation is more subtle; on some occasions the error relates directly to an incriminating finding, whereas on other occasions the error relates to subsidiary findings that contribute to an incriminating finding. The error is so pervasive and systematic and it is impossible to disentangle proper from improper findings. Some of the following examples, which are in no way exhaustive, are explained with more context in Parts II and III below.

57. The Chamber's conclusion that the RUF had adopted a plan to drive to Freetown is based on several distinct misapplications of the burden of proof. First, the Chamber improperly discounts TF1-567's express evidence that he was told by Bockarie that the alleged Bockarie/Taylor plan involved only an offensive on Kono (rather than Freetown). The Chamber then asserts that "his evidence *does not negate the possibility*" that another plan, also allegedly concocted with Taylor, was discussed at another meeting.[83] The mere possibility that such a plan was discussed at another

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favour of the accused and encompasses doubts as to whether an offence has been proved at the conclusion of a case"); *Halilović* AJ, para. 109; *Delić* TJ, para. 24.

[81] *Musema* AJ, para. 209.

[82] *Zigiranyirazo* AJ, para. 19.

[83] Judgement, para. 3097.

meeting is not enough to discount TF1-567's evidence; the appropriate question is whether, viewed in conjunction with other evidence, it raised a reasonable doubt as to whether another plan actually *was* actually – not possibly – discussed, at that other meeting. The Chamber adopted the same approach in respect of another credible witness on the same issue, discounting Mohamed Kabbah's testimony that the objective of the offensive was Kono on the basis that "Kabbah was told about a plan with regard to his duties, which does not *negate the possibility* of a larger plan."[84] The "negate the possibility" standard – applied to two witnesses whom the Chamber itself deemed credible – sets a far higher threshold than "raise a reasonable doubt". The approach to these two witnesses led directly to the Chamber's finding that the "Bockarie/Taylor plan" included "Freetown as the ultimate destination," on the basis of which the Chamber convicted Taylor of planning all the crimes committed during that operation. This was an "essential fact" for the incriminating finding and the Chamber was not entitled to apply any standard less stringent than "beyond a reasonable doubt."

58. Time and again the Chamber states that evidence contrary to the Prosecution case did not "exclude the possibility",[85] "does not preclude and is not inconsistent with",[86] does not "raise a reasonable doubt as to the possibility",[87] does not "negate[] the possibility",[88] was not "conclusive of the non-occurrence"[89] of an event, was not "dispositive of whether [an event] did or did not occur",[90] was not "dispositive of the Accused's non-involvement or non-awareness",[91] that previous independent arms transactions by an alleged intermediary was not "inconsistent with the premise that after he was elected President, the accused wanted to ensure" the continuing arms

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[84] Judgement, para. 3098.
[85] Judgement, para. 3833 (evidence that Sankoh used forms of communication other than the NPFL radio netword "does not exclude the possibility that he also used the NPFL radio network to pass messages on to Bockarie").
[86] Judgement, para. 4091 (evidence of prior use of "herbalists" by the RUF "does not preclude and is not inconsistent with assistance by the Accused in the provision of this support").
[87] Judgement, para. 4466 (contrary evidence by other witnesses deemed insufficient to "raise[] a reasonable doubt as to the possibility that Taylor sent Keita to Sierra Leone").
[88] Judgement, para. 4467 ("The Trial Chamber does not find that this negates the possibility that the Accused sent Keita to Sierra Leone").
[89] Judgement, para. 4835 ("neither TF1-585's failure to personally see Jungle bring ammunition during 1997 nor the lack of reference in Exhibits D-009 or P-067 to Tamba supplying the RUF is conclusive of the non-occurrence of this event").
[90] Judgement, para. 4835.
[91] Judgement, para. 4956 ("The Trial Chamber does not consider the lack of co-operation amongst the intermediaries engaged in supply to be dispositive of the Accused's non-involvement or non-awareness").

trade,[92] did not "preclude the possibility that the Accused made arrangements" for an arms transaction,[93] or "would not have precluded" an alleged perpetrator from obtaining supplies allegedly provided by Taylor.[94]

59. The Chamber misdirects itself even more obviously on some occasions, adopting a "likely" standard to reach certain critical factual findings. In respect of a crucial finding discussed in more detail in Ground 23, the Chamber found that: "As there is no evidence that the Junta obtained further materiel after the Magburaka shipment in late 1997 or that the RUF/AFRC were able to capture a significant amount of supplies in the retreat from Freetown, *it is likely* that the only supplies that the retreating troops had access to were from the Magburaka shipment." Based on the fact being "likely", the Chamber concluded that it could "safely infer that the Magburaka shipment was used in 'Operation Pay Yourself' and subsequent offensives."[95] An even more direct finding was that it was "likely" that Bockarie's forces provided resupply of materiel to Gullit's forces during the withdrawal from Freetown in early 1999.[96] Ground of Appeal 8 discusses an example of the Chamber the Chamber making a finding that a fact was "likely" in the discussion of the evidence, and the simply adopting the fact as proven in its factual findings.[97]

60. The "likely" standard recurs repeatedly, if less explicitly, in respect of other findings based on circumstantial evidence. One important finding concerned how a particular arms shipment was used by the RUF. The Chamber correctly directed itself that "there is no direct evidence," but then announced without further explanation that it could "nonetheless infer that it was used by the AFRC and RUF forces under Bockarie's command in the course of their activities in the Kenema District, which included the commission of crimes in the area."[98] The Chamber conducted no analysis that this was the *only* reasonable inference, not merely a *possible*, or even a *likely*,

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[92] Judgement, para. 5322.
[93] Judgement, para. 5523 ("The fact that Sankoh met with Diendre in no way precludes the possibility that the Accused made arrangements for this particular arms transaction", referring to the Burkina Faso shipment on which the Chamber placed heavy reliance to convict Mr. Taylor of aiding and abetting).
[94] Judgement, para. 5663 ("While evidence suggests that Mingo did capture materiel from the Fitti-Fatta operation, this would not have precluded him from also taking the materiel given to him by Bockarie for the Fittia-Fatta mission").
[95] Judgement, para. 5551.
[96] Judgement, para. 5710 ("Having found that troops under Bockarie's command and Gullit's force made collaborative efforts to re-attack Freetown, including joint attacks on the outskirts of Freetown, the Trial Chamber considers it likely that the former also supplied the latter with additional ammunition").
[97] Judgement, paras. 3120, 3480, 3486, 3617.
[98] Judgement, para. 5558.

inference. Similarly, the Chamber found that "it is not implausible" that a particular supply of material lasted long enough to be used in the commission of a distinct set of crimes.[99] A third example involves a finding that the Chamber could "reasonably infer that it was used by SLA commanders" in particular operations.[100] An inference must be more than simply "reasonable"; is must the *only* reasonable inference.

61. The Chamber's misapplication of the standard of proof is so fundamental and pervasive, especially when viewed in conjunction with the other serious and systematic errors in the assessment of the evidence, that a dramatic remedy is required to preserve justice. The only appropriate remedy is that aptly described by the ICTR Appeals Chamber in similar circumstances:

> In reversing Zigiranyirazo's convictions for genocide and extermination as a crime against humanity, the Appeals Chamber again underscores the seriousness of the Trial Chamber's errors. The crimes Zigiranyirazo was accused of were very grave, meriting the most careful of analyses. Instead, the Trial Judgement misstated the principles of law governing the distribution of the burden of proof with regards to alibi and seriously erred in its handling of the evidence. Zigiranyirazo's resulting convictions relating to Kesho Hill and the Kiyovu Roadblock violated the most basic and fundamental principles of justice. In these circumstances, the Appeals Chamber had no choice but to reverse Zigiranyirazo's convictions.[101]

v. GROUND OF APPEAL 5: The Chamber erred in law by disregarding the principle that substantial payments to witnesses, in itself, requires that their testimony be treated with caution.

(i) Overview

62. An number of Prosecution witnesses received substantial payments of money and other benefits as a result of their association with the Court. These payments came from the Prosecution's Witness Management Unit (WMU), or the Court's Witnesses and Victims Section (WVS),[102] or both. As acknowledged by the Chamber, some of these payments were made during periods in which there is no record of interviews with the Prosecution.[103] TF1-362 received 4,770 USD from WVS, 3,862 USD from WMU, and lived in a Prosecution safe house for months with her three children and sister, and received a mobile telephone, expenses for child care

[99] Judgement, para. 5655 ("The Trial Chamber considers that in such circumstances, and accounting for captured materiel from military engagements, it is not implausible that the materiel lasted for several months until September and October 1998").
[100] Judgement, para. 5659.
[101] *Zigiranyirazo* AJ, para. 75.
[102] See Rule 34 of the Rules.
[103] Judgement, paras. 287 and 344.

and school fees.[104] This is just one example of many.[105] The issue of excessive payments and incentives to Prosecution witnesses was a recurring feature of the Defence case before the Trial Chamber.[106]

63. For the purposes of this Ground of Appeal, the propriety of these payments may be set aside for a moment.[107] What is being challenged is the Trial Chamber's assessment of the credibility witnesses that received substantial payments and benefits. Instead of treating the evidence of such witnesses with caution, the Chamber engaged in the speculative and fruitless exercise of trying to determine the extent to which payments and benefits coloured the testimony of the respective witnesses.[108] The impossibility of resolving this subjective question was an error which undermines all findings by the Chamber that rely on the testimony of these witnesses.

(ii) The provision of payments and benefits requires automatic caution

64. At the *ad hoc* Tribunals, significant payments or other benefits automatically give rise to caution in the assessment of a witness' credibility and the weight given to their evidence. Rather than burdening themselves with the impossible task of determining to what degree, if any, the evidence in question was influenced by the payments or benefits, Trial Chambers have consistently held that appropriate caution is to be applied when assessing the weight of such evidence. As discussed below, this caution does not automatically mean disregarding the testimony of the witness, particularly if, for example, the witness has been thoroughly cross-examined. However, on many occasions, Trial Chambers at the ICTY and ICTR have found significant doubt as to the credibility of witnesses who have incentives or motives (due to disproportionately high payments or benefits) to implicate an accused, and have declined to rely on their evidence when uncorroborated.

65. Two witnesses in the *Martić* case, MM-03 and MM-079, sought and received assistance from the Prosecution in the form of support for asylum applications. In its

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[104] Judgement, para. 250.
[105] Judgement, paras. 234, 236, 250-1, 260-2, 287, 309, 344, 357-8.
[106] Contempt Decision; Disclosure Decision relating to DCT-032; Disclosure Decision relating to DCT-097; See also, TT, 10 March 2011, pp. 49473 *et seq*; Defence Final Brief at paras. 23-26.
[107] See Ground 40, below.
[108] See, **for example,** Judgement, para. 234: 'The Trial Chamber does not find that these payments undermine his credibility'; para. 287: 'nor did [the payments] appear to influence his testimony'; para. 344: 'The Trial Chamber, while noting the questions about these payments, does not accept that they improperly influenced his testimony'; para. 357: 'The Trial Chamber finds that these payments (...) did not influence his testimony'.

Final Trial Brief, the Prosecution acknowledged that this assistance required the Trial Chamber to treat their evidence 'with care'.[109] The *Martić* Chamber held:

> The Trial Chamber notes that both Witness MM-003 and Witness MM-079 sought assistance from the Prosecution, which also provided such assistance to both witnesses. The Trial Chamber therefore considers that there is significant doubt as to the credibility of both witnesses and has consequently given weight only to the parts of their respective evidence which are corroborated by other evidence.[110]

66. The same caution has been consistently applied at the ICTR. In *Karemera,* the Trial Chamber held that excessive benefits do not *per se* constitute a ground for dismissal or striking the testimony.[111] However, such benefits must be considered when assessing the weight to be accorded to the testimony in question, as the credibility of the witness might have been affected to some degree by the benefits received.[112] In *Karemera*, the Chamber consistently viewed the evidence of the relevant witnesses as 'problematic', never relying on their testimony unless corroborated by other witnesses.[113]

67. In a similar vein, the *Bizimungu* Trial Chamber held that "the possibility that witness D is motivated to provide evidence favourable to the Prosecution in order to ensure continued benefits cannot be ignored."[114] The Chamber noted that the record showed no improper conduct by the Prosecution in relation to the witness in question. Nevertheless, the payments provided for the witness were significant. Therefore, the Trial Chamber placed his evidence under close scrutiny,[115] and none of the Chamber's findings were based solely on the evidence of the witness in question.

68. In *Zigiranyirazo,* the Trial Chamber determined that benefits such as direct payments, payment of relocation costs for the witness' family, and promises related to the venue of the witness' own trial required that the witness' testimony be viewed with caution.[116] The Chamber held that '[u]nder these circumstances [payments received from OTP], the Chamber considers it unsafe to accept Bagaragaza's uncorroborated hearsay testimony'.[117]

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[109] *Martić* TJ, paras. 36-7.
[110] *Martić* TJ, para. 38.
[111] *Karemera* Decision.
[112] *Karemera* Decision, para. 7. *Karemera* TJ, paras. 194-5; 249-50; 341-2; 437-8; 470-1; 495-6; 530-1; 591-2; 623-4; 701-2; 735-6; 878-9; 1281-2; 1331-2; 1352-3.
[113] *Karemera* TJ, para. 110.
[114] *Bizimungu* TJ, paras. 830-1.
[115] *Bizimungu* TJ, paras. 830-1.
[116] *Zigiranyirazo* TJ, para. 139.
[117] *Zigiranyirazo* TJ, para. 140.

69. The approach consistently adopted at the *ad hoc* tribunals strikes a measured and appropriate balance between the often legitimate need to provide assistance to witnesses, and the reality that this assistance may influence their testimony. The question of influence is entirely subjective, and invariablly subtle in the absence of an explicit confession from the witness; it may indeed be as subtle as an underlying (and even unconscious) feeling of loyalty on the part of the witness to his or her benefactor, which colours testimony given before the court. In an acknowledgement of the impossibility of determining whether (or to what extent) benefits have influenced witnesses, the *ad hoc* trial chambers have routinely and automatically viewed the evidence of such witnesses with caution. It is submitted that this is the correct approach, and it reflects the limits of trial chambers' ability to accurately determine the subjective motivation of witnesses.[118]

70. This issue has been considered previously by the SCSL. Responding to Defence concerns, the AFRC Trial Chamber found that 'witness protection' in the form of relocation did not automatically give rise to a 'reason to doubt' a witness' evidence.[119] The Chamber therefore did not give 'undue weight to these alleged 'incentives' when assessing the credibility of the witnesses in question'.[120] It is not being asserted that a trial chamber should give 'undue weight' to incentives, nor that protective measures should automatically require that a witness' testimony be disregarded. Rather, as is the practice in the *ad hoc* tribunals, caution should be applied. A reasonable trier of fact should ensure that factual findings rest on evidence capable of supporting these conclusions beyond a reasonable doubt. Applying caution to the testimony of witnesses who have received excessive and/or duplicative benefits, or declining to rely on such evidence unless corroborated, mitigates the risk of relying on witnesses whose evidence may have been affected by oftentimes life-altering payments or benefits.

71. When determining whether benefits and/or payments influenced the testimony of witnesses, the Chamber made the following conclusions:

- 'The Trial Chamber does not find that these payments undermine his credibility';[121]

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[118] *Martić* TJ, paras. 36-8; *Karemera* TJ, para. 110; *Bizimungu* TJ, paras. 830-1; *Zigiranyirazo* TJ, para. 139-40.
[119] *AFRC* TJ, paras. 128-9.
[120] *AFRC* TJ, para. 130.
[121] Judgement, para. 234.

- '...the Trial Chamber does not find that [allegations of excessive payments] undermine the credibility of [the witness]';[122]
- '...the nature of the information he provided to the Prosecution... does not appear to have been tailored in favour of the Prosecution as a result of those benefits';[123]
- 'While these amounts were significantly more than he had actually spent, the Trial Chamber accepts the testimony of the witness... that he did not testify for monetary gain.';[124]
- The payments did not 'appear to influence his testimony';[125]
- 'The Trial Chamber, while noting the questions about these payments, does not accept that they improperly influenced his testimony';[126]
- 'The Trial Chamber finds that these payments... did not influence his testimony'.[127]

72. These conclusions demonstrate the difficulties with the Trial Chamber's approach. A witness could well decide to give inculpatory testimony in order to ensure continued financial assistance, without any overt indication that this evidence was untruthful. It could be the case that payments did not 'appear' to influence testimony, but this misses the vital point. There is no basis on which the Chamber can safely make such a subjective determination. As such, viewing this testimony with caution is an appropriate middle ground, and one which the Chamber erred in not adopting.

(iii) The Trial Chamber's error renders factual findings invalid

73. The Chamber's error infects all findings in the Judgement which rely in whole or in part on the testimony of witnesses who had received the payments and benefits in question; namely TF1-360;[128] TF-362;[129] TF1-337;[130] TF1-532;[131] TF1-334;[132] TF1-579[133] and TF1-274.[134]

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[122] Judgement, paras. 250-1.
[123] Judgement, paras. 260-2.
[124] Judgement, para. 271.
[125] Judgement, para. 287.
[126] Judgement, para. 344.
[127] Judgement, para. 357.
[128] Judgement, para. 234.
[129] Judgement, paras. 250-1.
[130] Judgement, paras. 260-2.
[131] Judgement, paras. 270-1.
[132] Judgement, para. 287.
[133] Judgement, para. 344.

74. These were key witnesses for the Prosecution, and the Chamber relied on their evidence extensively in the Judgement, and many times without corroboration. The Trial Chamber erred in law in failing to treat the evidence of these witnesses with **any** caution despite the benefits and payments received; the errors render findings based on these witnesses unsafe, invalidate the Judgement,[135] and warrant the reversal of all such findings.

75. A similar scenario arose in *Nchamihigo*, albeit with a Prosecution witness who was an accomplice, rather than a recipient of payments. The Trial Chamber recalled that "the testimony of accomplices may be tainted by motives or incentives to falsely implicate an accused to gain some benefit or advantage in regard to their own case or sentence."[136] However, it then concluded that the witness did not have "any motive or incentive to falsely incriminate" Nchamihigo.[137] The Appeals Chamber held this finding to be patently unreasonable and overturned factual findings, in part, on this error.[138]

76. In consequence of the Trial Chamber's wholesale error in failing to treat the evidence of witnesses who received payments and/or benefits with caution, the Appeals Chamber is requested to overturn all factual findings and subsequent convictions that rely, in whole or in part, on the respective testimony of TF1-360; TF-362; TF1-337; TF1-532; TF1-334; TF1-579 and TF1-274.[139] Alternatively, the

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[134] Judgement, para. 357.
[135] Article 20(1)(b), Statute.
[136] *Nchamihigo* TJ, paras. 17, 214.
[137] *Nchamihigo* TJ, para. 214.
[138] *Nchamihigo* AJ, paras. 305, 309, 312-4.
[139] **TF1-360** – Judgement, paras. 2450-2451; 2454; 2457-2459; 2476; 2478; 2481; 2518; 2524; 2526; 2626; 2629; 2831; 2839; 2844; 2856-2857; 2863-2864; 2931; 2937; 2947; 2951; 3124; 3129-3130; 3370-3371; 3374-3375; 3382; 3385; 3387-3389; 3391; 3394-3397; 3399-3401; 3404; 3408-3409; 3413; 3416-3417; 3420; 3423-3424; 3428; 3434-3435; 3437; 3445; 3449-3450; 3452; 3455; 3462; 3473; 3478; 3481-3486; 3587; 3606; 3609; 3657; 3660; 3664; 3665-3666; 3726-3728; 3729-3730; 3783-3785; 3788; 3796; 3804-3805; 3909; 3914; 4062; 4065; 4068; 4086; 4092; 4094; 4148-4150; 4152; 4372; 4374; 4377-4378; 4382; 4388-4390; 4394-4396; 4943; 4946-4947; 4965; 5015; 5021; 5030-5031; 5189; 5191; 5220; 5224; 5395; 5398; 5400; 5403; 5406-5409; 5587-5588; 5591; 5593; 5620; 5629; 5631; 5632; 5652; 5660; 5666-5667; 5669; 5703; 5718; 5719-5721; 5825; 5827; 5832-5834; 5931-5934; 5946; 5947; 5971; 5975; 5977; 6041; 6043; 6057-6058; 6126; 6128; 6130; 6132; 6135; 6136-6137; 6183-6187; 6189; 6191-6192; 6222; 6231; 6285; 6288; 6399; 6403-6404; 6414; 6544-6546; 6659; 6663; 6749-6750; 6757; 6768; 6776; 6783-6784; 6790; 6792; 6878; 6886.
TF1-362 – Judgement, paras. 2256; 2259; 2321; 2327; 2331; 2337; 4105-4108; 4109; 4167-4169; 4171; 4175-4176; 4555; 4566-4568; 4571-4573; 4579, 4581-4583; 4946-4947; 5717; 6768.
TF1-337 – Judgement, paras. 2335; 2378-2379; 2384; 2390-2391; 2703; 2718; 4836-4838; 4845; 5815; 5825; 5832-5834; 6725; 6728; 6768.
TF1-532 – Judgement, paras. 2320-2321; 2323-2329; 2331-2332; 2334; 2337; 2366-2367; 2378; 2390-2391; 2476-2478; 2480; 2481; 2553-2559; 2561; 2703; 2706; 2711; 2718; 2744-2745; 2747; 2753; 2831; 2838-2839; 2841-2842; 2844; 2853; 2857; 2863-2864; 2927; 2929; 2932;

Appeals Chamber is requested to overturn all factual findings and subsequent convictions that are based, in whole or in part, on the evidence of these witnesses, where not corroborated.[140]

B. PART II: ERRORS WHICH INVALIDATE THE PLANNING CONVICTIONS

a. INTRODUCTION

2951; 3090; 3093; 3100-3101; 3107; 3116; 3119-3120; 3125; 3129-3130; 3369; 3371; 3375-3376; 3383; 3388; 3393; 3397; 3399; 3406; 3410-3412; 3417; 3437; 3447; 3464; 3466; 3480; 3481-3486; 3660; 3662; 3664; 3665-3666; 3832; 3834; 3906; 3910; 3914; 4065; 4068; 4147; 4152; 4385; 4394-4396; 4467; 4491; 4493-4495; 4833; 4842; 4844; 4845; 4946-4947; 4960; 4965; 5345; 5384; 5389-5390; 5394-5395; 5397; 5399; 5402; 5404; 5406-5408; 5511; 5513; 5515; 5525; 5527; 5546; 5554; 5559-5560; 5587-5588; 5591; 5593; 5621-5622; 5629-5631; 5632; 5702-5703; 5719-5721; 5820; 5826; 5832-5834; 5868-5869; 5873; 5874; 5923; 5931; 5948; 6188; 6191-6192; 6515; 6518; 6520; 6544; 6546 – 6547; 6656; 6659; 6663; 6761; 6764; 6768; 6772; 6776; 6790; 6792.

TF1-334 – Judgement, paras. 2335; 2831; 2835-2839; 2841-2842; 2863-2864; 2933; 2944; 2951; 3091; 3106; 3121; 3123-3125; 3129-3130; 3370-3371; 3373-3375; 3382; 3385; 3388; 3394-3396; 3398; 3400-3401; 3403-3404; 3407-3409; 3411; 3413-3414; 3425-3426; 3428; 3435; 3437; 3445; 3450; 3454-3455; 3457; 3462; 3464; 3468; 3472; 3475; 3481-3486; 3659; 3665-3666; 3832; 3834; 3906; 3912-3913; 3914; 3979-3980; 3982; 4090; 4094; 4365; 4368-4373; 4375-4378; 4380; 4382; 4385; 4388-4393; 4394-4396; 4556-4560; 4562-4565; 4579, 4581-4583; 4946; 4957; 4965; 5384; 5389; 5395; 5397-5399; 5403; 5406-5409; 5581-5586; 5591-5592; 5593; 5652-5659; 5666-5667; 5706-5709; 5711; 5713; 5718; 5719-5721; 5742; 5752-5753; 5825; 5832-5834; 6341; 6343-6344; 6345; 6656; 6659; 6663; 6749-6750; 6759; 6761-6762; 6768; 6776; 6792.

TF1-579 – Judgement, paras. 2386; 2390-2391; 2703-2706; 2711; 2715; 2718; 3915; 3918; 4723-4724; 4734; 4832; 4845; 4943-4946; 4953; 4955; 4960; 4962; 4965; 5192; 5195; 5826; 5832-5834; 5923; 5931; 5934; 5948; 6565-6566; 6745.

TF1-274 – Judgement, paras. 2367; 2379-2380; 2387; 2390-2391; 2448; 2451; 2457-2458; 2626; 2629; 2765; 2769; 3100; 3110; 3129-3130; 3369; 3384; 3394-3400; 3405; 3410; 3413; 3416-3419; 3437-3438; 3440-3442; 3445-3447; 3449; 3451; 3454; 3456; 3464; 3473; 3478; 3481-3486; 3554-3556; 3562-3563; 3565; 3567-3568; 3571-3572; 3575; 3577-3578; 3587-3589; 3591; 3596; 3600; 3606, 3609; 3660-3661; 3665-3666; 3722; 3724; 3726; 3729-3730; 3783-3785; 3787-3788; 3795-3797; 3801; 3803; 3804-3805; 3832; 3834; 3840; 3842; 3855; 3862; 3856; 3868-3869; 3915; 3918; 3936; 3937; 4239-4240; 4247; 4248 (ix, xi); 4612-4613; 4800; 4802; 4843; 4943; 4946; 4948; 4965; 5008; 5014; 5021-5022; 5028; 5030-5031; 5123; 5126; 5128; 5130; 5316; 5325; 5329-5330; 5511; 5514-5515; 5519; 5527; 5587-5588; 5591; 5593; 5702; 5705; 5714-5716; 5719-5721; 5722(d); 5829; 5835(xi, xxxv); 6222; 6280; 6519; 6520; 6659; 6663; 6768; 6792.

[140] **TF1-360** – Judgement, paras. 2626; 2629; 3394-3397; 3399-3401; 3404; 3408-3409; 3413; 3416-3417; 3445; 3449-3450; 3481-3486; 3664; 3665-3666; 5587-5588; 5591; 5593; 5718; 5719-5721; 6183-6187; 6189; 6191-6192.

TF1-362 – Judgement, para. 5717.

TF1-532 – Judgement, paras. 3125; 3129-3130; 3383; 3399; 3447; 3481-3486; 3664; 3665-3666; 5587-5588; 5591; 5593; 6792.

TF1-334 – Judgement, paras. 3394-3396; 3398; 3400-3401; 3403-3404; 3462; 3481-3486; 4388-4393; 4394-4396; 4556-4560; 4562-4565; 4579, 4581-4583; 5581-5586; 5591-5592; 5593; 5652-5659; 5666-5667; 5711; 5713; 5718; 6343-6344; 6345.

TF1-274 – Judgement, paras. 2626; 2629; 2765; 2769; 3384; 3394-3400; 3405; 3410; 3413; 3416-3419; 3440-3442; 3445-3447; 3449; 3456; 3481-3486; 3554-3556; 3606, 3609; 3801; 3804-3805; 3936; 3937; 4612-4613; 4800; 4802; 5126; 5128; 5130; 5325; 5329-5330; 5587-5588; 5591; 5593.

77. The Chamber convicted Charles Taylor of "planning" crimes charged in the Indictment, on the basis that he and RUF commander Sam Bockarie allegedly formulated a plan to attack Kono and Kenema, with Freetown as the ultimate destination.[141] The Chamber reasoned that Mr. Taylor was therefore criminally responsible for crimes committed during and after the capture of Freetown, even though it made no finding that Mr. Taylor planned the commission of any concrete crime and was unable even to find that the operation he allegedly planned was carried out in reality.

78. This reasoning reflects two overarching errors. The first error arises from a misunderstanding of the *actus reus* of planning. The *actus reus* is designing the commission of a crime.[142] Convictions have therefore been based on the development of a design whose purpose was "the murder of Tutsis",[143] or the "wanton destruction of houses or other property" or "cruel treatment".[144] The Chamber did not find, and could not have found on the evidence, that Mr. Taylor planned the commission of any crime; it found only that he planned a military operation.[145] The significance of this error is discussed in Ground 11.

79. The second error arises from the fact that the alleged plan was never carried out. The RUF's offensives on Kenema and Freetown failed.[146] Freetown fell instead to AFRC troops commanded by Alex Tamba Brima (Gullit), who had launched their offensive from the north under the command of SAJ Musa, who refused to coordinate at all with the RUF. Gullit's troops entered Freetown; Gullit's troops took over the State House; and Gullit's troops were on the ground while the crimes were being carried out. This was uncontroversial.[147]

80. The Chamber nevertheless attributed Gullit's actions to Mr. Taylor by way of "planning". To do so, it overturned a crucial adjudicated fact (discussed in Ground 6 below),[148] and imputed responsibility to Mr. Taylor for a chain of events that surpasses any recognizable notion of "planning": (a) Sam Bockarie and Charles Taylor formed a military plan with Freetown as the ultimate destination; (b) Mr.

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[141] Judgement, paras. 3129, 3611(vi), 6961, 6971, 6994(b).
[142] *Nahimana* AJ, para. 479; *Limaj* TJ, para. 513. See also *Kordić & Čerkez* AJ, para. 26; *Brđanin* TJ, para. 268; *Krštić* TJ, para. 601; *Galić* TJ, para. 168.
[143] *Gacumbitsi* TJ, paras. 278.
[144] *Boškoski* TJ, para. 577.
[145] Judgement, paras. 3129, 3611(vi), 6961.
[146] Judgement, para. 3480.
[147] Judgement, para. 61, citing Judicial Notice Decision, Annex A, Facts 14, 15.
[148] Judgement, paras. 3377-8.

Taylor and Bockarie contemplated that SAJ Musa would participate in the plan, despite his direct refusal to do so; (c) SAJ Musa's death prompted communication between Gullit and Bockarie; (d) Gullit subsequently abandoned SAJ Musa's plan and adopted the "Bockarie/Taylor plan"; (e) Bockarie assumed effective command and control over Gullit; (f) a small contingent of RUF troops "joined up" with Gullit's troops in Freetown; (g) the "Bockarie/Taylor plan" underwent a "continuing evolution" to encompass Gullit's movements; and (h) Mr. Taylor was aware of the "evolving" plan through regular updates.

81. Grounds 7 to 13 discuss the significant evidentiary flaws affecting each of the links in this complicated factual chain. Given that these findings are interdependent, a reversal of one or more will undermine the Chamber's overall conclusion and warrant a reversal of the planning convictions.

82. Finally, Grounds 14 and 15 discuss the Chamber's error in failing to find that Mr. Taylor had the requisite *mens rea* for each of the 11 crimes for which he was convicted of having planned. Instead, the Chamber relied on a past awareness of crimes to infer intent for future crimes, and vague and uncorroborated evidence of alleged instructions from Mr. Taylor to conclude in a blanket manner that he intended to commit "crimes".[149] This was insufficient and incompatible with principles of individual criminal responsibility.

83. Planning is a straightforward mode of liability: responsibility arises when an accused plans to commit a crime which then occurs, and intends for it to be committed through the carrying out of the plan. Neither of these elements is present in the Chamber's reasoning: it could not find that Mr. Taylor planned any crimes, nor that his alleged plan was carried out. The Chamber's reasoning reflects errors of law that invalidate the Chamber's conviction and, to a lesser extent, errors of fact that could not have been made by a reasonable chamber, and that have occasioned a miscarriage of justice. In the presentation of these Grounds of Appeal, leave is sought from the Appeals Chamber to present Ground 9 before Ground 8 below.

b. ERRORS RELATING TO PLANNING: GENERAL

i. GROUND OF APPEAL 6: The Trial Chamber erred in fact and law in finding that the Prosecution had successfully challenged the truth of

[149] Judgement, para. 6969.

Adjudicated Fact 15 from the AFRC trial, thus requiring the Trial Chamber's re-consideration of the matters in question.

(i) Introduction

84. In March 2009, following the close of the Prosecution's case and prior to the start of the Defence case, the Chamber took judicial notice of fifteen adjudicated facts from the AFRC trial.[150] Adjudicated Fact 15 read as follows:[151]

> While the AFRC managed a controlled retreat [from Freetown]... RUF reinforcements arrived in Waterloo. However, the RUF troops were either unwilling or unable to provide the necessary support to the AFRC troops.

85. As such, having heard the Prosecution evidence, a majority of the Chamber took judicial notice of the factual conclusion from the AFRC trial,[152] that the RUF had not been part of the AFRC operation in Freetown of January 1999.[153] Justice Doherty dissented, noting this was a "central issue" in the present case.[154] The scope of the Defence case was determined, in part, in reliance on this adjudicated fact.

86. In the Judgement, however, the Chamber held that the Prosecution had sufficiently challenged the truth of the Adjudicated Fact 15 as to require the Trial Chamber's re-consideration.[155] The Prosecution's challenge was ostensibly presented in paragraph 540 of the Prosecution Final Brief.[156]

87. The Chamber's finding that the Prosecution could challenge an adjudicated fact after the close of the evidence, and without doing so expressly, diverges from established practice; is inconsistent with its original decision; and caused irreparable prejudice to Mr. Taylor by reversing a critical adjudicated fact without any opportunity to respond. These errors are examined below.

(ii) The Trial Chamber erred in law in its articulation of the legal effects and procedural implications of taking judicial notice of an adjudicated fact pursuant to Rule 94(B)

88. The Special Court has consistently relied on the approach adopted by the ICTR and ICTY Appeals Chambers in *Karemera*[157] and *Milošević*[158] that Rule 94(B)

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[150] Decision on Judicial Notice of AFRC Adjudicated Facts.
[151] Decision on Judicial Notice of AFRC Adjudicated Facts, Annex A, Fact 15 ("Adjudicated Fact 15").
[152] *AFRC* TJ, paras. 202, 206, 398.
[153] See, in particular, *RUF* TJ, para. 893.
[154] Decision on AFRC Adjudicated Facts, Separate and Partly Dissenting Opinion of Justice Teresa Doherty, para. 12.
[155] Judgement, paras. 3377-8.
[156] Judgement, para. 3378.
[157] *Karemera* Appeals Chamber Decision on Adjudicated Facts, para. 42, cited in Decision on Judicial Notice of AFRC Adjudicated Facts, para. 27. See also *RUF* Adjudicated Facts Decision, para. 18.

creates a well-founded presumption in favour 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.[159] Judicial notice of an adjudicated fact, according to these authorities, suspends evidential inquiry in favour of the fact, and provides an exemption from the necessity of adducing evidence on matters which are "at issue" between the parties.[160]

89. A party may, of course, challenge an adjudicated fact, but must "bring out the evidence in support of its contest *and* request the Chamber to entertain the challenge."[161] The issue may thereby be placed back on the table for the Chamber's consideration. The moving party, until that point entitled to rely on the adjudicated fact, is "provided with an opportunity to respond… and the Chamber will then decide on the matter."[162]

90. The Chamber followed this reasoning in its original *Decision on Judicial Notice of AFRC Adjudicated Facts,* pronouncing that judicial notice was "intended to streamline the Defence case" and expressly declaring 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.*"[163] The Defence relied on this pronouncement, expecting that if the Prosecution wished to challenge an adjudicated fact it would have to do so by adducing evidence. It did not do so.

91. Despite the absence of such a challenge, the Chamber accepted that an adjudicated fact could be challenged by submissions alone, relying on a decision of an ICTY trial chamber.[164] That Chamber pronounced that judicial notice of an adjudicated fact meant only that the "*fact* is *admitted into evidence,*"[165] rather than creating a rebuttable presumption of its truth.[166]

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[158] *Slobodan Milošević* Appeals Chamber Decision on Adjudicated Facts, p. 2, cited in Sesay Adjudicated Facts Decision, para. 18. Explicit reliance has also been placed on *Krajišnik* Adjudicated Facts Decision.
[159] Judgement, para. 210, citing Decision on Judicial Notice of AFRC Adjudicated Facts, para. 27; See also Sesay Adjudicated Facts Decision, para. 18.
[160] *Slobodan Milošević* Separate Opinion on Adjudicated Facts, paras. 6-7; See also *Karemera* Appeals Chamber Decision on Adjudicated Facts, para. 42 ("the effect is only to relieve the [proposing party] of its initial burden to produce evidence on the point").
[161] *Krajišnik* Adjudicated Facts Decision, para. 17.
[162] *Krajišnik* Adjudicated Facts Decision, para. 17.
[163] Decision on Judicial Notice of AFRC Adjudicated Facts, para. 32.
[164] *Popović* Adjudicated Facts Decision, para. 21.
[165] *Popović* Adjudicated Facts Decision, para. 21, emphasis added.
[166] *Popović* Adjudicated Facts Decision, para. 21.

92. More recent ICTY jurisprudence has reaffirmed that judicial notice of an adjudicated fact creates a rebuttable presumption in favour of the fact. As the *Mladić* Chamber recently held:[167]

> The core issue is that, in taking judicial notice of an adjudicated fact, a Trial Chamber does not take notice of the evidence underlying this fact on which the previous Chamber established that fact. The presentation of contradicting evidence, if sufficiently relevant and probative to be considered pursuant to the criteria of Rule 89(C), is to be understood as a step to reopen the evidentiary debate on the fact the Chamber took judicial notice of. Therefore, if contradicting evidence is presented, and the proposing party still wishes to meet its burden of persuasion in relation to that fact, the Trial Chamber is invited to strike a balance between a judicially noticed *fact* and *evidence*. As facts in themselves cannot be weighed against contradicting evidence, in order to strike such a balance, the obvious way is to allow the proposing party to submit evidence in relation to the now challenged fact, which can then be weighed against the contradicting evidence. This restores a situation in which the Trial Chamber weighs evidence *pro* and *contra* the judicially noticed fact at issue and makes its own finding.

93. The procedural implications, according to the *Mladić* Chamber, are two-fold. First, taking judicial notice of a fact "relieves the proposing party of its initial burden to produce evidence on that fact".[168] The challenging party may then challenge the fact.[169] Second, "even if the challenging party notifies the proposing party of its intention to challenge certain judicially noticed facts, the proposing party may still rely on the legal effect of being relieved of its initial burden to produce evidence on the point, until the moment the challenging party puts the adjudicated fact into question by *introducing* evidence to the contrary."[170] The proposing party must then have an opportunity to present further evidence: "the legal effect of judicial notice would not serve its purpose if, when the challenging party presents contradicting evidence, such a presentation results in the eradication of the proposing party's possibility to then present its evidence in support of this fact."[171]

94. The approach adopted by the Chamber in the Judgement (i) deviated from its own decision taking judicial notice of adjudicated facts; (ii) deviated from established SCSL jurisprudence on judicial notice; and (iii) deviated from the predominant approach to adjudicated facts at the ICTR and ICTY. This legal error alone invalidates

[167] *Mladić* Decision on Adjudicated Facts, para. 15.
[168] *Mladić* Decision on Adjudicated Facts, para. 13.
[169] *Mladić* Decision on Adjudicated Facts, paras. 16, 19.
[170] *Mladić* Decision on Adjudicated Facts, para. 17.
[171] *Mladić* Decision on Adjudicated Facts, para. 17.

the Chamber's findings concerning Mr. Taylor's alleged planning of the Freetown invasion and subsequent retreat, in addition to the further errors addressed below.

(iii) The Trial Chamber erred in finding that the Prosecution could challenge an Adjudicated Fact in its Final Trial Brief

95. The Chamber held, citing the Prosecution Final Trial Brief, that the Prosecution had sufficiently challenged the truth of Adjudicated Fact 15, requiring its reconsideration.[172] This was erroneous. Submissions are not "evidence", and the Prosecution was required to challenge the judicially-noticed adjudicated fact by adducing evidence to the contrary.[173]

96. A salutary aspect of the requirement that adjudicated facts be challenged by way of evidence alone is that this gives the party supporting the adjudicated fact an opportunity to rebut the evidence to the contrary.[174] As explained by the *Mladić* Trial Chamber, "the legal effect of judicial notice would not serve its purpose if, when the challenging party presents contradicting evidence, such a presentation results in the eradication of the proposing party's possibility to then present its evidence in support of this fact."[175] The methodology pursued by the Prosecution, and permitted by the Chamber, is worse than trial by ambush; it is the equivalent of an ambush after the battle is over.

97. Even assuming that the Chamber was entitled to find that a party could, as matter of law, challenge an adjudicated fact in this manner, no reasonable trial chamber could have found that the Prosecution did so.[176] Paragraph 540 of the Prosecution's Final Trial Brief reads:

> When the AFRC/RUF was unable to defeat ECOMOG forces defending the approaches to Freetown at Jui and Kossoh town, Issa Sesay gave an order for a small detachment of men to enter the city using a bypass to the south. He chose Idrissa Kamara, known as Rambo Red Goat, to lead the group because Kamara was an SLA soldier known to commanders inside the city, but the group itself included many RUF fighters. Issa Sesay confirmed in his testimony that the "Red Goat Batallion" was made up of RUF fighters.

98. The Chamber interpreted this paragraph as asserting that "RUF reinforcements sent by Bockarie arrived in Waterloo before Gullit retreated from Freetown and that

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[172] Judgement, para. 3378, fn. 7541.
[173] Decision on Judicial Notice of AFRC Adjudicated Facts, para. 32.
[174] *Krajišnik* Adjudicated Facts Decision, para. 17; *Mladić* Decision on Adjudicated Facts, para. 17.
[175] *Mladić* Decision on Adjudicated Facts, para. 17.
[176] Judgement, para. 3377.

they attempted and partially succeeded in connecting with the troops in the city".[177] The Chamber's interpretation is unwarranted. There is no mention in this paragraph of Bockarie, or any connection with Gullit's troops. The Chamber's reasoning is therefore unfounded, and compounds the errors identified above.

99. Even if it is assumed that this crucial paragraph of the Judgement has been carelessly drafted (a difficult assumption in light of the issuance of a corrigendum), and the Chamber in fact meant to refer to paragraphs 540 to 546 of the Prosecution Final Brief, the evidence cited therein comes from the Prosecution's own case. Insofar as that section makes reference to the testimony of Defence witness Issa Sesay, it examines his testimony predominantly for the purpose of discrediting it and thereby minimising its potential to detract from the Prosecution's evidence in chief.[178] This Prosecution evidence, therefore, had already been heard when the Chamber issued its decision taking judicial notice of the adjudicated fact in question.[179] Justice Doherty's dissent incontrovertibly demonstrates that a majority of the Chamber had already contemplated and rejected the evidence to the contrary.[180] The Prosecution's submission could in no way be interpreted as "*introducing* reliable and credible evidence to the contrary"[181] either through cross-examination of Defence witnesses, or through calling a case in rebuttal.[182] The Chamber was not entitled on this basis to overturn an adjudicated fact that it had itself recognized after the close of the Prosecution case.

(iv) The Chamber's error caused irreparable prejudice to the Defence

100. These errors caused irreparable prejudice to the Defence in two ways. Firstly, upon Adjudicated Fact 15 being judicially noticed, the Defence was entitled to rely (and did rely) on the legal effect of being relieved of its burden to produce evidence on this point. Judicial notice is a device that "provide[s] for an exemption from the

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[177] Judgement, para. 3378.
[178] Prosecution Final Brief, para. 544.
[179] *Slobodan Milošević* Final Decision on Adjudicated Facts, paras. 10-11. It found, as the facts in question pertained to areas of evidence already strongly challenged by the other party (in that case, the Accused) and upon which the other party had consistently cross-examined, judicially noticing them would not serve the interests of judicial economy: "attempts by an accused to rebut these facts may absorb considerable time and resources during the course of the proceedings, thereby not promoting judicial economy or expeditiousness"; See also *Mladić* Adjudicated Facts Decision, para. 18 ("[h]aving this specific information [of the precise nature of the challenge] enables the Chamber to determine whether, in this case, taking judicial notice would indeed serve judicial economy.")
[180] Decision on AFRC Adjudicated Facts, Separate and Partly Dissenting Opinion of Justice Teresa Doherty.
[181] *Karemera* Appeals Chamber Decision on Adjudicated Facts, para. 42.
[182] Decision on Judicial Notice of AFRC Adjudicated Facts, para. 32.

necessity to adduce evidence on matter which are "at issue between the parties"[183] and that an adjudicated fact is "put... into question by introducing reliable and credible evidence to the contrary."[184] Until such time as an adjudicated fact is challenged, "even if the challenging party notifies the proposing party of its intention to challenge certain judicially noticed facts, the proposing party may still rely on the legal effect of being relieved of its initial burden to produce evidence on the point, until the moment the challenging party puts the adjudicated fact into question by *introducing* evidence to the contrary."[185] As such, the Defence relied on the adjudicated fact to streamline its case.

101. Secondly, the Defence was deprived of any notice that Adjudicated Fact 15 was in contest. Had the Chamber applied the correct legal standard, the Defence would have been on such notice and have had the opportunity adduce additional evidence to confirm the adjudicated fact. To this end, it is worth noting the abundance of witnesses and evidence upon which SCSL Chambers have relied in order to consistently find that the RUF did not enter Freetown during the relevant period, which would presumably have also been available to Mr. Taylor to bring as evidence in the present case.[186] Crucially, in the absence of this Defence evidence, this error cannot be redressed on appeal.

102. This was not a harmless error. Having found that it could determine whether the RUF entered Freetown,[187] the Chamber then made an adverse finding against the accused. It found that a small contingent of RUF troops in fact reached Freetown, [188] and relied on this finding to conclude that the alleged "Bockarie/Taylor plan" "substantially contributed to the RUF/AFRC military attacks leading to and involving the Freetown Invasion, during which these groups committed the crimes charged in Counts 1 to 11 of the Indictment."[189] The Chamber's errors identified above invalidate this conclusion and warrant a reversal of the convictions on Counts 1 to 11 on the basis of planning the crimes committed during the invasion of and the retreat from Freetown between December 1998 and February 1999.[190]

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[183] *Slobodan Milošević* Separate Opinion on Adjudicated Facts, para. 7.
[184] *Karemera* Appeals Chamber Decision on Adjudicated Facts, para. 42.
[185] *Mladić* Decision on Adjudicated Facts, para. 17.
[186] *AFRC* TJ, paras. 202, 206, 398; *RUF* TJ, paras. 882, 884, 892, 893.
[187] Judgement, para. 3378.
[188] Judgement, paras. 3435, 3483, 3611(x), 6962.
[189] Judgement, paras. 6961-2, 6968.
[190] Judgement, paras. 6971, 6994(b).

(v) The Chamber erred in fact in finding that the RUF was involved in the Freetown invasion

103. Even assuming that these errors had not gravely prejudiced the Defence, the Chamber's conclusion that the RUF was involved in the Freetown invasion, (contrary to its own judicially noticed adjudicated fact), is one that no reasonable trier of fact could have reached on the available evidence.

104. The Chamber purported to rely on Bobson Sesay, Perry Karama, TF1-567,[191] TF1-375, and Exhibit P-149.[192] TF1-567, a "generally credible" RUF soldier,[193] testified that "we were unable to link up with the group in Freetown."[194] Exhibit P-149 is a memo from an Overall Intelligence Officer Commander to Issa Sesay, dated 21 January 1999, which reports that on 15 January 1999 "it was agreed that the men in Freetown and the men at our point were to do [*sic*] joint operation on Jui and Kosso town" but that "the Freetown men never turned up."[195]

105. TF1-375, Kamara and Bobson Sesay gave contradictory and divergent accounts of Rambo Red Goat's alleged entry into Freetown. Kamara testified that Rambo Red Goat came with 15 men, and that, rather than "joining up" with Gullit's troops, the two groups passed on Kissi Old Road when Gullit's troops were on their way out of Freetown. Rambo Red Goat stated that he had "not come to return" and decided (unlike the majority of Gullit's troops) to stay in Freetown.[196] Bobson Sesay, by contrast, testified that Rambo Red Goat came with "more than 50" men,[197] and that Gullit appointed the witness and others to receive this contingent in Allen Town and bring them to Ferry Junction, which he then did.[198] Their morale was high and everybody was happy, and together they joined the team at Eastern Police and advanced back to the State House, which was then recaptured.[199] The diametric opposition of the key elements of these two accounts deprives them of any corroborative character.

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[191] The Judgement cited an incorrect transcript date at fn. 7719.
[192] Judgement, para. 3434.
[193] Judgement, para. 3423.
[194] TT, TF1-567, 4 Jul. 2008, p. 12940.
[195] Exhibit P-149, p. 2.
[196] TT, Perry Kamara, 6 Feb. 2008, p. 3238.
[197] TT, Alimamy Bobson Sesay, 23 Apr. 2008, p. 8327.
[198] TT, Alimamy Bobson Sesay, 23 Apr. 2008, p. 8326.
[199] TT, Alimamy Bobson Sesay, 23 Apr. 2008, p. 8327.

106. Witness TF1-375, whose evidence the Chamber found must be considered with caution,[200] put the number of troops in Rambo Red Goat's group at 60 to 65, not 15, and testified that this group entered Freetown by way of a back road.[201] The witness offered no source for his hearsay information. The Chamber finds this testimony corroborative of that of TF1-371, who testified that Rambo Red Goat was successful in linking up with the AFRC troops.[202] TF1-371, who was not present in Freetown at the time, claims (without giving any source) that Rambo Red Goat's group "were able to resist for some time, and they came along with some of the prisoner and detainees at the Pademba Road Prison"[203] and then describes the combined group attacking at Waterloo and then retreating to Lunsar. TF1-371's account therefore contradicts both Kamara and Bobson Sesay as regards the movements of this contingent of anywhere between 15 and 65 men.

107. This was the only evidence in support of the Chamber's conclusion (different from that reached in both the ARFC and RUF trials)[204] that the small contingent led by Rambo Red Goat connected with Gullit's troops in Freetown. Given that these four witnesses gave vastly inconsistent accounts of this event, this conclusion was not one which a reasonable trial chamber could have reached.

108. More importantly, the Chamber heard virtually no evidence to support its finding that "these forces committed crimes charged in the Indictment."[205] Alimamy Bobson Sesay is the sole source for this claim,[206] but his evidence that Rambo Red Goat arrived with over 50 men consisting of a mix of SLA and RUF[207] is inconsistent with the evidence of Perry Kamara who testified that Rambo Red Goat was "the only man who could garner up to 15 manpower and they bypassed ECOMOG and came to Freetown and joined us."[208] The Chamber failed to address this. Moreover, once in Freetown, Bobson Sesay testified that Rambo Red Goat joined in with the Red Lion Battalion,[209] and the Chamber found that there was "no direct evidence" that members

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[200] Judgement, paras. 308-12.
[201] TT, TF1-375, 24 Jun. 2008, pp. 12608-12.
[202] Judgement, para. 3428.
[203] TT, TF1-371, 28 Jan. 2008, pp. 2427-8.
[204] *AFRC* TJ, paras. 202, 206, 398; *RUF* TJ, paras. 882, 884, 892, 893.
[205] Judgement, para. 6962.
[206] Only Alimamy Bobson Sesay testified about crimes that could be attributable to the forces led by Rambo Red Goat. See Judgement, paras. 806-7, 830, 2109, 2122, 2155, 2162.
[207] TT, Alimamy Bobson Sesay, 23 Apr. 2008, p. 8327.
[208] TT, Perry Kamara, 6 Feb. 2008, p. 3237.
[209] TT, Alimamy Bobson Sesay, 23 Apr. 2008, p. 8342; Perry Kamara, 6 Feb. 2008, p. 3238-9.

of this "Red Lion Batallion" committed crimes in Freetown.[210] No reasonable trier of fact, given the lack of corroboration, the diversity of descriptions, and the incriminating implications of the finding, could have drawn this conclusion. As such, the Chamber's finding that "these forces" committed "crimes charged in the Indictment"[211] is without a sufficient basis, warranting its reversal.[212]

109. In any event, the Chamber relied solely on Prosecution evidence to support its conclusion that a small contingent of RUF troops led by Rambo Red Goat, was able to join Gullit's troops in Freetown.[213] This is unsurprising, given the evidence of Defence witnesses that they did not.[214] This Prosecution evidence was before the Chamber when the majority judicially noted the fact that "the RUF reinforcements arrived in Waterloo, [but] were either unwilling or unable to provide the necessary support to the AFRC troops."[215] As such, the Chamber reviewed this evidence and concluded that the Prosecution had not brought forth sufficient evidence to make the question of whether RUF entered Freetown a point of serious contention, let alone that it had been proven beyond a reasonable doubt. These two conclusions are irreconcilable. The Chamber either erred in its *Decision on Judicial Notice of AFRC Adjudicated Facts*, or erred in the Judgement. A review of the evidence demonstrates that it was the latter.

110. The Chamber relied on this joining up of the undefined "small contingent" with Gullit's troops to conclude that the "Bockarie/Taylor plan substantially contributed to the RUF/AFRC military attacks leading to and involving the Freetown invasion", and thus held Mr. Taylor liable for planning the crimes charged in Counts 1 to 11 of the Indictment. [216] The Chamber's errors identified above invalidate this conclusion and warrant a reversal of the convictions on Counts 1 to 11 on the basis of planning the crimes committed during the invasion of and the retreat from Freetown between December 1998 and February 1999.[217]

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[210] Judgement, para. 4393.
[211] Judgement, para. 6962.
[212] An indication of the Chamber's lack of caution and care in relation to its factual findings is its failure to recognize that Bobson Sesay testified only that the crimes in Counts 1 through 3 were committed by these forces. The Chamber had no evidence at all that this force committed the crimes enumareted in Counts 4 through 11, and yet it entered a conviction against Taylor on all counts. Judgement, paras. 806-7, 830, 2122, 2155, 2162.
[213] Judgement, para. 3435, 3483, 3611(x), 6962
[214] Judgement, para. 3422.
[215] Decision on Judicial Notice of AFRC Adjudicated Facts, Annex A, Fact 15.
[216] Judgement, paras. 6961-2, 6968.
[217] Judgement, paras. 6971, 6994(b).

c. ERRORS RELATING TO PLANNING: ACTUS REUS

i. GROUND OF APPEAL 7: The Trial Chamber erred in fact and law in finding that Charles Taylor and Sam Bockarie jointly designed an attack on Kono, Makeni and Freetown.

(i) Overview

111. The Chamber found that in November or December 1998, Charles Taylor and Sam Bockarie planned a two-pronged military offensive on Kono and Kenema, with Freetown as the ultimate destination.[218] This plan, referred to throughout the Judgement as the "Bockarie/Taylor plan",[219] is the basis of Mr. Taylor's liability for "planning" in respect of the eleven crimes enumerated in the Indictment.

112. The Chamber heard no direct evidence about the making of this alleged plan. Bockarie died on 6 May 2003,[220] and Mr. Taylor denied that this plan was either made or that he knew of its existence.[221] All evidence concerning Mr. Taylor's alleged participation in formulating the plan came from the hearsay testimony of TF1-371, Issac Mongor, and Karmoh Kanneh as to what they were told by Bockarie. The probative value of the evidence therefore depends entirely on Bockarie's veracity and accuracy. The Chamber conducted no inquiry as to Bockarie's potential motivation for lying or exaggerating, despite such motivations being obvious. TF1-371's own testimony gives an abundant indication of Bockarie's motivation to lie, noting that he had improbably claimed to his commanders that "he [Bockarie] had been instructed by Taylor that no commander should contest his authority, otherwise they would be executed, conveying again that Taylor had given him authority."[222] The probative value of these three hearsay witnesses is diminished further by their numerous inconsistencies and contradictions.

113. On the basis of this extremely weak and unsatisfactory evidence, the Chamber made a directly incriminating finding: that Mr. Taylor had assisted Bockarie to plan an attack, on the basis of which Mr. Taylor was convicted of a wide range of crimes.[223] No reasonable trial chamber could have found that the evidence satisfied the burden of proof beyond a reasonable doubt, and no trial chamber as a matter of

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[218] Judgement, para. 3129.
[219] Judgement, paras. 3480, 3486, 3611(xiii), 3617.
[220] Exhibit D-46, p. 2.
[221] TT, Charles Taylor, 5 Aug. 2009, pp. 26050-1.
[222] Judgement, para. 2963.
[223] Judgement, paras. 3099, 3109, 3112, 3117, 3120, 3126-7 and 3129-30.

law could have convicted Mr. Taylor exclusively on the basis of an uncross-examined out-of-court statement, especially when that source had such an obvious motive to lie.

(ii) The Chamber erred in relying on TF1-371, Karmoh Kanneh and Isaac Mongor's evidence on the events leading up to the December 1998 offensive.

(a) Introduction

114. No reasonable trier of fact could have relied on the testimonies of TF1-371, Karmoh Kanneh and Isaac Mongor when their evidence is inconsistent and contradictory with respect to the events leading up to the December 1998 offensive, prior to the Freetown invasion. Some inconsistencies were addressed but deemed insignificant, and many inconsistencies were not addressed at all.

(b) The Chamber failed to take appropriate caution in the assessment of the evidence of TF1-371, Karmoh Kanneh and Isaac Mongor

115. The Trial Chamber held that TF1-371, Karmoh Kanneh and Isaac Mongor were all "generally credible" witnesses.[224] However, they are all accomplice witnesses, having been senior members of the RUF during the Indictment period.[225] As acknowledged by the Chamber, it was required to assess whether the accomplice has an ulterior motive to testify, and noted that it would generally look for corroboration or otherwise view the evidence with sufficient caution. [226] The Chamber erred in failing to do so.

116. The Chamber specifically criticised the evidence of Karmoh Kanneh with regard to his recollection of the events of 1998 concerning Operation Fitti-Fatta, stating "there are several elements of Kanneh's evidence which suggest that his recollection of the meeting [at Waterworks in spring 1998] may have been confused with other events occurring in 1998."[227] The Chamber then erred by unconditionally accepting Kanneh's evidence of later meetings in 1998 without reference to this confusion.

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[224] Judgement, paras. 226, 2704 and 274, respectively.

[225] There is no requirement that, in order to qualify as an accomplice, a witness must have been charged with a specific offence (Judgement, para. 182). The Trial Chamber noted that TF1-371 and Isaac Mongor are accomplice witnesses (Judgement, paras. 220 and 270, respectively). Furthermore, by their own admissions, Mongor, Kanneh and TF1-371 were accomplices in the December 1998 offensive: Mongor had the role of attacking Joru and advancing on to Zimmi (TT, Isaac Mongor, 11 Mar. 2008, pp. 5795-6); Kanneh had the role of attacking Segbwema and Daru (TT, Karmoh Kanneh, 9 May 2008, pp. 9426-7); TF1-371 was a member of the RUF, participating with Bockarie in the preparation of the offensive (TT, TF1-371, 28 Jan. 2008, pp. 2402-16).

[226] Judgement, para. 183. See also *Nchamihigo* AJ, paras. 305, 309, 312-4 (regarding the need for caution when assessing an accomplice's evidence).

[227] Judgement, para. 2941.

117. Further, despite the Chamber's finding that these witnesses were "generally credible", there are numerous and notable examples of when the Chamber declined to rely on their evidence elsewhere in the Judgement.[228] During the course of the evidence itself, Mongor and Kanneh had either previously lied[229] or were unclear[230] in their prior statements to the Prosecution of Mr. Taylor's role in the Freetown Invasion. Despite these factors which would reasonably give rise to scrutiny or caution being applied to their evidence, when it came to Mr. Taylor's involvement in the alleged plan, the Chamber accepted the testimony of all three witnesses without any reservation.

(c) The Chamber erroneously relied on inconsistent accounts of the meetings held before Sam Bockarie left Buedu

118. TFI-371, Karmoh Kanneh and Isaac Mongor provided inconsistent accounts of the meetings held prior to Bockarie's departure for Liberia and Burkina Faso. This evidence led to the findings that Mr. Taylor planned the offensive of December 1998.[231] The Chamber's failure to address the inconsistencies in the evidence relied upon therefore directly affects this finding.

119. Kanneh and Mongor both testified about a large Waterworks meeting before Bockarie left Buedu. Kanneh testified that the meeting occurred before Sani Abacha died,[232] around spring 1998,[233] and said that Bockarie left for Liberia and Burkina Faso that same month.[234] Kanneh then testified that the next Waterworks meeting was the senior officers' meeting at Bockarie's house on Bockarie's return.[235] Mongor, who attended the spring Waterworks meeting according to Kanneh,[236] testified that it

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[228] For example, the Chamber was "unable to accept TF1-371's testimony without doubt" when he testified that Taylor participated in a meeting in March 1991 to plan the invasion of Sierra Leone. TF1-371's assertion that Gullit was present at the Waterworks meeting in November/early December 1998 was also ignored. Mongor was not believed in respect of his evidence that JP Koroma contacted SAJ Musa to ask him 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: TF1-371: Judgement, paras. 2367-73, 3091, 4123-5, 5384-5, 6548-52; Karmoh Kanneh: paras. 2941, 3104, 5090, 5975; Isaac Mongor: Judgement, paras. 2367, 2559, 3119, 3383-4, 3412, 5384-5, 5395-6.
[229] See Judgement, para. 3101.
[230] See Judgement, para. 3110.
[231] Judgement, paras. 3090, 3099, 3112, 3129.
[232] TT, Karmoh Kanneh, 8 May 2008, p. 9393. Contradictingly, Kanneh stated in cross-examination that it happened after Sani Abacha's death (TT, Karmoh Kanneh, 13 May 2008, pp. 9678, 9687-8, 9689). However, the Chamber consistently summated that it was before Abacha's death (Judgement, paras. 2881, 2971).
[233] Judgement, para. 6526.
[234] TT, Karmoh Kanneh, 8 May 2008, pp. 9396-7.
[235] TT, Karmoh Kanneh, 9 May 2008, pp. 9416-9.
[236] TT, Karmoh Kanneh, 13 May 2008, p. 9689.

was in November, not spring, 1998.[237] He made no mention of a Waterworks meeting earlier in the year.

120. Kanneh and Mongor also point to different motivations and circumstances leading up to Bockarie's trip. Mongor explained how they sent a letter to Mr. Taylor asking for ammunition[238] and it was only when Bockarie had travelled to Monrovia around November 1998 that he informed his RUF colleagues that Taylor had made them "another connection": the President of Burkina Faso.[239] This is roughly consistent with TF1-371's account.[240] However, this cannot be reconciled with Kanneh's account that Bockarie informed the 600-strong group at the spring Waterworks meeting that the link with Blaise Compaoré to purchase arms was already in existence;[241] approximately six months before TF1-371 and Mongor knew about it. The Chamber brushed over some of these inconsistencies on the basis that neither TF1-371 nor Kanneh were asked how Mr. Taylor was initially contacted.[242] This specific question would not have been able to reconcile the fundamental differences in their recollections as outlined above. Moreover, the Chamber is not entitled in the exercise of its discretion to fill gaps in the Prosecution evidence by assuming that the witness' hypothetical answers would have done so.

121. The planning convictions were premised on the contextual evidence that Bockarie had arranged a trip to Burkina Faso to procure arms and ammunition, passing by Monrovia on the way there and back. The evidence of the meetings before Bockarie left is critical in establishing these events. Due to the inconsistencies in this evidence and the failure of the Chamber to address them, properly or at all, the Chamber reached a conclusion which was not open to a reasonable trier of fact.

(d) The Chamber erred in failing to address contradictory evidence concerning Isaac Mongor's meeting with Sam Bockarie

122. Mongor testified that he had a private meeting with Bockarie at his house in Buedu after Bockarie had returned from his Liberia/Burkina Faso trip on the evening before the Waterworks forum.[243] Bockarie explained to Mongor how he and Mr.

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[237] TT, Isaac Mongor, 11 Mar. 2008, pp. 5780-2.
[238] TT, TF1-532, 11 Mar. 2008, pp. 5781-2.
[239] TT, Isaac Mongor, 11 Mar. 2008, p. 5793.
[240] TT, TF1-371, 30 Jan. 2008, p. 2643.
[241] TT, Karmoh Kanneh, 8 May 2008, pp. 9396-7.
[242] Judgement, para. 5511 (the Trial Chamber considered this aspect of the evidence in the Burkina Faso Shipment section in Arms and Ammunition, as per para. 3090 of the Judgement).
[243] TT, Isaac Mongor, 11 Mar. 2008, pp. 5789-90.

Taylor planned the operation to capture Kono, Makeni, Freetown, Joru and Kenema together.[244] The plan entailed that Mongor attacked Joru and Zimmi, at which point he was to receive support from NPFL troops.[245]

123. Mongor claimed that no-one else was present at this private meeting. Therefore, there is no corroborative evidence as to its occurrence or contents. However, when comparing Mongor's account with other relevant evidence, numerous inconsistencies arise which the Chamber failed to consider. Firstly, as argued in Ground 9 below, Mongor's account of the plan, as told to him at this private meeting, encompassed three separate phases[246] as opposed to the two described by other witnesses at the meetings the day after, which the Chamber accepted.[247] Secondly, Mongor gave an account that involved the RUF receiving support from NPLF forces at Zimmi,[248] contradicting Kanneh's evidence that Bockarie explicitly rejected the idea of obtaining manpower support from Liberia at the "inner core" meeting the day after.[249] Thirdly, Bockarie apparently told Mongor that the weapons he had returned with were given to him by Mr. Taylor;[250] which cannot be reconciled with the Chamber's finding that the arms and ammunition came from Burkina Faso.[251]

124. Therefore, the Chamber erred in failing to consider relevant evidence and failed to address the inconsistencies identified above. A reasonable trier of fact, having regard to these significant inconsistencies, would not have been able to rely on the evidence of Mongor as to the content of this meeting or what Bockarie allegedly told him.

(e) The Chamber erred in relying on contradictor evidence regarding the Waterworks and "inner core" meetings after Sam Bockarie returned

125. The Chamber heard evidence about a number of meetings which were held upon Sam Bockarie's return. According to the deliberations of the Chamber,[252] these meetings occurred in the following sequence: (i) the meeting with Isaac Mongor the

[244] TT, Isaac Mongor, 11 Mar. 2008, p. 5795.
[245] TT, Isaac Mongor, 11 Mar. 2008, pp. 5795-6.
[246] TT, Isaac Mongor, 11 Mar. 2008, p. 5795.
[247] Judgement, para. 3129.
[248] TT, TF1-532, 11 Mar. 2008, pp. 5795-6.
[249] TT, Karmoh Kanneh, 13 May 2008, pp. 9726-7.
[250] TT, Isaac Mongor, 11 Mar. 2008, pp. 5794-5: "The ammunition which [Bockarie] brought, he told he had brought them from Liberia and that it was Mr Taylor who gave them to him."
[251] Judgement, para. 5527.
[252] Judgement, paras. 3089-128.

day prior to the Waterworks meeting,[253] (ii) the forum of commanders at Waterworks[254] and (iii) the "inner core" meeting at Bockarie's house.[255] Notably, the Chamber summated that the "inner core" meeting was convened **immediately after** the Waterworks forum[256] and, elsewhere in Judgement, **halfway**, through the briefing during the Waterworks forum.[257]

126. TF1-371 testified about both the Waterworks forum and the "inner core" meeting.[258] Karmoh Kanneh failed to mention the larger Waterworks forum,[259] testifying only about the "inner core" meeting[260] whereas Isaac Mongor completely skipped the "inner core" meeting and testified only about the Waterworks forum.[261]

127. Kanneh's and Mongor's failure to mention both meetings, particularly when one immediately followed the other (or was even overlapping) is such a crucial error that it undermines the reliability of their evidence. In failing to acknowledge either this inconsistency or its impact on both Kanneh and Mongor's evidence, the Chamber was in error. It also erred in concluding there were two successive (or overlapping) meetings despite relying on the evidence of two witnesses who only testified as to one.

(f) The Chamber erred by finding that TF1-371 and Karmoh Kanneh were testifying about the same "inner core" meeting

128. Regardless, the Trial Chamber determined that both TF1-371 and Kanneh testified about the same "inner core" meeting at Bockarie's house.[262] No reasonable trier of fact could find that TF1-371 and Kanneh were testifying about the same meeting, given their wholly different descriptions of events. The significance of this is vital; this is the meeting at which Bockarie allegedly told Kanneh that Mr. Taylor had

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[253] Judgement, para. 3093.
[254] Judgement, para. 3091.
[255] Judgement, paras. 3100-2. See also, Judgement, paras. 2963 and 5419.
[256] Judgement, para. 5419.
[257] Judgement, para. 2963.
[258] TT, TF1-371, 28 Jan. 2008, pp. 2405-16.
[259] Karmoh Kanneh actually explicitly stated that Bockarie **did not** convene a general meeting to tell them what he went to Burkina Faso for (TT, Karmoh Kanneh, 9 May 2008, pp. 9416-7).
[260] TT, Karmoh Kanneh, 9 May 2008, pp. 9418-9: "Q. Now, you said this second meeting that you held was after Sam Bockarie returned from Burkina Faso… Where was this meeting – this second meeting – held? A. At Sam Bockarie's house."
[261] TT, Isaac Mongor, 11 Mar. 2008, pp. 5789-802.
[262] Judgement, paras. 3102-4.

designed the plan[263] and allegedly told TF1-371 that Mr. Taylor instructed them to go to Freetown.[264]

129. Kanneh testified that the meeting was held at night specifically so that JP Koroma would not know about it.[265] Despite some uncertainty from Kanneh as to whether the meeting was held between 11 p.m. and 2 a.m., or between 9 p.m. and midnight,[266] the time of day was in no doubt. It was held at night. Indeed, according to him, after the meeting concluded, all the participants went to sleep.[267] The meeting TF1-371 testified about occurred around the afternoon; the "inner core" of participants were having lunch in Bockarie's bedroom.[268] After the "inner core" meeting, Bockarie had time to address the commanders who were outside of the house about his conversation with Mr. Taylor on the satellite phone, and the discussions held in the bedroom.[269] Instead of the participants all going to sleep, at the conclusion of the meeting the commanders began preparing for their various assignments and Bockarie gave instructions for the S4 to distribute materials.[270] On this alone, it is evident that they were not talking about the same meeting. Consequently, no reasonable trier of fact could have considered the discrepancy as to the time of day of the meeting to be insignificant.[271]

130. Kanneh and TF1-371 also differed dramatically as to who attended the "inner core" meeting. TF1-371 testified that Isaac Mongor was present,[272] while Kanneh testified he was not.[273] TF1-371 made no mention of Kanneh's presence at any of these meetings, and Mongor himself made no mention of any "inner core" meeting nor of Kanneh's presence at any meeting he attended.

131. Furthermore, TF1-371 and Karmoh Kanneh also have a fundamentally different perception of the format of the meeting. While Kanneh did not distinguish between different parts of the meeting,[274] TF1-371 split the meeting into at least two parts: (i) the meeting outside of Bockarie's house where Bockarie briefed the larger

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[263] TT, Karmoh Kanneh, 9 May 2008, p. 9424.
[264] TT, TF1-371, 30 Jan. 2008, pp. 2640-2.
[265] TT, Karmoh Kanneh, 9 May 2008, p. 9429.
[266] TT, Karmoh Kanneh, 9 May 2008, p. 9429, 9433; 13 May 2008, pp. 9694-5.
[267] TT, Karmoh Kanneh, 9 May 2008, p. 9437.
[268] TT, TF1-371, 28 Jan. 2008, pp. 2412-4.
[269] TT, TF1-371, 28 Jan. 2008, p. 2414.
[270] TT, TF1-371, 28 Jan. 2008, p. 2414.
[271] Judgement, para. 3104.
[272] TT, TF1-371, 28 Jan. 2008, p. 2410.
[273] TT, Karmoh Kanneh, 13 May 2008, pp. 9707-8.
[274] TT, Karmoh Kanneh, 9 May 2008, p. 9424-30.

group of commanders about the offensive[275] and (ii) the lunch meeting inside of Bockarie's bedroom attended by TF1-371 and five or six others.[276]

132. Kanneh made no mention of whether he was a part of the outside meeting or the bedroom lunch meeting. On the basis that the Trial Chamber accepted Kanneh's testimony of Bockarie calling Mr. Taylor during the meeting, it is implied that Kanneh was present for the bedroom lunch meeting (despite it being late at night, according to him), during which it was said by TF1-371 that this call occurred. However, TF1-371 did not mention Kanneh to be a part of either the outside meeting or the smaller bedroom lunch meeting, despite identifying virtually all the attendees by name.

133. Perhaps as a result of the confusion in the record, the Chamber itself gives an inconsistent account of the timing of the satellite phone call, at one point placing it at the end of the Waterworks meeting, [277] rather than at the inner core meeting.[278]

134. Despite previously having given an inconsistent account to the Prosecution as to how many were at the meeting, Kanneh testified that approximately twelve people were present.[279] Before being confronted with his prior inconsistent account, he stated that all twelve people at the meeting were on the veranda when Bockarie made the call to Mr. Taylor.[280] Not only does this differ from TF1-371's account that there were only about half the number of people at the meeting at which Bockarie placed the call to Mr. Taylor (nearly all identified by TF1-371),[281] it is also TF1-371's recollection that they remained in the bedroom when Bockarie went to the veranda to make the call to Mr. Taylor.[282]

135. The inconsistencies do not end there. Kanneh, who claimed to have been present during the telephone call, said that Bockarie and Jungle told Mr. Taylor about the plan being made and accepted by the senior RUF officers at the meeting.[283] Whereas TF1-371 testified that Bockarie returned to the bedroom and said that Mr. Taylor instructed them to go to Freetown so as to force the government to negotiation

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[275] TT, TF1-371, 28 Jan. 2008, p. 2411.
[276] TT, TF1-371, 28 Jan. 2008, pp. 2412-3.
[277] Judgement, para. 6958.
[278] See Judgement, para. 3102.
[279] TT, Karmoh Kanneh, 13 May 2008, pp. 9700-8.
[280] TT, Karmoh Kanneh, 9 May 2008, p. 9435.
[281] TT, TF1-371, 28 Jan. 2008, pp. 2412-3, 2415 (Jungle was also present).
[282] TT, TF1-371, 28 Jan. 2008, pp. 2412-3.
[283] TT, Karmoh Kanneh, 9 May 2008, p. 9435-6.

and supposedly gave Bockarie the authority to execute commanders who contested his command over the operation.[284]

136. Furthermore, the Chamber failed to address the evidence of "generally credible" witness Mohamed Kabbah,[285] which undermines TF1-371 and Kanneh's evidence that Bockarie spoke to Mr. Taylor via satellite phone on the veranda. Kabbah's evidence, relied upon elsewhere in the Judgement,[286] was that when in Buedu, Bockarie had to drive to "the hill" where there was satellite coverage, in order to use the satellite phone (which itself necessitated forewarning Mr. Taylor via radio that Bockarie was about to use the satellite phone).[287] Kabbah's testimony renders it implausible that Bockarie could have both conducted his call to Mr. Taylor within 15 minutes[288] and conducted it on the veranda of his house.[289] In any event, the fact remains that the number (and significance) of the inconsistencies as between Kanneh and TF1-371's testimony makes it impossible to accept that they were describing the same meeting.

137. The Chamber noted "some inconsistencies in the testimony of TF1-371 and Karmoh Kanneh with respect to this meeting".[290] It then referred to three.[291] The Chamber then concluded that it "does not consider these inconsistencies to be significant."[292] The Chamber did not refer to inconsistencies as between (a) the identity of the attendees, (b) whether the meeting was split between Bockarie's bedroom and outside, (c) the number of people present, (d) the content of Bockarie's satellite telephone call to Mr. Taylor, (e) what the participants did after the meeting and (f) TF1-371's failure to account for Kanneh at any of the meetings, including the small bedroom meeting.

138. The Chamber was free to disregard the testimony of Kanneh and accept the testimony of TF1-371, or vice versa. However, the Chamber does not have unfettered discretion in this assessment; there has to be consistency in the way in which it approaches Prosecution and Defence evidence. For instance, Martin George was contradicted by other witnesses on his testimony that Issa Sesay did not attend the

[284] TT, TF1-371, 28 Jan. 2008, pp. 2412-3.
[285] Judgement, para. 338.
[286] Judgement, para. 3555.
[287] TT, Mohamed Kabbah, 15 Sept. 2008, pp. 16176-7.
[288] TT, TF1-371, 28 Jan. 2008, p. 2412; TT, Karmoh Kanneh, 9 May 2008, p. 9437.
[289] TT, Karmoh Kanneh, 9 May 2008, p. 9435; TT, TF1-371, 28 Jan. 2008, p. 2412.
[290] Judgement, para. 3104.
[291] Judgement, para. 3104.
[292] Judgement, para. 3104.

meeting at Waterworks. As a result, the Chamber did not find his evidence to be credible.[293] However, when TF1-371 stated that Gullit was at the same Waterworks meeting, which is also contradicted by other witnesses, this did not affect his credibility.[294]

139. The Chamber's approach of either ignoring or minimizing the flagrant and numerous inconsistencies of Prosecution evidence and finding the testimonies of TF1-371 and Kanneh to be corroborative was not one which a reasonable trier of fact could have reached. In light of the multitude of inconsistencies in the evidence of TF1-371 and Karmoh Kanneh about vital and memorable details, the Chamber's finding that Bockarie returned to Buedu with a plan that he had drawn up with Mr. Taylor,[295] based on TF1-371's and Kanneh's evidence of what Bockarie told them in smaller meetings at Bockarie's house,[296] and that Mr. Taylor was briefed on the meeting from Buedu by satellite phone,[297] was manifestly erroneous.

(iii) The Chamber erred in accepting accounts of the plan that are inconsistent and contradictory

140. The Trial Chamber found that "the plan presented at the Waterworks meeting was for a two-pronged attack on Kono and Kenema, with Freetown as the ultimate destination."[298] The Trial Chamber failed to address the inconsistencies of the witnesses on which it relies.

141. Prosecution witnesses differed as to which commanders were responsible for the two operational flanks. No fewer than five different commanders were associated with the command of the southern prong of the offensive. Kanneh claimed that he was given the role of taking Segbwema and Daru on the southern flank,[299] Mongor said that he was tasked with the role of taking Joru and Zimmi on the southern flank.[300] TF1-371 said that Bockarie had assigned Akim Turray and Momoh Rogers to take the Kenema, Bo and Masiaka on the southern flank. None of the witnesses corroborated

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[293] Judgement, para. 3094.
[294] Judgement, para. 3091.
[295] Judgement, para. 3109.
[296] Judgement, para. 3100.
[297] Judgement, para. 3112.
[298] Judgement, para. 3099.
[299] TT, Karmoh Kanneh, 9 May 2008, pp. 9426-7.
[300] TT, Isaac Mongor, 11 Mar. 2008, pp. 5795-6. Superman was also considered but was too far away in Koinadugu District at the time.

each other's claims and Augustine Mallah contradicted TF1-371 by stating that Akim was instructed by Bockarie to attack Kono and Tongo on the northern flank.[301]

142. As noted above, Kanneh and Mongor provided conflicting accounts on whether the RUF were to receive manpower support from the NPFL,[302] There are further serious contradictions between the evidence of Kanneh and Mongor concerning the plan. Kanneh testified that Bockarie called SAJ Musa after the meeting at Bockarie's house and asked him to attack Freetown, but SAJ Musa unequivocally refused and a heated argument ensued.[303] Mongor testified that, following a discussion at the meeting of his involvement, SAJ Musa was contacted, accepted the request, and agreed to run the operation.[304]

143. Faced with these two conflicting versions, the Chamber found Mongor's account as being "inaccurate" on the basis that his account stemmed from an un-named radio operator.[305] However, the Chamber failed to explain the inconsistency between Mongor's first-hand evidence that it was agreed that it would be JP Koroma who would contact SAJ Musa[306] and Kanneh's first-hand evidence that Bockarie contacted SAJ Musa,[307] specifically to avoid JP Koroma's involvement.[308] It also ignored the evidence of TF1-371 who made no reference to a discussion among the participants to approach SAJ Musa, or to SAJ Musa's refusal (or agreement) to be involved.[309]

144. Perhaps one of the most memorable aspects of an operation is its name, usually symbolizing an overarching objective or target. Yet, none of the witnesses could agree as to the name of the December 1998 offensive. Kanneh called it Operation Free the Leader.[310] TF1-371 said that Operation Free Sankoh was the name of the in-house plan of the RUF to free Sankoh after his death sentence was announced,[311] but also said that Operation Spare No Soul was the name of the operation to free Sankoh.[312] However, Mongor said that Operation Spare No Soul was

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[301] TT, Augustine Mallah, 13 Nov. 2008, p. 20223.
[302] Compare TT, Karmoh Kanneh, 13 May 2008, pp. 9726-7 with TF1-532, 11 Mar. 2008, pp. 5795-6.
[303] Judgement, para. 3118.
[304] Judgement, para. 3119.
[305] Judgement, para. 274.
[306] TT, Isaac Mongor, 11 Mar. 2008, pp. 5799-800.
[307] TT, Karmoh Kanneh, 9 May 2008, pp. 9425-6.
[308] TT, Karmoh Kanneh, 9 May 2008, p. 9429.
[309] Judgement, paras. 2958-70.
[310] TT, Karmoh Kanneh, 8 May 2008, p. 9398; 13 May 2008, p. 9734.
[311] TT, TF1-371, 30 Jan. 2008, p. 2649.
[312] TT, TF1-371, 28 Jan. 2008, p. 2401.

an operation led by Morris Kallon to take the town of Njaima Nimikoro in the Kono District.[313] TF1-371 also referred to the names Operation No Bush Shake, which no other witness has mentioned and Operation Spare No Living Thing,[314] which was a name coined by Bockarie – not Mr. Taylor.[315] With no agreement on such an elementary aspect of the plan, serious doubts arise as to the credibility and/or reliability of the other evidence of these witnesses concerning the alleged plan.

145. The military plan found by the Chamber was signifant, encompassing multiple targets and the invasion of a capital city. The utter improbability that such a plan would exist only in oral form also further undermines the credibility of the evidence from these three witnesses. A military plan is not verbally created and then memorised, it would entail the creation of a paper trail; of maps, documents concerning the chain of command, logistics, intelligence, and operational orders. The Chamber did not hear any evidence that such a written account of the plan existed, nor did the Prosecution produce any documentary evidence of this kind. This further calls its existence into question.

(iv) The Chamber erred in systematically failing to assess the reliability of the source of hearsay

146. The Trial Chamber also erred in failing to assess the reliability of the source of hearsay evidence, ignoring Defence arguments in its Final Trial Brief emphasising the importance of establishing the reliability of hearsay evidence.[316] The jurisprudence and arguments regarding the importance for the Chamber to assess the reliability of the source of hearsay have been detailed in Ground 2 and are incorporated here as if set out in full. The specific error in relation to planning in this instance is the Chamber's failure to assess the reliability of Sam Bockarie, who is the source of the hearsay for TF1-371, Kanneh and Mongor.

147. Bockarie might not have been truthful to the witnesses as to Mr. Taylor's involvement in the plan for many reasons. He might have told the witnesses different things, which might explain some of the inconsistencies between their evidence. For example, it is not disputed that Mr. Taylor, as president of Liberia, was viewed as an authoritative figure in West Africa, as a successful leader of a revolution in Liberia that resulted in his legitimate appointment to power. By contrast, this was a

[313] TT, Isaac Mongor, 11 Mar. 2008, pp. 5752-3.
[314] TF1-371, 28 Jan. 2008, pp. 2412-3; 30 Jan. 2008, p. 2643.
[315] TF1-371, 30 Jan. 2008, pp. 2649-50.
[316] Defence Final Brief, paras. 81 and 1391.

particularly critical period for the AFRC/RUF; the junta had failed to stay in power and there had been serious fractures amongst their ranks, with different groups operating independently. Yet, the success of their mission to free Sankoh and capture Freetown relied on Bockarie exercising effective and unchallenged command over all the troops, especially those who had split away such as SAJ Musa's group. By claiming that a plan was designed with Mr. Taylor, Bockarie lent a great deal of credence to his plan allowing him to compel SAJ Musa to submit to his command[317] and pronounce, for instance, that he had the authority to execute anyone who contested his command.[318]

148. This is just one of many possible motivations for Bockarie to falsely draw Mr. Taylor into the story he presented to the RUF/AFRC troops assembled in Waterworks. The failure of the Trial Chamber to consider any possibility other than Bockarie telling the absolute and whole truth renders its finding unsafe. Moreover, these three witnesses claim to have been told about Mr. Taylor's alleged involvement from the same source; Sam Bockarie. As such, even had their evidence been consistent and corroborative, it would only have been corroborative of Bockarie's hearsay statement of Mr. Taylor's involvement, and not of Mr. Taylor's involvement itself.

(v) Conclusion

149. TF1-371, Karmoh Kanneh and Isaac Mongor were relied on to link Mr. Taylor to Bockarie, through an alleged military plan. Their evidence, as laid out above, is inconsistent and contradictory. The Trial Chamber erroneously dismissed many of these inconsistencies as insignificant,[319] which is a finding that no reasonable trier of fact could have reached. In many cases, it failed to address or acknowledge the inconsistencies at all, which is an error.

150. The evidence detailing the plan suffers from the same flaw; without a clear picture of what the plan entailed, it was impossible for the Chamber to safely conclude what plan could have been designed by Mr. Taylor in Monrovia. The Chamber also erred by failing to consider the reliability of the source of the hearsay; namely, Sam Bockarie, who is the single source of all the evidence directly implicating Mr. Taylor with regard to the plan.

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[317] TT, Karmoh Kanneh, 9 May 2008, pp. 9425-6.
[318] TT, TF1-371, 28 Jan. 2008, pp. 2412-3.
[319] Judgement, para. 3104.

151. The errors identified above both invalidate and warrant the quashing of the finding that in November 1998, Mr. Taylor and Sam Bockarie jointly designed a two-pronged attack on Kono and Kenema with Freetown as the ultimate destination.[320] Consequently, the Appeals Chamber should reverse the convictions on Counts 1 to 11 for planning the attacks on Kono and Makeni and the invasion of and retreat from Freetown between December 1998 and February 1999.[321]

ii. GROUND OF APPEAL 9: The Trial Chamber erred in fact and law in finding that the "Bockarie/ Taylor plan" had Freetown as the "ultimate destination".

(i) Overview

104. The Chamber accepted evidence that the alleged "Bockarie/Taylor plan" included an advance on Freetown. It also accepted evidence that it did not. As such, the Chamber's conclusion cannot be reconciled with its own factual findings, particularly in the absence of any reasons for preferring inculpatory evidence over evidence more favourable to Mr. Taylor.

(ii) The Chamber erred in relying on contradictory evidence as to the locations encompassed by the alleged plan

105. The Chamber relies on the testimony of TF1-371, Isaac Mongor, Karmoh Kanneh and TF1-585 as to the locations encompassed by the alleged plan, and concluded that "the plan presented at the Waterworks meeting was for a two-pronged attack on Kono and Kenema, with Freetown as the ultimate destination."[322]

106. The testimonies relied upon are insufficiently corroborative to underpin this finding. The itinerary of the alleged operation is a critical (and undoubtedly memorable) material fact. Each of the four witnesses gives a different version. With the devil being in the detail, the Chamber's summaries in the Judgement brush over the following significant discrepancies.

107. Rather than a two-pronged attack, Isaac Mongor identifies three separate phases: "[Bockarie] came with a plan for us to launch an operation whereby we'll capture Kono, Makeni and advance to Freetown. And we were **also** to attack Joru. So those were the areas we were to capture. We were also to launch **another attack** on

[320] Judgement, para. 3129.
[321] Judgement, paras. 6971, 6994(b).
[322] Judgement, para. 3099. See also Judgement paras. 3127, 3129, 3615.

Kenema. We were to attack Kenema as well."[323] TF1-585 talks of one prong of attack, namely "a uniform mission... after they and SAJ would have cleared up Kono they should go to Kabala, and from Kabala they should proceed to Freetown".[324] While Karmoh Kanneh and TF1-371 identify two phases, their locations do not match up. Kanneh testified that "the first target should be Kono, to Makeni, up to Freetown, and the next target should be Segbwema and Daru, that is heading towards Kenema and to go to the southern province."[325] TF1-371 testified "Issa Sesay and Kallon were given the mission to attack Koidu and move to Makeni and from Makeni they were supposed to head for Lunsar, Masiaka as a meeting point for the other flank that would have moved from Kenema, Bo and subsequently to Masiaka and onwards to Waterloo and then to Freetown."[326]

108. The Trial Chamber formulated the alleged plan in general terms, perhaps in an attempt to encompass these divergent versions and sidestep the inconsistencies between the different witness accounts. Key differences in the testimonies of the four witnesses, however, deprive them of any corroborative character. The Chamber accordingly erred in reaching a conclusion not supported by the evidence, and/or in failing to give sufficient reasons as to why this evidence is corroborative.

(iii) The Chamber erred in concluding that the plan included an advance on Freetown having accepted evidence that it did not

109. The Chamber's conclusion that the alleged "Bockarie/Taylor" plan had Freetown as the ultimate destination suffers from a second flaw. Three witnesses testified that the discussion at the Waterworks meeting did not include an advance on Freetown.[327] The Chamber explicitly rejected this evidence. [328] A fourth witness said that Bockarie returned from Monrovia with a plan to attack Kono and other mining areas,[329] while a fifth had been told that the Waterworks meeting participants discussed an attack on Kono and Makeni. [330] Their evidence is also discounted as not negating the possibility that the plan for Freetown was also discussed. [331] However,

[323] TT, Isaac Mongor, 11 Mar. 2008, p. 5795 (emphasis added).
[324] TT, TFI-585, 8 Sept. 2008, p. 15700.
[325] TT, Karmoh Kanneh, 9 May 2009, p. 9424.
[326] TT, TF1-371, 28 Jan. 2008, p. 2411.
[327] Judgement, paras. 3094-6.
[328] Judgement, paras. 3094-6.
[329] Judgement, para. 3097.
[330] Judgement, para. 3098.
[331] Judgement, para. 3098.

the Chamber accepted the testimony of three other witnesses, none of whom testified that Freetown was the ultimate goal.

110. Augustine Mallah, who the Chamber found had attended the meeting at Waterworks, testified the plan had been for the 1st brigade to attack towns up to and including Kenema, while another group would attack Kono and advance towards Makeni.[332] His recollection of the plan did not include Freetown. Abu Keita, who had also been at the meeting, testified that Bockarie told the attendees to attack Kono and proceed to Makeni, while the witness himself was assigned to fight on an axis leading to Kenema.[333] His recollection of the plan did not include Freetown. Albert Saidu, though not at the Waterworks meeting himself, was told that at the meeting the plan discussed was for the 1st and 2nd brigades to attack Kenema and Kono respectively.[334] His recollection of the plan did not include Freetown.

112. The Chamber concluded its summary of this testimony by "recall[ing] its findings that... Augustine Mallah, Abu Keita and Albert Saidu are all generally credible witnesses."[335] The Chamber neither discounted this testimony, nor provided any reasoning as to its preference for those witnesses who incorporated Freetown into their recitation of the alleged plan over those who did not. The Chamber could well have declined to rely on this testimony or reconciled it with the testimony of the four witnesses upon whom it relied. It did not. The Trial Chamber was required to be satisfied of Freetown's inclusion in the alleged plan beyond a reasonable doubt. Such a finding is precluded by its acceptance of evidence from "generally credible" witnesses, none of whom included Freetown in the alleged "Bockarie/Taylor plan".

113. Compounding the Chamber's error was its dismissal as "implausible" Freetown not being mentioned as a target, given that the goal of the operation was Sankoh's release and Sankoh was being held in Freetown.[336] This reasoning is illogical, given it would have been easy for ECOMOG forces to transfer Sankoh elsewhere in advance of the RUF forces. Nor can this be reconciled with the Chamber's finding elsewhere that the operation was designed to pressure the

[332] TT, Augustine Mallah, 13 Nov. 2008, pp. 20222-4.
[333] TT, Abu Keita, 23 Jan. 2008, pp. 2005-8.
[334] TT, Albert Saidu, 5 Jun. 2008, pp. 11082-6.
[335] Judgement, para. 3092.
[336] Judgement, para. 3095.

Government into negotiations for his release, rather than physically removing him from prison.[337]

114. As a result of this error, the Chamber's finding beyond a reasonable doubt that "the Accused, in concert with Bockarie, intentionally designed a plan for the RUF/AFRC Freetown Invasion"[338] was not open to a reasonable trial chamber. The inclusion of Freetown in the "Bockarie/Taylor plan" was the basis for the Chamber's subsequent finding that the plan substantially contributed to the military attacks involving the Freetown invasion.[339] As such, the Chamber's error invalidates Mr. Taylor's planning convictions for crimes committed during the Freetown invasion and subsequent retreat,[340] and occasions a miscarriage of justice.

iii. GROUND OF APPEAL 8: The Trial Chamber erred in fact and law in finding that the incorporation of Gullit's movements into the "Bockarie/Taylor plan" was contemplated by Sam Bockarie and Charles Taylor.

(i) Overview

115. The "Bockarie/Taylor plan" failed.[341] The Chamber acknowledged that the RUF's attempts to take over and capture Kenema and Freetown were unsuccessful.[342]Freetown was instead invaded by SAJ Musa's AFRC troops, operating under the command of his successor Alex Tamba Brima (Gullit).[343] As such, there was no legal or factual link back to Mr. Taylor. The Chamber creatively inferred that SAJ Musa or Gullit's movements were somehow foreseen by Mr. Taylor and Bockarie and were, accordingly, incorporated into their plan.[344]

116. The reasoning is unsound. The Chamber's original conclusion that SAJ Musa's involvement was contemplated at the time the "Bockarie/Taylor plan" was formulated is based on circumstantial, uncorroborated hearsay and was not the only reasonable conclusion available on the evidence. In any event, there is no evidence that Mr. Taylor contemplated Gullit's movements (who was then SAJ Musa's

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[337] Judgement, para. 3117.
[338] Judgement, para. 6961.
[339] Judgement, para. 6968.
[340] Judgement, paras. 6971, 6994(b).
[341] Judgement, para. 3480.
[342] Judgement, para. 3480.
[343] Judgement, para. 61, Decision on Judicial Notice of AFRC Adjudicated Facts, Annex A, Facts 14, 15.
[344] Judgement, paras. 3118-24; 3480; 3486; 3611 (xiii); 3616-7; 6958-71.

deputy)[345] being incorporated into the "Bockarie/Taylor plan" at the time it was allegedly made.

(a) The Trial Chamber's inconsistent findings

117. Structuring a 2,500-page judgement undoubtedly poses challenges. One of the consequences of the Judgement's structure is that findings are repeated in the conclusions of different sections and sub-sections. The finding concerning Bockarie and Mr. Taylor's "contemplation" of Gullit's movements appears on four occasions.[346] This is not of itself problematic, except that the finding changes with each repetition.

118. After an analysis of the evidence, the Chamber makes its original finding:

> ...the Trial Chamber finds that **the possibility** that **SAJ Musa** would participate in the execution of the plan was contemplated by **Bockarie and the Accused at the time they designed the plan**.[347]

119. As it re-appears throughout the Judgement, this finding morphs as follows, starting with the first non-sequitur:

- ...recalling that even at Waterworks Bockarie envisaged **SAJ Musa's direct involvement** in the implementation of this plan... the Trial Chamber finds that SAJ Musa's original plan was abandoned and **Gullit's movements** were incorporated into the Bockarie/Taylor plan as had been envisioned **by Bockarie at Waterworks**.[348]

- From that point on... **Gullit's movements** were incorporated into the Bockarie/Taylor plan, as had been contemplated by Bockarie **and the Accused**[349]

- From that point onwards... **Gullit followed** the Bockarie/Taylor plan, as had been contemplated by Bockarie **and the Accused**.[350]

120. Through a process reminiscent of Chinese-whispers, the finding goes from both Bockarie and Mr. Taylor having contemplated the possibility that SAJ Musa would participate at the time they designed the plan; to Bockarie having envisioned that Gullit's movements would be incorporated; to both Bockarie and Mr. Taylor having contemplated that Gullit would follow the plan.

121. No argument can be made that each of these statements is a distinct factual finding. In each case, the Chamber is recalling or summarising its previous findings,

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[345] Judgement, para. 55.
[346] Judgement, para. 3120; repeated at paras. 3480, 3486, 3611(xiii), 3617.
[347] Judgement, para. 3120 (emphases added).
[348] Judgement, para. 3480 (emphases added).
[349] Judgement, para. 3486 (emphases added). See also para. 3611(xii).
[350] Judgement, para. 3617 (emphases added).

and no references are given. As a result, there is no basis for the Chamber's eventual "finding" that Mr. Taylor contemplated that Gullit would follow the Bockarie/Taylor plan, warranting its reversal.

(ii) There is insufficient evidence that Bockarie and Mr. Taylor contemplated the possibility of SAJ Musa's participation

122. Even the original finding that Bockarie and Mr. Taylor contemplated the possibility of SAJ Musa's participation in their plan is unreasonable.

123. Firstly, the Chamber erroneously downplays the acrimonious and violent recent history between SAJ Musa and the RUF. Elsewhere in the Judgement, the Chamber acknowledges that following "Operation Fitti-Fatta" in mid-1998, RUF commander Denis Mingo assumed the leadership of a group of RUF fighters travelling to Koinadugu to join SAJ Musa's group. In October 1998, there was a violent dispute between Denis Mingo's group and SAJ Musa's group,[351] following which SAJ Musa severed ties with the RUF command and created an unaffiliated SLA group of approximately 1,000 fighters, with Brima as his deputy.[352]

124. No reconciliation occurred in the intervening month. Prosecution witness Kanneh testified (and the Chamber accepted) that SAJ Musa was already "disgruntled" before Bockarie's overtures, which is corroborated by other evidence.[353] By the Prosecution's own admission, "it is indisputable that by October 1998 SAJ Musa was going not to cooperate with Bockarie and the RUF".[354] Moreover, the Chamber accepted that while in Monrovia, Bockarie complained to Mr. Taylor about SAJ Musa's recent disloyalty.[355] This makes any contemplation of SAJ Musa's possible involvement in the plan highly unlikely, and certainly not the only reasonable conclusion available on the evidence.

125. Secondly, the Chamber recognised that it heard two conflicting accounts of the attempt to involve SAJ Musa in the "Bockarie/Taylor plan". Karmoh Kanneh testified that Bockarie called SAJ Musa after the meeting at Bockarie's house and asked him to attack Freetown, but SAJ Musa unequivocally refused and a heated argument ensued.[356] In direct contrast, Isaac Mongor testified that following a discussion at the

[351] Judgement, para. 55.
[352] Judgement, para. 55.
[353] See, for example, Judgement, paras. 3118-9, 3122, 3125.
[354] Prosecution Final Brief, para. 476.
[355] Judgement, para. 3120.
[356] Judgement, para. 3118.

meeting of his involvement, SAJ Musa was contacted, accepted the request, and agreed to run the operation.[357]

126. Faced with these two conflicting versions, the Chamber found Isaac Mongor's account to be "inaccurate", and accepted Kanneh's version.[358] This was despite the fact that Isaac Mongor was considered to be a "generally credible" witness.[359] However, the Chamber failed to explain the inconsistency between Mongor's evidence that it would be JP Koroma who would contact SAJ Musa[360] and Kanneh's evidence that Bockarie contacted SAJ Musa,[361] specifically to avoid JP Koroma's involvement.[362] It also ignored the evidence of TF1-371 who makes no reference to a discussion among the participants to approach SAJ Musa, or to SAJ Musa's refusal (or agreement) to be involved.[363]

127. In any event, having found Isaac Mongor's account to be "inaccurate", and accepting Kanneh's version,[364] the Chamber then erroneously relies on Mongor's version in the very next paragraph, concluding as follows:

> Based on the evidence of **Karmoh Kanneh** that Bockarie said that he had complained to the Accused about SAJ Musa's disloyalty and refusal to take orders from him, and on the evidence of **Isaac Mongor** that Bockarie and the Accused took into consideration the locations in which both the RUF and the SLAs were stationed at the time of their discussion of the plan, and that following the Waterworks meeting Bockarie contacted SAJ Musa and requested or ordered him to cooperate, the Trial Chamber finds that the possibility that SAJ Musa would participate in the execution of the plan was contemplated by Bockarie and the Accused **at the time they designed the plan.**[365]

128. From this paragraph, it is clear that the Chamber inferred Bockarie and Mr. Taylor's "contemplation" of SAJ Musa's involvement from three circumstantial elements: (a) uncorroborated hearsay evidence from Kanneh that Bockarie told Mr. Taylor about SAJ Musa's disloyalty; (b) uncorroborated hearsay evidence from Mongor that Bockarie and Mr. Taylor considered RUF and SLA positions; and (c) uncorroborated hearsay evidence from Mongor that, following the Waterworks meeting, SAJ Musa was contacted to cooperate.

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[357] Judgement, para. 3119.
[358] Judgement, para. 3119.
[359] Judgement, para. 274. See also Ground of Appeal 3 above.
[360] TT, Isaac Mongor, 11 Mar. 2008, pp. 5799-800.
[361] TT, Karmoh Kanneh, 9 May 2008, pp. 9425-6.
[362] TT, Karmoh Kanneh, 9 May 2008, p. 9429.
[363] Judgement, paras. 2958-70.
[364] Judgement, para. 3119.
[365] Judgement, para. 3120 (emphases added).

129. Even considered cumulatively, this evidence does not lead to Bockarie and Mr. Taylor's contemplation of SAJ Musa's involvement as the only reasonable conclusion available.

130. Firstly, a discussion between Mr. Taylor and Bockarie about SAJ Musa's disloyalty does not lead to the only reasonable conclusion that his involvement would be contemplated. Logically, it suggests the opposite. Secondly, a discussion of RUF and SLA troop positions is also insufficient to conclude that Mr. Taylor and Bockarie anticipated that SAJ Musa's troops would be part of their plan. The making of any operational plan would presumably involve a discussion of the location of other troops in the relevant area, without automatically giving rise to contemplation that the other troops would form part of the operational plan. Moreover, in the immediately preceding paragraph the Chamber found that Mongor (from whom this hearsay testimony stems) gave "inaccurate" testimony under oath about SAJ Musa's involvement.[366] The Chamber's selective reliance on isolated aspects of this part of Mongor's testimony is erroneous.

131. Lastly, the Chamber relied on Mongor's evidence concerning contact with SAJ MUSA which it had rejected as "inaccurate" in the immediately-preceding paragraph. In relying on evidence which it had rejected, the Chamber committed an error which undermines its finding that SAJ Musa's involvement was "contemplated". In addition, Mongor testified that the idea of contacting SAJ Musa was discussed by the participants of the Waterworks meeting, who "all agreed" that Bockarie should contact SAJ Musa.[367] Had Bockarie and Mr. Taylor really contemplated SAJ Musa's involvement "at the time they designed the plan"[368] in Monrovia, this discussion among the participants at the meeting to decide whether or not to contact SAJ Musa would not have been necessary.

132. Finally, the circumstantial evidence of Kanneh and Mongor is uncorroborated hearsay, warranting caution and rendering it even less capable of supporting a finding beyond a reasonable doubt. The Chamber relied on this evidence in the absence of any scrutiny or caution, or any consideration of its reliability or circumstantial guarantees of truthfulness, or the context and circumstances in which their statement

[366] Judgement, para. 3119.
[367] TT, Isaac Mongor, 11 Mar. 2008, pp. 5799-800.
[368] Judgement, para. 3120

were made. [369] This is despite the Chamber's obligation to "provide a fully reasoned opinion" and "be especially rigorous" in its assessment of such evidence.[370] In these circumstances, the weakness of the evidence relied upon renders the Trial Chamber's conclusion unsafe.

(iii) Contemplation of the possibility of SAJ Musa's involvement, does not automatically extend to Gullit

133. The Chamber found that Bockarie and Mr. Taylor contemplated SAJ Musa's possible participation "at the time they designed the plan".[371] Whether this was the case or not becomes irrelevant once SAJ Musa, in reality, refused to cooperate. From the moment Bockarie got off the phone from SAJ Musa, following his unequivocal refusal and the subsequent heated argument,[372] any contemplation of his further involvement must have ceased. There was no longer any reasonable, or even slight prospect or expectation that SAJ Musa would be involved in the "Bockarie/Taylor" plan, let alone any possible contemplation that his then-deputy, Gullit, would ultimately follow it.

134. The evidence leaves no room for any finding that the AFRC faction in the north, whether under SAJ Musa or Gullit, was within the contemplation of the "Bockarie/Taylor plan", or that the extreme violence[373] ultimately committed by Gullit's troops[374] was remotely within the contemplation of that plan. Convicting Mr. Taylor for planning the crimes committed by Gullit's troops in the Freetown invasion and subsequent retreat is accordingly a miscarriage of justice, warranting the quashing of these convictions.[375]

iv. GROUND OF APPEAL 10: The Trial Chamber erred in fact and law in finding that SAJ Musa's plan to attack Freetown was abandoned.

(i) Overview

135. Following its erroneous finding that Mr. Taylor contemplated Gullit's movements being incorporated into the plan, the Chamber then went on to find that Gullit abandoned SAJ Musa's plan to attack Freetown, and adopted the

[369] *RUF* TJ, para. 495-6.
[370] *Kordić & Čerkez* AJ, para. 274.
[371] Judgement, para. 3120.
[372] Judgement, para. 3118.
[373] Judgement, para. 6967.
[374] Judgement, para. 6966.
[375] Judgement, paras. 6971, 6994(b).

"Bockarie/Taylor plan" to attack Freetown, while in the midst of attacking Freetown.[376]

136. This "abandonment theory" of the Freetown events originates with the Chamber. Not a single witness testified that Gullit abandoned SAJ Musa's plan for the "Bockarie/Taylor plan" and effectively changed course mid-stream. Nor does this theory come from the Prosecution. According to the Prosecution, the Freetown invasion was a "joint operation", for which the RUF provided "support".[377] The Chamber developed this theory on its own.

137. The abandonment theory is a critical cog in Mr. Taylor's planning convictions. If the troops who invaded Freetown were following SAJ Musa's plan under the command of his successor Gullit, then there was no link back to Mr. Taylor. The "Bockarie/Taylor plan" could not have substantially contributed to the commission of crimes by Gullit's troops in Freetown if it was not put into action. It was the abandonment theory that allowed the Chamber to sidestep SAJ Musa's stubborn independence from the RUF, and link the events in Freetown back to Charles Taylor. The problem with this theory is that there is simply no evidence to support it.

(a) The Chamber's abandonment theory is not supported by the evidence

138. The fact that there were two plans to invade Freetown is uncontroversial.[378] The Chamber accepted that "there were two plans to attack Freetown, one made by the RUF and one made by the AFRC group led by SAJ Musa."[379]

139. It is also incontrovertible that SAJ Musa's advance to Freetown started well before the "Bockarie/Taylor plan" even came into being."[380] The Chamber appears to accept the evidence of Alimamy Bobson Sesay that SAJ Musa's planned advance on Freetown began as early as June or July 1998, long before the Waterworks meeting in December 1998.[381] In any event, it was an adjudicated fact that at a meeting in Koinadugu District, SAJ Musa met with various AFRC commanders who agreed that troops who had arrived from Kono District should act as an advance party, which would establish a base in the north-western area of Sierra Leone in preparation for an attack on Freetown,[382] and that SAJ Musa left to join the advance team and prepare

[376] Judgement, paras. 3480, 3486; para. 3611(xiii).
[377] Judgement, paras. 3132-4.
[378] Judgement, para. 3121. See also Judgement paras. 3122-5, 3128, 3478, 3480, 3486, 3611(xiii).
[379] Judgement, para. 3121.
[380] Judgement, para. 3125.
[381] Judgement, para. 3121.
[382] Judgement, para. 3122, Decision on Judicial Notice of AFRC Adjudicated Facts, Annex A, Fact 8.

for the attack on Freetown **in October 1998**.[383] Arriving in Colonel Eddie town in November 1998, SAJ Musa stressed that it was vital that his troops arrive in Freetown before the RUF. [384] As such, there were two plans; the first having been in train for weeks (if not months) before the other allegedly came into existence.

140. In support of its finding beyond a reasonable doubt that Gullit disengaged his approximately 1,000 troops[385] from Plan A and re-engaged them in Plan B, the Chamber points to nothing. There is no evidence to show that Gullit moved from the "AFRC plan" to the "RUF plan". There is no evidence that Bockarie told Gullit "you should now follow the RUF plan", nor any evidence of Gullit acquiescing or agreeing to do so. There is no evidence of Gullit's troops either being informed that the plan had changed, or doing anything differently. By contrast, Perry Karama testified that some of Gullit's troops were opposed to even contacting Bockarie after SAJ Musa's death,[386] and when Bockarie told Gullit to wait for reinforcements to advance to Freetown, a majority of Gullit's troops voted to ignore this instruction.[387] In light of this evidence (from a witness whose evidence the Chamber found to be "highly probative"[388] and "of significant weight"),[389] it is difficult to accept that Gullit (or his troops) who had been preparing for and following SAJ Musa's plan for weeks or months would abruptly start following the plan of an RUF commander, a group from which they had recently split after a violent dispute.[390]

141. The Chamber heard no evidence of the difference between the two plans in terms of strategy, timing, troop movements, intelligence, locations, operational plans, or manoeuvres. This kind of evidence would have provided a basis for the Chamber's finding that from a particular date the 1,000 troops started following the "Bockarie/Taylor plan" rather than the plan they had followed up to that point. Of course, a counter-argument can be made that given the chaos, killing, disorder, anarchy and absence of a conventional armed force or conventional conflict, clear-cut operational plans or defined strategic schema did not exist. If this is the case, however, it mitigates against any trier of fact being able to establish beyond

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[383] Judgement, para. 3122, Decision on Judicial Notice of AFRC Adjudicated Facts, Annex A, Fact 10.
[384] Judgement, para. 3122, Decision on Judicial Notice of AFRC Adjudicated Facts, Annex A, Fact 11.
[385] Judgement, paras. 55, 3150, 3335, 4302.
[386] Judgement, para. 3176.
[387] Judgement, paras. 3179, 3408.
[388] Judgement, para. 3391.
[389] Judgement, para. 3408.
[390] Judgement, para. 55.

reasonable doubt that the troops in question were following one plan as opposed to another.

142. At one point, the Chamber appears to draw a distinction between two plans on the basis of their respective goals, stating: "the evidence indicates that Musa's goal in attacking Freetown was to reinstate the army while Bockarie's goal in attacking Freetown was to release Foday Sankoh from prison."[391] Later, however, the Chamber corrects itself and notes that: "[t]he evidence indicates that it was the intention of the forces lead by Gullit and SAJ Musa **to free some prisoners**, not a new idea from Bockarie."[392]

143. In any event, the evidence does not support a clear distinction between the two plans on the basis of their ultimate goal. While "generally credible" witness Alimamy Bobson Sesay[393] referred to SAJ Musa's goal to reinstate the army,[394] he ultimately rejected the proposition that SAJ Musa's goals were different from those of Bockarie,[395] and cited the execution of the 24 SLA soldiers, the desire to reinstate the army, and the desire to release the RUF and ARFC political detainees at Pademba Road Prison as all being factors leading to the decision to invade Freetown by SAJ Musa's troops.[396] He also cited the release of people "like Foday Sankoh",[397] demonstrating a clear overlap between SAJ Musa's goals, and those of the RUF and Bockarie. As such, Gullit's advancing on Freetown and releasing prisoners cannot be safely attributed to Gullit following the "Bockarie/Taylor plan".

144. Moreover, there was evidence before the Chamber that 3,500 prisoners were released, namely SLA and RUF members and their supporters.[398] The Chamber later put the figure in the "hundreds".[399] Had the sole motivation of SAJ Musa been to "reinstate the army", a large injection of manpower would have gone a fair way to assisting him in this goal. There is no evidence which would allow the two plans to safely be distinguished in terms of their respective goals, or on the basis that Gullit released prisoners once in Freetown.

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[391] Judgement, para. 3123.
[392] Judgement, para. 3375.
[393] Judgement, para. 289.
[394] Judgement, para. 3123.
[395] Judgement, para. 3123
[396] Judgement, para. 3167.
[397] TT, Alimamy Bobson Sesay, 29 Apr. 2008, p. 8837.
[398] TT, Alimamy Bobson Sesay, 22 Apr. 2008, pp. 8280-1.
[399] Judgement, para. 3371.

145. The Chamber also attempts to differentiate between the two plans on the basis that SAJ Musa ordered his forces to proceed towards Freetown without killing looting or burning, while Bockarie had a campaign of terror in mind.[400] Even had SAJ Musa given such an order, there is abundant evidence that it was disobeyed by certain commanders like Santigie Borbor Kanu and Kabila, and the fighters killed, looted and murdered during their advance towards and into Freetown.[401] Equally, the Chamber made no findings that any crimes were committed in Kono and Makeni by the troops carrying out the only successful portions of the "Bockarie/Taylor plan".[402]

146. In reality, the Chamber's finding that one plan was abandoned for another is artificial. It is an impossible task for a trier of fact to find beyond reasonable doubt that at one point troops engaging in a chaotic and fast moving attack on a capital city were following Plan A, and then suddenly and uniformly switched to Plan B, particularly given the lack of evidence as to what the respective plans entailed.

(b) The weight of evidence undermines the Chambers abandonment theory

147. There was some contact between Bockarie and Gullit prior to the entry of Gullit's troops into Freetown itself.[403] However, the wealth of evidence does not demonstrate that that Gullit's troops were carrying out the "Bockarie/Taylor plan" as distinct from SAJ Musa's plan.

148. Even assuming momentarily that SAJ Musa's plan had been abandoned, it appears that the very first task that Gullit was given in pursuit of the new plan was simply to wait. Bockarie told Gullit **not** to advance to Freetown and to wait for reinforcements.[404] Having been told by the architect of his new plan **not** to advance to Freetown, Gullit promptly advanced to Freetown.[405] The Chamber insists that this was not disobedience, nor a rejection of Bockarie's authority, but rather a strategic decision.[406] Regardless of Gullit's motive, this evidence does not support the Chamber's theory that the "Bockarie/Taylor plan" was now the plan in operation.

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[400] Judgement, para. 3142.
[401] See, for example, TT, TF1-143 5 May 2008, p. 9015-8; Alimamy Bobson Sesay, 22 Apr. 2008, p. 8226-72. See also Judgement paras. 863-4, 848-50, 1565.
[402] The only finding of crimes in Kono during the relevant period is the shooting of five civilians at Yengema Training Base between December 1998 and 2000, which is not connected to the offensives on Kono and Makeni. See Judgement, para. 721. There are no findings of crimes committed in Makeni.
[403] Defence Final Brief, para. 615.
[404] Judgement, paras. 3402-18.
[405] Judgement, paras. 3402-18.
[406] Judgement, para. 3413-4.

149. The wealth of evidence heard by the Chamber suggests the opposite. Mr. Taylor testified that having heard about the Freetown invasion on the morning it occurred, a subsequent conversation between his national security advisor and Bockarie revealed that "Bockarie did not know what was going on in Freetown".[407] Issa Sesay testified as to the independence of this attack, and told the Chamber that he found out through the media.[408] Sam Kolleh, a RUF Vanguard[409] also found out through the press.[410]

150. Even putting this Defence evidence to one side, the Prosecution evidence suggests the same level of detachment and division and between Bockarie and the invading troops. Perry Karama, who gave "highly probative" evidence" of "significant weight", [411] confirmed that only after Gullit's troops had invaded Freetown, taken the State House, taken National Stadium, taken Pademba Road Prison, released prisoners,[412] and the commanders were "based and settled" at the State House, was Bockarie even informed.[413] TF-371 confirmed that Gullit called Bockarie once already in the State House.[414] Mohamed Kabbah agreed the RUF radio operators and RUF members in Buedu only heard that Gullit was in Freetown from the BBC.[415] Notably, Kabbah testified that this was not a complete surprise because Gullit's troops had never had accepted Bockarie's orders because "that was their own mission",[416] and that the mission was unplanned as far as Bockarie was concerned.[417]

151. The evidence of Bockarie's reaction to this news that Gullit had advanced to Freetown is particularly telling. RUF radio operator Dauda Aruna Fornie testified that Bockarie was "grumbling" that "maybe Gullit and the others would want to turn themselves into presidents in Freetown",[418] and that "Bockarie was concerned that Gullit would take power in Freetown on his own."[419] It is difficult to accept that the "Bockarie/Taylor plan" envisaged Gullit anointing himself the President of Sierra Leone following a successful invasion. Had Gullit really been following the

[407] Judgement, para. 3306.
[408] Judgement, para. 3319-21.
[409] Judgement, para. 2428.
[410] Judgement, para. 3336.
[411] Judgement, paras. 3391, 3408.
[412] TT, Perry Kamara, 6 Feb. 2008, p. 3229.
[413] TT, Perry Kamara, 6 Feb. 2008, p. 3229.
[414] TT, TF1-371, 30 Jan. 2008, p. 2648.
[415] TT, Mohamed Kabbah, 17 Sept. 2007, p. 16447.
[416] TT, Mohamed Kabbah, 17 Sept. 2007, p. 16447.
[417] TT, Mohamed Kabbah, 17 Sept. 2007, p. 16448.
[418] Judgement, para. 3251.
[419] Judgement, para. 3251.

Bockarie/Taylor plan, then Bockarie would not have had to grumble about such a possibility, nor be concerned that it would occur. Prosecution witness Abu Keita, who said he was with Bockarie in Buedu during the invasion, testified that when Bockarie heard on the BBC on 6 January 1999 a commander speaking from Freetown saying that he was in control of the State House, Bockarie became angry.[420] This is not the reaction of a man whose plan was being followed.

152. The Chamber also heard that SAJ Musa stressed that it was vital that his troops arrived in Freetown before the RUF ever got there.[421] Dauda Aruna Fornie agreed that even though SAJ Musa was killed in Benguema, his objective and that of his troops was that "they would be the ones who took Freetown, and not the RUF as a body."[422] This evidence is extremely difficult to reconcile with these same 1,000 troops abruptly changing course and following the plan of an RUF commander.

153. Contemporaneous documentary evidence provides further corroboration that Gullit was unrestrained by the "Bockarie/Taylor plan". Exhibit P-067 is a 1999 report to Foday Sankoh from a Black Guard commander, in which he recounts the operation to capture Kono and Makeni. He writes:

> Furthermore, Col Rambo also tried his level best to link up with the other brothers that entered Freetown, but the Freetown operation was not coordinated as the said **Commander Black Jah [Gullit] was not going by the instruction from the High Command**. When they retreated from Freetown, the BFC met them and told them to present a comprehensive report pertaining [*sic*] the whole Freetown operation, but they deliberately fail to do so.[423]

154. This evidence does not support a finding that Gullit's troops were carrying out the "Bockarie/Taylor plan". In fact, it suggests the opposite; that Gullit was continuing to lead SAJ Musa's troops in their ongoing mission into Freetown which had long before been set in motion.

155. Nor does any evidence of "coordination" between Bockarie and Gullit provide support for the theory that SAJ Musa's plan had been abandoned.[424] In fact, the term "coordination" implies an effort to ensure the harmonious operation of two separate plans. Another reasonable conclusion was that the RUF and AFRC were essentially

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[420] TT, Abu Keita, 23 Jan. 2008, pp. 2019-20.
[421] TT, Dauda Aruna Fornie, 4 Dec. 2009, p. 21722.
[422] TT, Dauda Aruna Fornie, 4 Dec. 2009, p. 21724.
[423] Exh. P-067, page 8 (emphasis added), summarized in Judgement at para. 3360.
[424] Judgement, paras. 3480, 3486, 3611(xiii).

two groups working against a common enemy, the Sierra Leone Government,[425] who would necessarily be in contact during a significant military operation that was in both their interests.

156. 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.

(ii) Outcome of the Chamber's error

157. If Gullit's troops had been following SAJ Musa's plan during the Freetown invasion, the dormant "Bockarie/Taylor" plan did not substantially contribute to their crimes. The "abandonment" theory was the Chamber's key to severing the connection between Gullit's troops and SAJ Musa's plan. Only once this link was broken was the Chamber free to create a link between the troops involved in the Freetown invasion and Charles Taylor, through the abrupt and mid-course adoption of the "Bockarie/Taylor plan".

158. The finding that Gullit "abandoned" SAJ Musa's plan is artificial, unsupported by evidence, and undermined by a wealth of evidence showing that Gullit was continuing with what SAJ Musa had started; a determination on the part of his troops to enter Freetown without waiting for the RUF. The Chamber's "abandonment theory" was certainly not the only reasonable conclusion available on the evidence.

159. No reasonable trier of fact could have devised the abandonment theory based on the evidence. The finding is pure speculation, and bears no demonstrable relation to matters that were initially within Mr. Taylor's initial or subsequent contemplation. Holding Mr. Taylor criminally responsible for "planning" the crimes of Gullit's forces in Freetown on this basis[426] 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.[427]

v. GROUND OF APPEAL 11: The Trial Chamber erred in fact and in law in convicting Charles Taylor for crimes committed during the implementation of a different plan from the one it erroneously attributed to him.

[425] TT, Alimamy Bobson Sesay, 29 Apr. 2008, pp. 8860-1.
[426] Judgement, para. 6965.
[427] Judgement, paras. 6971, 6994(b).

(i) The Trial Chamber erred in convicting Mr. Taylor absent of a finding that he designed a plan to commit crimes

160. The Prosecution alleged that the "Bockarie/Taylor plan" included a "ruthless terror campaign"[428] - i.e. was a plan to commit crimes.

161. The Chamber did not make this finding. It accepted that Bockarie and Mr. Taylor planned a military operation: that they "intentionally designed a plan for the RUF/AFRC Freetown invasion".[429] It did not find that this was a plan to commit acts of terrorism, or to commit sexual slavery, or to commit outrages on personal dignity, or to commit any of the concrete crimes in Counts 1 to 11 of the Indictment. It found (erroneously as discussed in Ground 15, below), that the Accused told Bockarie that the operation carried out should be "fearful"[430] and later told Bockarie via satellite phone that he should "by all means" take Freetown.[431] For the Chamber, these two comments were relevant to Mr. Taylor's *mens rea*. The Chamber held that through his instructions to take Freetown "by all means" and to make the operation "fearful", Mr. Taylor "demonstrated his awareness of the substantial likelihood that crimes would be committed during the execution of the plan".[432] The Chamber never held that the plan itself was a plan to commit crimes.

162. The *actus reus* of planning is "one or more persons formulate a method of design or action, procedure or arrangement of the accomplishment of a particular crime."[433] Liability for planning arises when one or several persons design the commission of a statutory crime".[434] One commentator describes planning in international criminal law as "devising... 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 widespread or systematic attack."[435]

163. When there is evidence of an accused having formulated a plan that does not constitute a plan to commit concrete crimes, this does not give rise to liability through the mode of liability of "planning". In *Brđanin*, the Chamber found the existence of a

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[428] Prosecution Final Brief, paras. 161, 168.
[429] Judgement, para. 6961. See also Judgement, paras. 3127, 3611(vi), 6958.
[430] Judgement, paras. 3116-7, 3611 (vii), 6959, 6969.
[431] Judgement, paras. 3117, 3130, 3611(vii), 6969.
[432] Judgement, para. 6969.
[433] *Semanza* TJ, para. 380.
[434] See *Limaj* TJ, para. 513. See also *Kordić & Čerkez* AJ, para. 26; *Brđanin* TJ, para. 268; *Krštić* TJ, para. 601; *Galić* TJ, para. 168; *Boškoski* TJ, para. 398; *Nahimana* AJ, para. 479.
[435] Cassese, Antonio, *International Criminal Law*, Oxford University Press (Oxford 2003), p. 192.

"Strategic Plan" to create a separate Bosnian Serb state which could only be implemented through force and fear."[436] As to *Brđanin's* liability for planning, the Chamber held that while the accused espoused the Strategic Plan, which may have set the wider framework within which crimes were committed, the evidence was insufficient to conclude that he "was involved in the immediate perpetration of concrete crimes. This requirement of specificity distinguishes "planning" from other modes of liability."[437] In the absence of evidence that the accused was involved in the preparation of *concrete crimes*, the Chamber could not sustain a conviction for planning, despite his espousal of the overall "Strategic Plan".

164. The Chamber's error in holding Mr. Taylor liable on the basis of a military plan, in the absence of a finding that he planned the commission of concrete crimes, means that a material element of planning is missing. This legal error invalidates the Judgement, and vitiates the planning convictions entered under Counts 1 to 11 of the Indictment.

(ii) The Trial Chamber erred in convicting Charles Taylor for crimes committed during the implementation of a different plan

165. Having failed to identify a design to commit particular crimes, the Chamber then went on to erroneously convict Mr. Taylor for a different plan from the one it found he had made.[438]

166. The Chamber accepted that the "Bockarie/Taylor plan" to capture Freetown were unsuccessful.[439] Before the RUF troops could reach the capital, the AFRC troops led by Gullit invaded.[440] The Chamber held that the invasion by Gullit's troops was marked by "extreme violence" and the commission of crimes in the Indictment.[441]

167. Liability for planning arises when an accused (i) designs criminal conduct constituting statutory crimes, and (ii) these crimes are later perpetrated.[442] As discussed above, the Chamber failed to find that Bockarie and Mr. Taylor devised a

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[436] *Brđanin* TJ, para. 65.
[437] *Brđanin* TJ, para. 357-8 (emphasis in original).
[438] Judgement, paras. 3118-24, 3486, 3611(xiii), 3616-7, 6958-71.
[439] Judgement, para. 3480 (emphasis added).
[440] Judgement, paras 3370-1.
[441] Judgement, para. 6967.
[442] Judgement, para 470; *Nahimana* AJ, para. 479; *Kordić & Čerkez* AJ, para. 26; See also ILC Draft Code of Crimes, Article 2(3)(e); *Dragomir Milošević* AJ, para. 268; Judgement, para. 470: "...the plan must have been a factor 'substantially contributing to [...] criminal conduct constituting one or more statutory crimes that are later perpetrated.'" See also *Blaškić* AJ, para. 278: "a person other than the person who planned (...) must have acted in furtherance of a plan or order".

plan to commit particular crimes. Nor were any planned crimes perpetrated as the troops simply did not reach Freetown.[443]

168. The Chamber nevertheless extended the original "Bockarie/Taylor plan" to encompass the actions of all 1,000 of Gullit's troops who entered Freetown. It did so by finding that the plan underwent a "continuing evolution";[444] that Bockarie and Mr. Taylor contemplated that Gullit's movements and action, whatever they might be, would be incorporated into the original plan;[445] and that SAJ Musa's plan had been abandoned.[446] This reasoning is wrong in law and in fact.

169. No trier of fact could have found that Mr. Taylor contemplated the incorporation of Gullit's movements in the plan, as previously discussed.[447] The Chamber confuses hindsight with what could possibly have been foreseen – let alone what actually was foreseen by the alleged protagonists. Even assuming that such a finding could have been supported by the evidence, the Chamber cites no legal principle, either from domestic or international criminal law, to support its theory that an accused can be held liable for crimes that occur in the implementation of a plan different from the one he was found to have made. The notion of an "expanded" or "evolved" plan has no discernible legal basis.[448] Planning is not JCE, and certainly not JCE III, and no such doctrines as to an "evolving" JCE have ever been applied to planning. The Chamber's notion of an "evolved" plan involves a confusion of planning and JCE III which is improper in law.

(iii) The Chamber erred in convicting Mr. Taylor for crimes committed during the attacks on Kono and Makeni in the absence of findings that these crimes occurred

170. The Chamber convicted Mr. Taylor for "planning the crimes charged in Counts 1 to 11 of the Indictment, committed by members of the RUF/AFRC and Liberian fighters **in the attacks on Kono and Makeni**, in the invasion of Freetown, and during the retreat from Freetown."[449]

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[443] Judgement, para. 3480.
[444] Judgement, para. 6966: "Taylor… was aware of its continuing evolution".
[445] Judgement, para. 3116(xiii), 3617.
[446] Judgement, paras. 3480, 3486, 3611(xiii).
[447] See Ground of Appeal 8.
[448] Judgement, para. 3486.
[449] Judgement, para. 6971.

171. The Chamber did find that some crimes were committed in Kono District in 1998, but they were not carried out during this operation.[450] The only other finding of crimes in Kono is the shooting of five civilians at Yengema Training Base between December 1998 and 2000, which is not connected to the offensives on Kono and Makeni.[451] As discussed below in Ground 23, section (iii)(e)(2), the isolated reference in paragraph 5719 to crimes having been committed during this operation in these locations is contradicted elsewhere in the Judgement. There were no findings as to crimes in Makeni during this period. Consequently, the planning convictions based on crimes alleged to have been committed in Kono and Makeni must also be quashed.

(iv) The Chamber's error requires a reversal of the planning convictions

172. In its apparent determination to fashion a link between the Freetown invasion and Mr. Taylor, the Trial Chamber firstly failed to find a material element of "planning" as a mode of liability, namely a plan to commit crimes. It then relied on a different "expanded" plan for his conviction for the crimes committed during the Freetown invasion and subsequent retreat, through an unprecedented and impermissible expansion of planning liability. Lastly, it failed to find that any crimes pursuant to the alleged plan were committed in Kono and Makeni. The various legal and factual errors identified above invalidate the Chamber's decision, and occasion a miscarriage of justice warranting the reversal of Mr. Taylor's planning convictions.

vi. GROUND OF APPEAL 12: The Trial Chamber erred in fact and law in finding that Charles Taylor received daily updates as to the implementation of the "evolving" plan and in finding him liable on the basis of these updates.

(i) Introduction

173. A remarkable aspect of this part of the Prosecution case is the lack of direct evidence concerning Charles Taylor's actual acts and conduct during the Freetown invasion. Despite the Prosecution's relentless assertions that Mr. Taylor planned, and was even controlling the invasion of 6 January 1999,[452] the Chamber heard no direct evidence from the Prosecution about what Mr. Taylor did, said, or was aware of during this period. In the accounts of Prosecution witnesses, Mr. Taylor is a distant

[450] Judgement, para. 1231. See (i) Amputations in Tombodu, March to June 1998 (Judgement, para. 1217); (ii) Mutilations in Kayima, May 1998 and Mid-1998 (Judgement, paras. 1221-2); Carvings and "knocking out teeth" in Wondedu, sometime between April and November 1998 (Judgement paras. 1228-9).
[451] Judgement, para. 721.
[452] Judgement, para. 3611(xviii).

figure, apparently speaking at the other end of satellite telephones, but never actually seen or heard.

174. Mr. Taylor was available to the Chamber to recount in detail his level of knowledge about the Freetown events. His evidence is disregarded, on the basis of an erroneous assessment of selective extracts, discussed below.

175. In the end, the Chamber relies on the evidence of two witnesses to support its finding of direct contact between Bockarie and Mr. Taylor during the Freetown invasion;[453] TF1-516 and Mohamed Kabbah. Neither had been in Monrovia during the Freetown invasion. Their evidence is uncorroborated second-hand hearsay. Neither TF1-516 nor Mohamed Kabbah spoke with Mr. Taylor directly, or heard his voice, or had any direct knowledge of what he allegedly told Bockarie during these conversations. Their evidence is manifestly insufficient to support the Chamber's finding of direct contact between Bockarie and Mr. Taylor during this period, let alone its content.

176. Perhaps as a result, the Chamber then hedged its bets by finding that, even if there was little or no direct contact between Bockarie and Mr. Taylor during the Freetown invasion, there was direct contact between Bockarie and Benjamin Yeaten,[454] Director of the Liberian Special Security Service.[455] Even if this had been established beyond a reasonable doubt, the Chamber heard no evidence that Yeaten regularly (or ever) relayed the content of his conversations with Bockarie back to Mr. Taylor. As such, this alternative finding does not assist the Chamber.

177. The importance of this evidence is clear: if Mr. Taylor was not in contact with Bockarie (either directly or through Yeaten) during the invasion, he had no basis to be "aware" that his plan was evolving, thus severing the link made by the Chamber between the "Bockarie/Taylor plan" and the actions of Gullit's troops in Freetown.[456] As shown below, the evidence simply does not support that this level of contact existed.

(ii) The Chamber erred in disregarding the testimony of Mr. Taylor as to his contact with Bockarie during the Freetown invasion

[453] The Trial Chamber concluded that this contact was "daily" through a morphing of its original finding of "frequent" contact: see Judgement, paras. 3654, 3606, 3611(xiv), 6966.
[454] Judgement, para. 2571.
[455] Judgement, paras. 3654, 3606, 3611(xiv), 6966.
[456] Judgement, para. 6966.

178. The Chamber did not make a general finding as to Mr. Taylor's credibility. His evidence is assessed on a case-by-case basis throughout the Judgement. Some aspects are relied upon. Some are not.

179. Mr. Taylor testified that he was not in direct contact with Bockarie via satellite phone during the Freetown invasion,[457] that he had no prior knowledge nor encouraged anyone to invade Freetown, and did not receive information about the Freetown invasion through Yeaten.[458] The Chamber disregarded his denial that he was communicating with Bockarie directly or through Yeaten.[459] Two reasons are given.

180. Firstly, the Chamber found "inconsistencies" in Mr. Taylor's evidence as to the contact between Bockarie and the Liberian Government.[460] However, the Chamber misconstrued the three extracts which it cited as "inconsistent". The three impugned responses from Mr. Taylor, while not identical, each relate to a different period.

- In response to a suggestion that Bockarie spoke to Yeaten and Tuha **during the Freetown fighting**, Mr. Taylor testified that "**they** would have had no reason to be in touch with Sam Bockarie **during the Freetown invasion**. None whatsoever."[461]

- When questioned whether there was any communication between the **Government of Liberia** and Bockarie **in the aftermath of the Freetown invasion**, Mr. Taylor testified "Yes, in January 1999 there was communication I would say **immediately after the Freetown invasion** and into the negotiation for the ceasefire which occurred, I would say, around the middle of January. Yes, there were communications."[462]

- When asked "are you aware of communications, radio communications between the RUF and Benjamin Yeaten through is radio operator **at or about the time that Koidu and some Nigerian soldiers were captured**?", Mr. Taylor responded "No. But to be factual about it, I would not dispute that - well, the first thing is that Benjamin Yeaten, I mean, he as director would have a radio operator. I don't know his code. The second thing factually is that I would not dispute the fact that the operator of Benjamin - because of Benjamin coordinating the security, it would not be out of reason for his operator to call Sam Bockarie, okay? So I don't - but I don't know the name of the operator. So I wouldn't have the details, and so I don't have a quarrel with the fact that maybe there's communication. I don't."[463]

[457] TT, Charles Taylor, 22 Sept. 2009, 29395-6.
[458] TT, Charles Taylor, 16 Sept. 2009, 29104-5; 17 Sept. 2009, pp. 29266, 29273-7.
[459] Judgement, para. 3564.
[460] Judgement, para. 3564.
[461] TT, Charles Taylor, 22 Sept. 2009, pp. 29395-6.
[462] TT, Charles Taylor, 16 Sept. 2009, pp. 29095-6
[463] TT, Charles Taylor, 14 Sept. 2009, p. 28738.

181. These statements are not inconsistent. Mr. Taylor is giving different answers based on the context and timing of the different propositions put to him. The Chamber's finding otherwise is erroneous.

182. Just as erroneous is the Chamber's finding that "in light of these inconsistencies and against the weight of the Prosecution evidence", Mr. Taylor's evidence was not credible.[464] This almost-textbook burden shift by the Chamber further undermines its conclusion to disregard Mr. Taylor's direct evidence. A Chamber is required to determine whether Prosecution allegations have been proven beyond a reasonable doubt. Contradictory Defence evidence (such as from Mr. Taylor) is relevant to that assessment. The credibility of Defence evidence does not depend on whether it is inconsistent with any or all of the Prosecution evidence.

183. The Chamber therefore erroneously excluded Mr. Taylor's direct testimony from its assessment of the second-hand hearsay of Prosecution witnesses as to his alleged contact with Bockarie.[465] Had Mr. Taylor's evidence been considered, no reasonable chamber could have concluded beyond a reasonable doubt that direct contact was taking place.

(iii) The Chamber erred in relying on TF1-516 and Mohamed Kabbah to find beyond a reasonable doubt that Mr. Taylor was in direct contact with Bockarie

(a) TFI-516

184. TF1-516 was a RUF radio operator based in Buedu.[466] The Chamber relies on his evidence, together with that of Kabbah, to conclude there was direct contact between Mr. Taylor and Bockarie during the Freetown invasion.

185. His evidence suffers from the following flaw: the premise of his testimony is that "020" was the call sign of the radio located in "Executive Mansion" in Liberia,[467] and that the operator of the radio with the call sign "020" reported to President Charles Taylor.[468] On this basis, he testified as to Bockarie being in "persistent communication" with "020" and "Base 1" (Yeaten's call sign).[469]

186. However, the question of whether anyone else could (or did) use the radio with the call sign "020" is never addressed. The basis for the witness" knowledge that

[464] Judgement, para. 3564.
[465] Judgement, para. 3564.
[466] TT, TF1-516, 8 Apr. 2008, p. 6857.
[467] TT, TF1-516, 8 Apr. 2008, pp. 6861, 6890-1.
[468] TT, TF1-516, 8 Apr. 2008, pp. 6891.
[469] TT, TF1-516, 8 Apr. 2008, pp. 6937.

this call sign was linked to the "Executive Mansion" is not established. The Chamber heard no other evidence that "020" was the call sign of the radio at the "Executive Mansion". TF1-516 never heard Mr. Taylor's voice during any alleged conversations with Bockarie. [470] He did not testify as to what Mr. Taylor told Bockarie, or the content of their discussion.

187. TF1-516 also demonstrated an inability to accurately place events as having happened during the Freetown invasion. He testified that Bockarie flew to Monrovia to see Mr. Taylor and returned 72 hours later during the Freetown invasion.[471] He later said he was mistaken, and that this had occurred when "the operation in Freetown had long been undertaken."[472]

188. Moreover, TF1-516's evidence is uncorroborated hearsay. As discussed in Ground 1, while there is no absolute prohibition on reliance on uncorroborated hearsay, the judgements of international tribunals are replete with such statements being deemed insufficient to support findings beyond a reasonable doubt.[473] This practice reflects the fact that hearsay evidence is untested, not given under oath, potentially affected by compound errors or perception and memory, and (particularly when uncorroborated) its content cannot be confirmed or verified.[474]

189. The Chamber's error is not that it relied on TFI-516's hearsay evidence,[475] but its reliance on this evidence in the absence of any scrutiny or caution, or any consideration of its reliability or circumstantial guarantees of truthfulness, or the context and circumstances in which the statement was made. [476] This is despite the Chamber's obligation to "provide a fully reasoned opinion" and "be especially rigorous" in its assessment of such evidence.[477] The Chamber's error was compounded by its complete failure to assess the reliability of the source of the hearsay: Sam Bockarie, and consider any motivation he may have had for exaggerating or fabricating his level of contact with the President of Liberia.[478]

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[470] TT, TF1-516, 8 Apr. 2008, pp. 6923-4.
[471] TT, TFI-516, 8 Apr. 2008, pp. 6945-5, 6962-5.
[472] TT, TF1-516, 16 Apr. 2008, p. 7821.
[473] See, Ground of Appeal 1. See, for example, *Bizimungu* TJ, para. 693; *Gacumbitsi* TJ, para. 196; *Nzabonimana* TJ, paras. 1454, 1688. See also, *Kanyarukiga* TJ, para. 193.
[474] *RUF* TJ, para. 495.
[475] *Kordić & Čerkez* AJ, para. 274: "[a]ny appeal based on the absence of corroboration must therefore necessarily be against the weight attached by a Trial Chamber to the evidence in question."
[476] *RUF* TJ, para. 495-6.
[477] *Kordić & Čerkez* AJ, para. 274.
[478] See Ground 2, above. See also Ground 7 on Sam Bockarie's motivations for associating with Taylor.

190. This lack of scrutiny came on the heels of the Chamber's recognition that TF1-516 was evasive and "tried to avoid answering questions" on more than one occasion.[479] Having recounted this behaviour, the Chamber simply concluded that the witness was "generally credible", thereby failing to address or resolve the evasiveness it had identified. In such circumstances, the lack of scrutiny applied to this second-hand uncorroborated hearsay is an error.

(b) Mohamed Kabbah

191. The only other witness relied upon by the Chamber is Mohamed Kabbah, another radio operator in Buedu.[480] He testified about one conversation between Bockarie and Mr. Taylor during which he was present, which occurred at the MP station, on a hill.[481] Like TF1-516 he did not hear Mr. Taylor speaking on the other end of the satellite phone.[482] He is very clear that this was the "only communication" that he monitored.[483] He made no mention of what Mr. Taylor told Bockarie, or the content of their discussion.

192. This evidence of Mr. Taylor's conversation is, again, uncorroborated hearsay. As such, the same errors arise out of the Chamber's reliance without any scrutiny or caution. Kabbah told the court that he had lied to Prosecution investigators about the Freetown attack.[484] His motivation was his security, although this is not fully explained or comprehensible. The Chamber unreservedly "accepts Kabbah's explanation."[485] A demonstrable willingness to lie about the events when it serves his interest, warrant even further caution in assessing his uncorroborated evidence. The Chamber's unreserved and unquestioning reliance on this testimony is an error.

193. [See Confidential Annex A, para. 2]

194. The Chamber also ignores that other Prosecution witnesses who were with Bockarie during the Freetown invasion knew nothing about direct contact between Bockarie and Mr. Taylor. Dauda Aruna Fornie, a "generally credible" witness,[486] and RUF radio operator[487] was in a position to testify that there was constant contact

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[479] Judgement, para. 283 (footnotes omitted).
[480] Judgement, para. 3505.
[481] TT, Mohamed Kabbah, 15 Sept. 2008, p. 16177.
[482] TT, Mohamed Kabbah, 15 Sept. 2008, p. 16178.
[483] TT, Mohamed Kabbah, 15 Sept. 2008, p. 16179.
[484] The Chamber erroneously cited to "Transcript, 12 September 2008, pp. 16244 – 16247", when in fact these pages and this discussion occurred on 15 September 2008.
[485] Judgement, para. 338.
[486] Judgement, para. 358
[487] TT, Dauda Aruna Fornie, 1 Dec. 2008, p. 21395.

between Bockarie and Yeaten during the invasion, at least two to three times per day.[488] He said nothing about contact between Bockarie and Mr. Taylor. Abu Keita, a "generally credible" witness[489] was also with Bockarie in Buedu in January 1999, also testified about Bockarie's contact with Yeaten.[490] He said nothing about direct contact between Bockarie and Mr. Taylor. The failure of these two witnesses to implicate Mr. Taylor, given their "credibility" and direct proximity to Bockarie during the events, casts doubt over the two witnesses who testified otherwise. In failing to consider this evidence, the Chamber was in error.

195. Even had the evidence of TF1-516 and Mohamed Kabbah been sufficiently corroborated and reliable (which it was not), there was no evidence of the content of any discussions between Bockarie and Mr. Taylor. The Chamber must have presumed (without so saying) that these alleged communications were to inform Mr. Taylor as to the "continuing evolution" of his alleged plan. In the absence of evidence to support this, or any reasoning to support the Chamber's assumption, and given the Chamber's errors in assessing the problematic and uncorroborated hearsay of TF1-516 and Kabbah, its finding as to direct contact with between Bockarie and Mr. Taylor is manifestly unsafe.

(iv) The Chamber erred insofar as it relied on the Pademba Road order as supporting its finding of direct or daily contact between Mr. Taylor and Bockarie

196. The Chamber concluded, citing to nothing, that Mr. Taylor "gave advice to Bockarie" and received updates as to the progress in Freetown.[491] The sole evidence accepted by the Chamber about the content of Mr. Taylor's alleged communications during the Freetown invasion concerns an alleged order which emanated from Mr. Taylor, through Yeaten, to Bockarie, to release the Pademba Road prisoners.[492]

197. Only one witness links the release of the Pademba Road prisoners back to Mr. Taylor; Dauda Aruna Fornie. He gives uncorroborated fourth-hand hearsay on Mr. Taylor's involvement as follows: Mr. Taylor told Yeaten in Monrovia, who told Bockarie via satellite phone in Buedu, who told Mohamed Kabbah, which was

[488] TT, Dauda Aruna Fornie, 3 Dec. 2008, pp. 21609-10.
[489] Judgement, para. 219.
[490] TT, Abu Keita, 23 Jan. 2008, pp. 2020-2.
[491] Judgement, paras. 3606, 3611(xiv).
[492] Judgement, para. 3591.

overheard by the witness, to release the Pademba Road prisoners.[493] Bockarie then instructed Kabbah to send a message to Gullit to release the prisoners.[494]

198. This evidence is so far removed from the source that it is impossible that a reasonable trial chamber would be satisfied by its reliability. In this case, the Chamber unblinkingly accepts this testimony, with no apparent caution despite its fourth-hand nature, with no enquiry into the credibility of the multiple sources of the hearsay, and from a witness who received significant payments from the Prosecution and WVS over two years,[495] and who admitted to a "lack of candour" in his dealings with the Prosecution until receipt of a letter promising immunity.[496]

199. Notably, Fornie's extended-hearsay-chain includes Mohamed Kabbah, one of the two witness upon whom the Chamber relies to find that Mr. Taylor was in regular contact with Bockarie. Kabbah says nothing about this incident. The Chamber acknowledged this. His omission is justified on the fact that "having testified prior to Fornie, Kabbah was not questioned further on his testimony concerning the release of Pademba Road prisoners."[497] This reasoning is erroneous. Firstly, it invites parties to mask uncorroborated testimony through strategic scheduling of witnesses. Secondly, the Prosecution's questioning of Kabbah on communications concerning Mr. Taylor was exhaustive. In response to a direct question, he was clear that he only monitored one alleged conversation involving Bockarie and Mr. Taylor:[498]

> Q. Now, where there any other communications during this time that you have information about involving Sam Bockarie and the satellite phone?
> A. That is the communication that I monitored between him, that is Sam Bockarie, and Charles Taylor. That was the only conversation I monitored.

200. Kabbah's failure to recount that Bockarie told him about instructions from Mr. Taylor to release the Pademba Road prisoners undermines Fornie's already extremely shaky account of this event.

201. In any event, even had there been sufficient and credible evidence of Mr. Taylor telling Yeaten to tell Bockarie to tell Gullit to release the Pademba Road

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[493] Judgement, para. 3588.
[494] TT, Dauda Aruna Fornie, 3 Dec. 2008, 21586-8.
[495] Judgement, para. 357.
[496] Judgement, para. 352.
[497] Judgement, para. 3589.
[498] TT, Mohamed Kabbah, 15 Sept. 2008, p. 16178-9.

prisoners, this does not assist with establishing "direct" or "daily" contact between Mr. Taylor and Bockarie, or his general awareness of the events in Freetown.[499]

(v) The Chamber's attempt to hedge its bets through Yeaten fails because of a lack of evidence

202. Fornie's fourth-hand uncorroborated hearsay is in fact the sole evidence of any alleged exchange between Mr. Taylor and Yeaten during the Freetown invasion. Kabbah testified that "it was said" within the RUF that Yeaten was Mr. Taylor's right-hand man and so "whatever he said he must have discussed it with the Pa."[500] But even he agreed there was no evidence to support this, it was just what people in the RUF assumed.[501]

203. The Chamber examined at length the relationship between Yeaten and Bockarie, but made no findings as to the regularity of contact between them.[502] Relevantly, it concluded that Yeaten was emboldened "take action without prior direction from the Accused."[503]

204. There is accordingly no basis to conclude that in the absence of direct contact between Mr. Taylor and Bockarie, Mr. Taylor would be aware of the continuing evolution of the plan because of contact between Yeaten and Bockarie. This finding required evidence that Yeaten was regularly reporting the content of these discussions back to Mr. Taylor. No such evidence was heard.

(vi) The impact of the error

205. As outlined in Ground 11 above, the Chamber was unable to find that the crimes committed by Gullit's troops in Freetown were part of the original "Bockarie/Taylor plan". As such, they found that this plan "evolved", and held Mr. Taylor liable through this expanded plan, and on the basis that his alleged "awareness" of this evolution through daily contact with Bockarie. The evidence examined above demonstrates that no reasonable chamber would have accepted that this daily or regular contact had been established beyond a reasonable doubt. As such, the Chamber's basis for Mr. Taylor's liability for the crimes encompassed in the "evolved plan" disappears, invalidating the Judgement and warranting a reversal of

[499] Judgement, paras. 3654, 3606, 3611(xiv), 6966.
[500] TT, Mohamed Kabbah, 16 Sept. 2008, p. 16381.
[501] TT, Mohamed Kabbah, 16 Sept. 2008, p. 16381.
[502] Judgement, paras. 2621-9.
[503] Judgement, para. 2623.

the planning convictions based on the crimes that were committed during the Freetown invasion and subsequent retreat after the evolution of the plan occurred.[504]

vii. GROUND OF APPEAL 13: The Trial Chamber erred in fact and law in finding that Sam Bockarie exercised effective command and control over Gullit whether before, during or after the capture of State House and Pademba Road Prison in Freetown.

(i) Overview

206. The Chamber did not accept that Mr. Taylor directed or had control over the Freetown invasion.[505] It found, however, a relationship of "effective command and control" between Mr. Taylor's "co-planner" Sam Bockarie and AFRC commander Alex Tamba Brima (Gullit).[506] It then relied on this relationship of command to extend liability for the Freetown invasion to Mr. Taylor, as follows:

> The Trial Chamber recalls its finding that **Bockarie then assumed effective control over Gullit's actions** and SAJ Musa's plan was abandoned for the plan that had been made by Bockarie and the Accused in November 1998. The troops commanded by Gullit in Freetown were subordinated to and used by Bockarie in furtherance of this plan, and further execution of the plan was carried out with close coordination between Bockarie and Gullit, with Gullit in frequent communication with Bockarie and with Gullit taking orders from Bockarie. **In these circumstances the Trial Chamber finds that the plan made by Bockarie and the Accused substantially contributed to the commission of crimes committed by Gullit's forces while Gullit was operating under Bockarie's command.**[507]

Hence, for the Chamber, Bockarie's command of Gullit forms the link between Mr. Taylor in Monrovia and the fighters in Freetown. The Chamber was explicit that "what is relevant to the responsibility of the Accused is whether Bockarie was effectively in command of a concerted and coordinated effort to take Freetown, with Gullit as his subordinate."[508]

207. No reasonable trier of fact could have concluded on the available evidence that Bockarie exercised effective control over Gullit. Moreover, the Chamber failed to make the findings necessary for a finding of effective control; namely that Bockarie

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[504] Judgement, para. 6966.
[505] Judgement, paras. 3605, 3611(xviii), 3618.
[506] See Judgement, paras. 3464, 3479, 3485, 3611(xii), 3617, 6965.
[507] Judgement, para. 6965 (emphases added). See also Judgement, para. 3485: "Bockarie exercised effective command and control over Gullit during the capture of the State House and Pademba Road Prison." See also Judgement, paras. 3463, 3479, 3611(xii), 3617.
[508] Judgement, para. 3479.

had the material ability to prevent or punish crimes. [509] Either of these two errors, alone or in combination, invalidate Mr. Taylor's planning convictions because of the direct link explicitly made by the Chamber between Bockarie's command of Gullit and Mr. Taylor's involvement in the Freetown invasion.

208. The gaping holes in the Chamber's command findings are unsurprising, given that the facts do not lend themselves to a finding of effective control in a superior-subordinate relationship. Factually, the Chamber found that Bockarie was giving orders to commit crimes, rather than failing to prevent or punish crimes. The doctrine of command responsibility centres on the culpable omission of a superior to adopt necessary and reasonable measures to prevent and punish crimes, [510] rather than liability for having given criminal orders in the first place. The Chamber appears to have conflated the doctrine of command responsibility with "ordering" as a mode of liability. However, the Chamber's insistent use of the terms of art "effective command and control",[511] and Gullit as Bockarie's "subordinate",[512] and its conclusion that "Gullit was operating under Bockarie's command"[513] leave no doubt about the Chamber's reliance on this doctrine, and its concomitant obligation to be restrained by its confines and to make the necessary findings.[514]

(ii) Bockarie did not exercise effective control over Gullit

(a) Bockarie was not the de jure superior of Gullit

209. The Chamber firstly asserts that "in February 1998, Bockarie took command over both the RUF and AFRC, pursuant to which he had a formal superior-subordinate relationship with Gullit."[515] It is assumed that by "formal superior-subordinate relationship" the Chamber was referring to *de jure* command, where

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[509] *AFRC* AJ, para. 257; citing *Delalić* AJ, para. 256. See also *Bagilishema* AJ, para. 50; *Hadžihasanovic* TJ, para. 164. See also *Halilović* AJ, para. 59.

[510] *CDF* TJ, para. 234: "It is thus the failure to act when under a duty to do so which is the essence of this form of responsibility. It is responsibility for an omission..."; *Halilović* TJ, para. 54: "The Trial Chamber finds that under Article 7(3) command responsibility is responsibility for an omission. The commander is responsible for the failure to perform an act required by international law. This omission is culpable because international law imposes an affirmative duty on superiors to prevent and punish crimes committed by their subordinates"; *AFRC* AJ, para 783: "[A] superior is responsible not for the principle crimes, but rather for what has been described as a 'dereliction' or 'neglect of duty' to prevent or punish the perpetrators of serious crimes."

[511] Judgement, paras. 3646, 3485, 3611(xii), 3617.

[512] Judgement, para. 3479.

[513] Judgement, para. 6965.

[514] See, for example, *Orić* AJ, paras. 47-9, where the Appeals Chamber quashed Orić's convictions under Article 7(3) because of the Chamber's to make sufficient findings as to the criminal liability of his subordinate, making only a small number of general findings "without any indication of whether and how they relate to any form of criminal liability under the International Tribunal's Statute".

[515] Judgement, para. 3464.

power is derived from official or formal appointment to a position of authority.[516] The Chamber points to no evidence of the formalisation of Bockarie's appointment over the AFRC forces, noting only that he "assumed" command after an incident where JP Koroma was arrested on suspicion of attempting to leave the country with a large quantity of diamonds; an incident which is placed between late-February and mid-1998.[517]

210. Even had Bockarie assumed a "formal superior-subordinate relationship with Gullit" sometime before mid-1998 (which is not accepted), the Chamber acknowledged that in October 1998 "SAJ Musa severed ties with the RUF command and created an unaffiliated SLA group... with Brima [Gullit] as his deputy."[518] As such, any such formal relationship was certainly dissolved prior to the relevant period.

211. In any event, a relationship of *de jure* command does not necessarily give rise to effective control.[519] *De jure* authority may exist without the superior being in a position to exercise effective control over subordinates.[520] As was affirmed by the ICTY Appeals Chamber in *Orić*, "*de jure* authority is not synonymous with effective control."[521] Whereas the possession of *de jure* powers may suggest a material ability to prevent or punish criminal acts of subordinates, it may be neither necessary nor sufficient to prove this ability.

212. Whether Bockarie had effective control over Gullit depends on his material ability to prevent and punish Gullit's crimes, rather any official title or appointment.[522]

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[516] *Bagilishema* AJ, para. 50; *Kordić & Čerkez* TJ, para. 406; *Delalić* AJ, para. 193.

[517] Judgement, para. 53. The Chamber also cited in the Judgement, para. 3463, fn. 7851 to a paragraph of the Prosecution Final Brief which does not support its assertion, and a paragraph of the Defence Final Brief which states only that "It was at this point in which the command structure became unified. Each group led by a RUF commander was to have an AFRC deputy, and each group commanded by an AFRC commander was to have a RUF deputy; though in practice there was no RUF commander as deputy to an AFRC commander. The RUF took over the command role, with any AFRC commander as deputy."

[518] Judgement, para. 55.

[519] *Nahimana* AJ, para. 787.

[520] *Halilović* AJ, paras. 211 and 214.

[521] *Orić* AJ, para. 91. See also *Hadžihasanović* AJ, para. 21: "Even when a superior is found to have *de jure* authority over his subordinates, the Prosecution still has to prove beyond reasonable doubt that this superior exercised effective control over his subordinates." See also *Halilović* AJ, 16 October 2007, para. 85.

[522] *AFRC* AJ, para. 257: "[t]he power or authority may arise from a *de jure* or a *de facto* command relationship. Whether it is *de jure* or *de facto,* the superior-subordinate relationship must be one of effective control, however short or temporary in nature." Citing *Bagilishema* AJ, para. 50; *Delalić* AJ, para. 256.

(b) There was insufficient evidence to support a finding that Bockarie "ordered" Gullit

213. The evidentiary burden required to establish effective control is high.[523] This is unsurprising given that the doctrine of superior responsibility potentially gives rise to broad liability for the actions of others. On this basis, "[g]reat care must be taken lest an injustice be committed in holding individuals responsible for the acts of others in situations where the link of control is absent or too remote."[524] A chamber is required to satisfy itself that each act upon which the Prosecution seeks to rely to establish effective control is an "unequivocal exercise of superior authority."[525] Effective control must be established beyond a reasonable doubt. If another competing and reasonable conclusion is open on the evidence, this precludes such a finding.

214. As the Appeals Chamber has recognised, effective control is the ability to prevent or punish the actions of subordinates.[526] The ICTY Appeals Chamber was clear that indicators of effective control "are limited to showing that the accused had the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators where appropriate."[527]

215. The Chamber was aware of this test. When setting out the "elements of superior responsibility", it defined effective control as "the material ability to prevent or punish the commission of the offence."[528] In acquitting Mr. Taylor under Article 6(3) of the Statute, the Chamber held *inter alia* that "the Accused was not in a position to take the necessary and reasonable measures to prevent or punish Bockarie for the commission of crimes", and "the evidence does not establish... that the Accused had effective control over the AFRC/RUF Junta, i.e. that the Accused was in a position to take the necessary and reasonable measures to prevent or punish Koroma for the commission of crimes."[529] This requirement went out the window when it came to the Chamber's analysis of Bockarie's effective control over Gullit, which was

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[523] *AFRC* TJ, para. 1660.
[524] *Delalić* TJ, para. 377; See also *Kordić & Čerkez* TJ, para. 414.
[525] *Delalić* TJ, para. 669.
[526] *AFRC* AJ, para. 257; citing *Delalić* AJ, para. 256. See also *Bagilishema* AJ, para. 50; *Hadžihasanović* 98*bis* Decision, para. 164. See also *Halilović* AJ, para. 59.
[527] *Blaškić* AJ, para. 69.
[528] Judgement, para. 493.
[529] Judgement, paras. 6979-86.

substantially restricted to examining whether Bockarie gave orders to Gullit, which were then obeyed.

216. The Chamber found four instances of such orders from Bockarie to Gullit, namely: (a) to withdraw from Freetown and make it "fearful"[530] (b) to send the Pademba Road prisoners to Buedu;[531] (c) to execute Martin Moinama;[532] and (d) to execute captured ECOMOG soldiers.[533]

217. The evidence relied upon by the Chamber is insufficient to support findings beyond a reasonable doubt. The Chamber's finding that Bockarie ordered Gullit to execute captured ECOMOG soldiers, for example, was based on the hearsay evidence of one uncorroborated witness, whose testimony was misrepresented. The Chamber incorrectly asserted that: [534]

> Kamara testified that Bockarie told Gullit that as there was no prison for ECOMOG, any captured ECOMOG soldiers should be killed.

218. In fact, Kamara testified that: [535]

> Sam Bockarie would tell [Gullit] that he had no prison for ECOMOG. No politicians. As a result, those ECOMOG soldiers were killed under the cotton tree.

219. Kamara did not testify that Bockarie gave an order to execute the ECOMOG soldiers, rather he stated that Bockarie said that there was no prison for these soldiers, which, without more, cannot be equated to an order for their execution. There is accordingly no evidence that Bockarie gave an order to kill the captured ECOMOG soldiers, undermining one of the four orders relied upon by the Chamber for its finding of "effective control".

220. Concerning the execution of Martin Moinama, the Chamber relied on the hearsay evidence of two witnesses.[536] Alice Pyne only heard after the fact that Moinama had been killed on Bockarie's orders,[537] and under cross-examination confirmed a prior statement that Moinama's wife informed her that Moinama had been killed before the Freetown intervention.[538] Foday Lansana claims to have monitored a radio communication in which Bockarie gave an order to Gullit to

[530] Judgement, paras. 3445-52.
[531] Judgement, paras. 3453-7.
[532] Judgement, paras. 3458-63.
[533] Judgement, paras. 3458-63.
[534] Judgement, para. 3462.
[535] TT, Perry Kamara, 6 Feb. 2008, pp. 3230-1.
[536] Judgement, paras. 3458-62.
[537] Judgement, para. 3459.
[538] TT, Alice Pyne, TFl-584, 20 June 2008, pp. 12342-4.

execute Moinama. He had no direct evidence concerning whether this order had been carried out.[539] Moreover, Lansana had told the Prosecution in 2003, that he did not know Moinama's whereabouts.[540] The Chamber acknowledged these (and other) difficulties with this evidence, but relied on it regardless.

221. Even if the Chamber was correct in relying on this evidence despite the flaws outlined above (which is not accepted), it erred in failing to address additional weaknesses. Lansana and Pyne were husband and wife.[541] They were radio operators, both stationed with Superman in Lunsar throughout the Freetown attack, operating from the same location.[542] Lansana claims to have monitored Bockarie ordering Gullit to execute Moinama.[543] Pyne's testimony, by contrast, corroborated her prior statement that she never heard a radio message about Moinama's release or death from anyone.[544] Pyne's evidence therefore necessarily casts doubt on the reliability of Lansana's testimony. The Chamber's failure to acknowledge or address this is an error. In addition, the Chamber acknowledged that Lansana told the Prosecution in 2003 that he did not know Moinama's whereabouts, but accepted Lansana's explanation that "he did not initially tell the Prosecution about Moinama's death because he did not yet feel safe as a witness."[545] The Chamber did not address the fact that Lansana first testified that he had in fact told the Prosecution in 2003 that Moinama had been executed.[546] Lansana is not only inconsistent as between his prior statement and his testimony, but is also inconsistent in the excuses he gave for this inconsistency.

222. In these circumstances, the Trial Chamber's reliance on such vague and inconsistent hearsay (coupled with its failure to address at least two significant evidentiary weaknesses), in order to conclude beyond a reasonable doubt that Bockarie gave an order to Gullit to execute Martin Moinama is an error. The resultant finding is one that no reasonable trier of fact could have reached.

(c) Gullit's disobedience

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[539] Judgement, para. 3459. See also TT, TFI-275, 26 Feb. 2008, p. 4749.
[540] TT, Foday Lansana, TFI-275, 26 Feb 08, pp. 4749-54.
[541] TT, Alice Pyne, 18 June 2008, pp. 12135-6.
[542] Judgement, para. 3459; TT, Foday Lansana, 22 Feb. 2008, pp. 4453, 4569 ; Alice Pyne, 19 June 2008, p. 12273.
[543] Judgement, para. 3459.
[544] TT, Alice Pyne, 20 June 2008, pp. 12342-4.
[545] Judgement, para. 3461.
[546] TT, Foday Lansana, TFI-275, 26 Feb 08, p. 4750.

223. Even had sufficient evidence been heard about Bockarie's four orders, the Chamber's finding then runs into its next obstacle to a finding of effective control: Gullit's persistent insubordination. As the Chamber acknowledged, Gullit did not always follow Bockarie's orders. Evidence of prior instances of indiscipline and of non-compliance with orders is relevant to an assessment of effective control.[547]

224. To take the most striking example, five Prosecution witnesses testified that Bockarie gave Gullit an order (characterized by the Chamber as an "instruction") **not** to advance towards Freetown until reinforcements arrived. [548] An instruction not to advance on the capital during a civil war is of undeniable significance. Gullit went anyway. [549] The Chamber concluded that "by advancing to Freetown from Waterloo and Benguema without Bockarie's reinforcements, Gullit was not rejecting either Bockarie's authority or his offer of assistance".[550] Perhaps not, but he was certainly not following Bockarie's instruction. However the facts are dressed up, Bockarie gave an instruction which Gullit did not follow.

225. The Chamber seems to have been aware of the significance of this particular example of non-compliance by Gullit. At one stage it limits its temporal finding of effective control "from the point at which Gullit reported to Bockarie after the capture of the State House",[551] (namely after Gullit had broken ranks and advanced to Freetown). Elsewhere, however, it finds that "Bockarie exercised effective command and control over Gullit during the capture of the State House and the Pademba Road Prison."[552] Obviously, these two findings cannot be reconciled. Either way, the Chamber found effective control at a time when Gullit was advancing on Freetown despite Bockarie's instruction, or it found effective control at the time when Gullit reported to Bockarie that he had done so. Neither scenario provides support for a finding of effective control.

226. Nor is the Chamber assisted by the testimony of two radio operators who testified as to tensions between Bockarie and Gullit during this period. Dauda Aruna Fornie testified that upon hearing one of the fighters who had entered Freetown speaking on the BBC, Bockarie became concerned that Gullit would take power in

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[547] *Strugar* AJ, para. 257.
[548] Judgement, paras. 3402-6.
[549] Judgement, paras. 3402-18.
[550] Judgement, para. 3413.
[551] Judgement, para. 3464.
[552] Judgement, para. 3611(xii).

Freetown on his own.[553] Perry Kamara testified that Bockarie told Gullit to delay entering Freetown "for the command structure". The Chamber conceded that this "indicates Bockarie was concerned about maintaining his authority over the troops led by Gullit."[554] Prosecution witness Abu Keita, who said he was with Bockarie in Buedu during the invasion, testified that when Bockarie heard on the BBC on 6 January 1999 a commander speaking from Freetown saying that he was in control of the State House, Bockarie became angry.[555] Their evidence also casts doubt on the Chamber's conclusion that Bockarie was in command.

227. In any event, Gullit's independent advance to Freetown was not the only example of his "disobedience" towards Bockarie, which also finds support in contemporaneous documentary evidence. Exhibit P-067 is a 1999 report to Foday Sankoh from a Black Guard commander, in which he recounts the operation to capture Kono and Makeni as follows:[556]

> Furthermore, Col Rambo also tried his level best to link up with the other brothers that entered Freetown, but the Freetown operation was not coordinated as the said **Commander Black Jah [Gullit] was not going by the instruction from the High Command**. When they retreated from Freetown, the BFC met them and told them to present a comprehensive report pertaining [*sic*] the whole Freetown operation, but they deliberately fail to do so.

228. The Chamber also acknowledged the existence of "certain decisions made by Gullit which had the appearance of insubordination or a rejection of Bockarie's involvement."[557] These decisions are explained away, however, as being justified by Gullit on the basis of "military necessity."[558]

229. The Chamber's finding that Gullit followed those orders which suited him, and rejected those which were inconvenient (whether militarily or otherwise), mitigates against a finding of effective control. It points to a likelihood that Gullit did not consider himself bound to obey Bockarie's orders, but sometimes acted in a manner consistent with them because he agreed with them or considered that it was in

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[553] Judgement, para. 3416.
[554] Judgement, para. 3416.
[555] TT, Abu Keita, 23 Jan. 2008, pp. 2019-20.
[556] Judgement, para. 3360.
[557] Judgement, para. 3442.
[558] Judgement, para. 3442.

his interests to do so.[559] This other reasonable conclusion was open to the Chamber, and was not considered or discounted.

230. In any event, even if the Chamber's evidentiary analysis had been flawless, and sufficient evidence established beyond a reasonable doubt that Bockarie gave orders to Gullit which he uniformly followed, this would not automatically give rise to a finding of effective control. Again, what matters is the material ability to prevent or punish the actions of subordinates. In *Kordić*, although Dario Kordić possessed sufficient authority over the Bosian-Croat forces to order them to commit certain acts and could therefore be liable for ordering those acts under Article 7(1) of the ICTY Statute, the Trial Chamber held that he lacked the effective control necessary for a finding of effective control relevant to Article 7(3).[560] In *Blaškić*, the ICTY Appeals Chamber held "the issuing of humanitarian orders does not by itself establish that the Appellant had effective control over the troops that received the orders."[561] The issue is not whether orders were given (or followed) but whether the superior had the material ability to prevent or punish the alleged subordinates. This finding was never made. The Chamber's conclusion as to Bockarie's effective control over Gullit is therefore in error.

(d) Other insufficient indicia of "effective control"

231. As such, the four orders relied upon by the Chamber are insufficient to establish Bockarie's effective control over Gullit, either legally or evidentially. Perhaps in an attempt to bolster its conclusion, the Chamber coupled these orders with two other factors: (a) "that Gullit reported to Bockarie as the overall commander"; and (b) Gullit's use of deferential language when communicating with Bockarie.[562]

232. In support of its statement that "Gullit reported to Bockarie as the overall commander", the Chamber relies on two witnesses. The first, Alimamy Bobson Sesay, did not characterise Bockarie as the "overall commander". He testified:

> [w]hen we captured the State House all the reports he made to Mosquito. Whatever happened he briefed Mosquito.[563]

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[559] See, for example, *Orić* TJ, para. 706, where the changeable willingness of local leaders and fighters to subordinate themselves to the command and control of the accused mitigated against a finding of effective control.
[560] *Kordić & Čerkez* TJ, paras. 834, 839-41.
[561] *Blaškić* AJ, para. 485.
[562] Judgement, para. 3464.
[563] TT, Alimamy Bobson Sesay, 22 Apr. 2008, p. 8289.

At its highest, this testimony is only demonstrative of Gullit reporting to Bockarie. While reporting can be one indicia of command, it is certainly not dispositive.

233. Nor did Mohamed Kabbah testify that "Gullit reported to Bockarie as the overall commander", stating only that:

> [i]t was Gullit who was in charge of the men in Freetown, the fighting force that went there, but Sam Bockarie was in charge of the entire movement.[564]

An individual can be in charge of a movement without having command over particular troops. In *Halilović*, the ICTY Appeal Chamber upheld the Trial Chamber's refusal to find effective control, noting that "responsibility does not attach to a military official merely on the basis of his over-all command" in the absence of the prevention or punishment of crimes.[565] The testimony of these two witnesses does not stand for the proposition relied upon by the Chamber.

234. Lastly, the Trial Chamber added "the level of deference exhibited by Gullit towards Bockarie in their communications" into the mix of indicia of effective control. Two witnesses testified that Gullit called Bockarie "sir", or "master". [566] Without evidence that the use of the terms "master" or "sir" was more than a reflection of politeness, or Gullit's acknowledgement of Bockarie's age or position, [567]or even a way to avoid identifying Bockarie over sensitive radio communications during a civil war, [568] these terms are of negligible evidential weight, and certainly insufficient to tip the balance in terms of effective control.

(e) Failure to Make Necessary Findings

235. Even had the Chamber not made the multitude of errors identified above, the conclusion as to Bockarie's effective control was made in the absence of any discussion or findings of Bockarie's material ability to prevent or punish Gullit's actions. Without this, there is no basis for the Trial Chamber's finding of effective control. Any finding of effective control in the absence of a material ability to prevent or punish would be contrary to the law as established by the SCSL,[569] and the doctrine of command responsibility more generally.[570]

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[564] TT, Mohamed Kanneh, 15 Sept. 2008, pp. 16172-3.
[565] *Halilović* AJ, para. 214.
[566] TT, Dauda Aruna Fornie, 3 Dec. 2008, p. 21603; Isaac Mongor, 11 Mar. 2008, pp. 5825-6.
[567] See, for example, TT, Isaac Mongor, 11 Mar. 2008, p. 5826.
[568] See, for example, TT, Dauda Aruna Fornie, 3 Dec. 2008, p. 21603.
[569] Judgement, para. 493, citing *AFRC* TJ, para. 782. See also *RUF* TJ, para. 287, citing *AFRC* AJ, paras. 257, 298.
[570] *Delalić* AJ, para. 256. See also *Bagilishema* AJ, para. 50; *Hadžihasanović* 98*bis* Decision, para. 164. See also *Halilović* AJ, para. 59.

(iii) Consequences of the Trial Chamber's error

236. The Chamber characterised the relationship between Bockarie and Gullit as one of "effective command and control". The Chamber was explicit that "what is relevant to the responsibility of the Accused is whether Bockarie was effectively in command of a concerted and coordinated effort to take Freetown, with Gullit as his subordinate."[571] It concluded that "the plan made by Bockarie and the Accused substantially contributed to the commission of crimes committed by Gullit's forces while Gullit was operating under Bockarie's command."[572] Without command, this link disappears. The errors in the Chamber's finding that Bockarie "commanded" Gullit therefore invalidate the planning convictions for crimes attributable to Gullit and his troops during the Freetown invasion and subsequent retreat, and have occasioned a miscarriage of justice.[573]

(iv) Conclusion: The Chamber erred in finding that the "Bockarie/Taylor plan" substantially contributed to the crimes committed by RUF/AFRC fighters

237. In order to find that the "Bockarie/Taylor plan" substantially contributed to the crimes committed, the Chamber relied on two elements:[574] (i) the "joining up" of a small contingent of RUF troops lead by Rambo Red Goat with Gullit's troops, who then committed crimes;[575] and (ii) the Chamber's "evolved" planning theory together with Bockarie's command over Gullit. The numerous errors which invalidate these findings and have occasioned a miscarriage of justice have been explored in Grounds 6 to 13 above.

238. Even if these findings had been established beyond a reasonable doubt, no reasonable trial chamber would have concluded that the "Bockarie/Taylor plan" substantially contributed to the crimes committed during the Freetown invasion and subsequent retreat. While the Prosecution is not required to establish that the crimes would not have been perpetrated but for the alleged plan,[576] it is required to prove beyond a reasonable doubt that the plan was a factor "substantially contributing to [...] criminal conduct constituting one or more statutory crimes that are later perpetrated."[577] The Chamber accepted that SAJ Musa's troops invaded Freetown

[571] Judgement, para. 3479.
[572] Judgement, para. 6965.
[573] Judgement, paras. 6971, 6994(b).
[574] Judgement, paras. 6962-8.
[575] Judgement, para. 6962.
[576] Judgement, para. 470, citing *Kordić & Čerkez* AJ, para. 26.
[577] Judgement, para. 470, citing *Kordić & Čerkez* AJ, para. 26.

independently,[578] and accepted abundant evidence that these fighters killed, looted and murdered during their advance towards and into Freetown,[579] both before they were joined by the "small contingent" of RUF troops,[580] and before Bockarie allegedly assumed command.[581]

239. As such, no reasonable trier of fact would have found that that the "Bockarie/Taylor plan" substantially contributed to the crimes committed,[582] such a finding being precluded by the previous conduct of these particular troops.

240. Apart from the Freetown invasion and retreat, the Chamber also convicted Mr. Taylor for planning crimes committed "in the attacks on Kono and Makeni".[583] Given the absence of findings that any crimes were committed during the implementation of the alleged plan in Kono and Makeni, the planning convictions based on these areas must also be reversed.

d. Errors Relating to Planning: Mens Rea

i. GROUND OF APPEAL 14: The Trial Chamber erred in fact and law in inferring that Charles Taylor possessed the requisite mental state for planning based on alleged awareness of crimes being committed by the RUF and/or AFRC.

241. To be liable for planning, the accused must have either intended that the planned crime be committed or, at a minimum, been aware of the substantial likelihood that the crime would be committed when the plan was carried out.[584]

242. Immediately, the Chamber hits its first obstacle. As discussed in Ground 11 above, the Chamber failed to find that Mr. Taylor made a plan to commit particular statutory crimes or underlying offences. It found that Mr. Taylor and Bockarie "intentionally designed a plan for the RUF/AFRC Freetown Invasion",[585] but failed to identify any concrete crimes that were part of this plan.

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[578] Judgement, paras. 57, 61, 3121.
[579] See, for example, TT, TF1-143, 5 May 2008, p. 9015-8; Alimamy Bobson Sesay, 22 Apr. 2008, p. 8226-72. See also Judgement paras. 863-4, 848-50, 1565.
[580] Judgement, para. 6962.
[581] Judgement, para. 3464: "Bockarie exercised effective command and control over Gullit from the point at which Gullit reported to Bockarie after the capture of the State House and Pademba Road Prison."
[582] Judgement, para. 6968.
[583] Judgement, para. 6971.
[584] Judgement, para. 499(ii); *Nahimana* AJ, para. 479. See also Judgement, para. 470; *Kordić & Čerkez* AJ, para. 31.
[585] Judgement, para. 6961.

243. Planning convictions in other cases have identified plans to "murder Tutsi"[586] or "kill military aged men, expel civilians, and destroy houses"[587] Accordingly, at the *mens rea* stage, the Chamber in only required to determine whether the accused intended that these crimes occur (or was aware of a substantial likelihood that they would). In this case, the Chamber's failure to find a plan to commit certain crimes means that there was no object crime to the *mens rea* finding.

244. Instead, the Chamber found in a blanket manner that Mr. Taylor was aware that "crimes" would occur.[588] The Chamber relied on: (i) Mr. Taylor's awareness that the AFRC/RUF's "war strategy was explicitly based on a widespread or systematic campaign of crimes against civilians" and (ii) his instruction to make the operation "fearful" and use "all means".[589] No basis was given for Mr. Taylor's *mens rea* for each of these 11 separate and distinct crimes. This was an error.

245. The Appeals Chamber Judgement in *Kordić and Čerkez* is instructive. Kordić had been present at a meeting where an order had been approved to kill all Muslim men of military age, expel civilians and burn down their houses.[590] He was therefore held to have participated in the planning of the attack against Ahmići (and other Lašva Valley villages) aimed at "cleansing" these areas of Muslims.[591] Kordić was held liable for planning crimes he directly intended, namely "to kill military aged men, expel civilians, and destroy houses."[592] He was also liable for crimes which were substantially likely to occur as a result of the plan: "Kordić approved the general plan... with the awareness of the substantial likelihood that other crimes such as killing of civilians, unlawful detention of civilians, and plunder would be committed in the execution of this general plan."[593]

246. Where the Chamber went wrong in the present case was failing to make a finding as to which crime(s) Mr. Taylor either intended or was aware might likely occur. Unlike in *Kordić*, no basis was given for Mr. Taylor's awareness of the substantial likelihood that 11 different underlying offences, (i) acts of terrorism; (ii) murder; (iii) violence to life, health and physical and mental well-being of persons in

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[586] *Gacumbitsi* TJ, paras. 271-8
[587] *Kordić & Čerkez* TJ, para. 976.
[588] Judgement, para. 6969.
[589] Judgement, para. 6969.
[590] *Kordić & Čerkez* TJ, para. 631.
[591] *Kordić & Čerkez* AJ, para. 975.
[592] *Kordić & Čerkez* AJ, para. 976.
[593] *Kordić & Čerkez* AJ, paras. 976, 1092.

particular murder; (iv) rape; (v) sexual slavery; (vi) outrages upon personal dignity; (vii) violence to life, health and physical and mental well-being of persons in particular cruel treatment; (viii) other inhumane acts; (ix) conscripting or enlisting children under the age of 15 into armed forces or groups or to participate actively in hostilities; (x) enslavement; and (xi) pillage would occur.

247. Holding an accused liable for all offenses in an Indictment without finding intent for the particular crimes[594] is inconsistent with principles of individual criminal responsibility.[595] To be convicted of a war crime, for example, the principle of individual guilt requires "that fundamental characteristics of a war crime be mirrored in the perpetrators mind... it is illogical to say that there is such a nexus unless it is proved that the accused has been aware of the factual circumstances concerning the nature of the hostilities." [596] To be liable for murder as a crime against humanity, an accused must have known of the fundamental characteristics of this category of crimes.[597]

248. As a result of its failure to make a finding as regards Mr. Taylor's *mens rea* for each of crimes for which he was convicted, the Chamber jumped over these fundamental steps. The Chamber made no findings that Mr. Taylor had knowledge of the fundamental characteristics of war crimes or crimes against humanity. A failure to make a *mens rea* finding in relation to crimes has previously necessitated the quashing of convictions.[598] The same should occur in the present case.

249. Further, the two elements relied upon, namely Mr. Taylor's awareness of past crimes by the AFRC/RUF, and his "fearful" and "by all means" instructions (discussed in Ground 15), were insufficient to satisfy the *mens rea* for planning.

250. The Chamber cites to no precedent of awareness of past crimes being sufficient to establish the requisite *mens rea* for planning. Even when awareness of past crimes is a legitimate consideration in determining whether a superior "had reason to know" that his subordinates have or will commit crimes,[599] caution has been

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[594] Judgement, para. 469.
[595] See *Naletilić* AJ, para. 114.
[596] *Naletilić* AJ, para. 114.
[597] *Tadić* AJ, para. 271: 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 (emphasis in original). See also *Naletilić* AJ, para. 114.
[598] *Krajišnik* AJ, paras. 175-8, 203; *Vasiljević* AJ, paras. 131-2. See also *Orić* AJ, paras. 47, 53, 56, 60.
[599] Judgement, para. 490.

regularly exercised in drawing inferences to establish such constructive knowledge,[600] and only in very limited circumstances can future crimes be inferred from past conduct. It is not sufficient to establish awareness of the risk that crimes might or could be committed by subordinates, rather there must be a substantial or strong risk, or a real and obvious prospect that this will occur.[601]

251. On this point, the arguments set out in Ground 17 below are repeated and relied upon. In short, the Chamber's own findings demonstrate that RUF/AFRC soldiers, rather than implementing a policy of crimes against civilians, tended to commit crimes opportunistically when on the brink of defeat. And while Mr. Taylor acknowledged the past commission of gross atrocities,[602] the Chamber also accepted that the RUF issued a public apology to the citizens of Sierra Leone in May 1997,[603] and the findings in the Judgement of violent crimes committed by the RUF/AFRC forces during the Junta period are notably sparse.[604] Moreover, Mr. Taylor's acknowledgement of criminal activity on the part of the RUF must be read in light of his testimony that the situation in Sierra Leone was changeable.[605] In such circumstances, there is an insufficient basis to conclude (nor was one reached) that Mr. Taylor was aware of a substantial likelihood at the time he formulated the "Bockarie/Taylor plan" that the RUF/AFRC would commit any or all of the particular crimes for which he was convicted.

252. Moreover, a Chamber is required to make findings that particular crimes, and not any criminal offence, had been or was about to be committed. In *Hadžihasanović*, the ICTY Appeals Chamber found that Kubura's knowledge of wanton destruction could not automatically be inferred from his awareness of acts of plunder committed in the same area.[606] In *Krnojelac*, the ICTY Appeals Chamber found it was not sufficient for the accused to have known that his subordinates were beating people to convict him of "torture" if it had not been established that he knew of the prohibited

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[600] See, for example, *Bagilishema* TJ, para. 988.
[601] *Blaškić* AJ, paras. 41-2; *Strugar* TJ, para. 370, 417-8; *Kvočka* AJ, paras. 155 and 179.
[602] Judgement, para. 6969.
[603] Judgement, paras. 526, 6880
[604] See Ground 17 below.
[605] TT, Charles Taylor, 25 Nov. 2009, p. 32390 ("It depends on when. You've been switching me between '99 and '98"). See *Perišić* Dissenting Opinion, para. 49: "It is important to recognize that situations during a war can change dramatically over time. What Perišić knew or thought he knew about the activities and propensities of the VRS during the initial break-up of the SFRY cannot be equated with his understanding of circumstances during later stages of the war."
[606] *Hadžihasanović* AJ, para. 295.

purpose behind the beatings which forms part of the definition of torture.[607] The Chamber's vague reference to past "crimes against civilians" and past "atrocities"[608] fails to demonstrate that Mr. Taylor had constructive knowledge that particular crimes would or were likely to be committed. As such, this error invalidates the Chamber's finding that Mr. Taylor had the requisite *mens rea* for planning, warranting the reversal of the planning convictions.

ii. GROUND OF APPEAL 15: The Trial Chamber erred in fact and law in finding that Charles Taylor instructed that the Freetown operation be made "fearful" and that the RUF should capture Freetown "by all means", and in relying on these findings to infer that Charles Taylor possessed the requisite mental elements for planning.

(i) The Chamber erred in finding that Mr. Taylor told Bockarie that invasion of Freetown should be "fearful"

253. The second element erroneously relied upon by the Chamber to make its insufficient blanket finding that Mr. Taylor intended or was aware that "crimes" would be committed was his instruction to Bockarie that the operation should be "fearful", and that he should take Freetown "by all means".[609]

254. That Charles Taylor told Sam Bockarie to make the operation "fearful"[610] is uncorroborated second-hand hearsay from Isaac Mongor.[611] No witness heard Mr. Taylor give this instruction to Bockarie. Only Mongor heard Bockarie say that Mr. Taylor had given it.

255. The Chamber's reliance on an uncross-examined out-of-court statement to infer a directly incriminating fact was legally improper, as discussed in Ground 1. The Chamber's reasoning also reflects none of the caution that the jurisprudence of the international tribunals has repeatedly emphasized in respect of hearsay, even in respect of less important findings.[612] The Chamber makes a highly prejudicial and incriminating finding on the basis of information that, in effect, is untestable.[613]

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[607] *Krnojelac* AJ, para. 155.
[608] Judgement, para. 6969.
[609] Judgement, para. 6969.
[610] Judgement, paras. 3116-7, 3611 (vii), 6959, 6969.
[611] Judgement, paras. 3116-7.
[612] See, Ground of Appeal 1. See, for example, *Bizimungu* TJ, para. 693: "Finally, the Chamber does not consider that Witness LEL's uncorroborated hearsay evidence provides a sufficient basis for it to conclude beyond reasonable doubt that Mugenzi sent security personnel, whether they be soldiers or gendarmes, to rescue Vestine Ugiranyina and her husband's niece"; para. 764: "Notwithstanding the frailties in the Defence evidence, Witness GHY's uncorroborated hearsay evidence fails to provide a

256. The Chamber also failed to give reasons that would be remotely adequate in relation to the nature of the finding. No reasons are given concerning the reliability of the original statement or circumstantial guarantees of truthfulness, or the context and circumstances in which the statement was made. [614] This is despite the Chamber's obligation to "provide a fully reasoned opinion" and "be especially rigorous" in its assessment of such evidence.[615] The Chamber's error was compounded by its complete failure to assess Sam Bockarie's veracity or motivations for being untruthful about Mr. Taylor's alleged "fearful" instruction.[616]

257. Isaac Mongor's reliability is also significantly undermined by his admission that he was untruthful when first discussing Mr. Taylor's role in the Freetown operation with the Prosecution.[617] He is an accomplice witness[618] whose evidence (according to the Chamber) must be viewed with caution when uncorroborated,[619] who benefited financially from his testimony,[620] and upon whom the Chamber declined to rely elsewhere in the Judgement.[621] In such circumstances, the Chamber's unqualified acceptance of his uncorroborated second-hand hearsay evidence in the absence of any scrutiny or caution is an error.[622] This was manifestly insufficient in the circumstances.

258. A further inconsistency in Mongor's testimony arises from his claim that he was first told about the "fearful" instruction in a private conversation,[623] and that the next morning during a commander's meeting Bockarie "explained the same thing that

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sufficient basis for the Chamber to make findings beyond reasonable doubt." *Gacumbitsi* TJ, para. 196: "However, the hearsay evidence of Witness TAS is insufficient, failing corroboration, to establish that the Accused ordered the murder of Marie and Béatrice"; para. 327: "On her part, Prosecution Witness TAS also testified that she heard those who raped her say that the Accused had ordered them to rape Tutsi women and girls, but her uncorroborated hearsay evidence is not such as to prove the involvement of the Accused." *Nzabonimana* TJ, para. 1454: "Nevertheless, the Chamber observes that the Prosecution relied on the uncorroborated hearsay evidence of a single witness to support this allegation. The Chamber recalls that it may find an allegation proven beyond a reasonable doubt on the basis of a single witness's testimony. However, in this instance, given the hearsay nature of the witness's evidence and the lack of corroborating evidence, the Chamber does not find this evidence sufficient to support this allegation." See also para. 1688. See also, *Kanyarukiga* TJ, para. 193.

[613] *RUF* TJ, para. 495.

[614] *RUF* TJ, paras. 495-6.

[615] *Kordić & Čerkez* AJ, para. 274.

[616] See Ground 2, above. See also Ground 7 on Sam Bockarie's motivations for associating with Taylor.

[617] TT, Isaac Mongor, 7 Apr. 2008, pp. 6735-42.

[618] Judgement, para. 270.

[619] Judgement, para. 183.

[620] Judgement, para. 271.

[621] Judgement, paras. 2367, 2559, 3119, 3383-4, 3412, 5384-5, 5395-6.

[622] Judgement, paras. 3116-7.

[623] TT, Isaac Mongor, 11 Mar. 2008, pp. 5796-7.

he had briefed me on."[624] Despite this, there is no evidence that Bockarie relayed the same "fearful" instruction to the other commanders. The Chamber heard from other witnesses who allegedly attended this meeting, and didn't say that Bockarie's recitation included the instruction that it be "fearful". TF1-371 was at that meeting and makes no reference to any instruction that the operation should be "fearful" or to otherwise terrorize the civilian population.[625] Its absence from the conversation casts significant doubt on Mongor's assertion that Bockarie had told him the previous day.

259. A further indication that no such "fearful" instruction was ever given is that the Chamber made no findings that any crimes were committed in the only successful portion of the "Bockarie/Taylor plan" – the offensives on Kono and Makeni.[626] The Chamber did find that some crimes were committed in Kono District in 1998, but not during this operation.[627] The only other finding of crimes in Kono is the shooting of five civilians at Yengema Training Base between December 1998 and 2000, which is not connected to the offensives on Kono and Makeni.[628] As discussed below in Ground 23, section (iii)(e)(2), the isolated reference in paragraph 5719 to crimes having been committed during this operation in these locations is contradicted elsewhere in the Judgement. There were no findings as to crimes in Makeni during this period.

260. The Chamber appears to rely on evidence that Bockarie later instructed commanders to make the operation "fearful" during the course of the Freetown invasion.[629] Even if this occurred, this does not implicate Mr. Taylor. There is no evidence of Bockarie telling anyone, except Isaac Mongor in their private meeting, that this instruction originated with Mr. Taylor. In such circumstances, the Chamber's reliance on this second-hand corroborated hearsay, particularly in light of the complete lack of scrutiny of Mongor's evidence, or the source of the hearsay, is in error.

(ii) The Chamber erred in its assessment of and reliance on TFI-371's evidence that "we should use all means to capture Freetown"

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[624] TT, Isaac Mongor, 11 Mar. 2008, p. 5697.
[625] TT, TF1-371, 30 Jan. 2008, pp. 2652-5.
[626] Judgement, para. 3840.
[627] Judgement, para. 1231. See (i) Amputations in Tombodu, March to June 1998 (Judgement, para. 1217); (ii) Mutilations in Kayima, May 1998 and Mid-1998 (Judgement, paras. 1221-2); Carvings and "knocking out teeth" in Wondedu, sometime between April and November 1998 (Judgement paras. 1228-9).
[628] Judgement, para. 721.
[629] Judgement, para. 6969.

261. Again, the evidence that Charles Taylor told Sam Bockarie to use "all means" to capture Freetown is uncorroborated second-hand hearsay from TF1-371,[630] giving rise to the same concerns as to the Chamber's lack of scrutiny, reasoning or caution, or any consideration of the credibility of the source of the hearsay: Sam Bockarie. The problems and inconsistencies about TF1-371's evidence of the alleged satellite phone conversation between Bockarie and Mr. Taylor have been discussed in Ground 7 above, in particular the inconsistencies between his evidence and that of Karmoh Kanneh and Isaac Mongor. These same arguments are incorporated and relied upon here.

262. TF1-371 is also an accomplice witness,[631] who explained prior inconsistent statements on the basis of their being "improperly recorded",[632] and upon whom the Chamber declined to rely in other parts of the Judgement.[633] The Chamber just recalled his evidence and then relied upon it.[634] This was manifestly insufficient, and an error.

263. Moreover, the Chamber repeats throughout the Judgement that Bockarie said that Mr. Taylor said to "use all means" to get to Freetown.[635] This was a mischaracteriation on the part of the Chamber. In fact, TF1-371 said that Bockarie said that Mr. Taylor said "we should by all means capture Freetown".[636] A small difference, but potentially significant in meaning.

264. It was not the only reasonable conclusion that the phrase "by all means" demonstrated Mr. Taylor intended or had an awareness of the substantial likelihood that crimes would be committed.[637] There is no evidence (nor any discussion) of what "by all means" meant to TF1-371, or was intended by Mr. Taylor to mean, or what it meant in this context. On the same day of testimony, TF1-371 had used the same phrase in an innocuous manner, testifying that "the mission was to meet Mr. Taylor by all means",[638] with no suggestion that this mission would employ violence to achieve its end. "We should by all means capture Freetown" could reasonably be understood as meaning "by all available military means" or "employ all available

[630] TT, TF1-371, 28 Jan 2008, p. 2413.
[631] Judgement, para. 220.
[632] Judgement, para. 221.
[633] Judgement, paras. 2367-73, 3091, 4123-5, 5384-5, 6548-52.
[634] Judgement, paras. 3114, 3117.
[635] Judgement, paras. 3117, 3130, 3611(vii), 6969.
[636] TT, TF1-371, 28 Jan 2008, p. 2413.
[637] Judgement, para. 6969.
[638] TT, TF1-371, 28 Jan 2008, p. 2374.

troops and materiel". These and other innocuous and reasonable interpretations were neither considered nor rejected by the Chamber, rendering unsafe the Chamber's inference that the phrase had an underlying criminal meaning.

265. In failing to make a *mens rea* finding for each of the 11 distinct crimes for which he was convicted, and in erroneously relying on vague references to past crimes and uncorroborated second-hand hearsay "instructions", the Chamber erred in concluding that Mr. Taylor either intended or was aware of the substantial likelihood that the crimes charged in Counts 1 to 11 of the Indictment would be committed.[639] The Chamber's failure to make *mens rea* findings invalidates the Judgement, and warrants a reversal of the convictions for planning the crimes committed during the attacks on Kono, Makeni and during the Freetown invasion and subsequent retreat.[640]

C. PART III: ERRORS WHICH INVALIDATE THE AIDING AND ABETTING CONVICTIONS

a. INTRODUCTION

266. The Chamber convicted Mr. Taylor for aiding and abetting all crimes committed by the RUF/AFRC between 1997 and 2002 on the basis that he provided military support to those organizations knowing that they had committed such crimes in the past, and would therefore probably do so again in the future. This conviction is based on (i) eliminating any requirement that the assistance be given for the purpose of assistance those crimes, rather than for some other purpose; (ii) deeming assistance to the continued existence of the organization as assistance to crimes committed by its members; and (iii) deeming knowledge of crimes to be satisfied by public reports thereof, including in the reports of human rights organizations.

267. The Chamber's reasoning criminalizes conduct that is widely regarded by States as not unlawful. The United States Government provided substantial military support to Yemen in 2009 and 2010 to eliminate safe havens for terrorist organizations at a time when its own Department of State and Human Rights Watch reported that its air force, army and police had probably engaged in indiscriminate targeting of civilians, unlawful killings, torture and arbitrary detention. Any American official with knowledge and decision-making authority over such assistance, based on the legal and evidential approach adopted by the Chamber, is guilty of aiding and abetting those crimes. The same situation would arise in many other States or armed

[639] Judgement, para. 6970.
[640] Judgement, paras. 6971, 6944(b).

groups in respect of which there are credible indications of recurring crimes – whether it be unlawful detention, torture, or indiscriminate targeting in armed conflict. Support to the rebels in Syria or Libya, or to the governments of Rwanda, Afghanistan, and Pakistan would, *prima facie*, be categorized as not just wrongful, but criminal.

268. This cannot be so. States do have the right to pursue national security interests by supplying materiel to the armed forces of a State or a party to an internal conflict, even if there is evidence of a recurring pattern of crimes committed by those armed forces. Behaviour of this sort is not prohibited as a matter of general public international law, and yet the Chamber seeks not only to make it wrongful, but to render any such action *criminal* under international criminal law. National courts would then have jurisdiction – indeed, an obligation – to prosecute such assistance as aiding and abetting.

269. Pronouncements of international courts are not directly binding on States, but do have substantial persuasive value in interpreting international customary law. The consequences of the Chamber's reasoning extend far beyond this specific case, or even the specific jurisdiction of the Court. This Special Court does have the authority, and the solemn responsibility, to articulate customary international law as it binds all States, and all individuals. Conversely, this Court has no authority to apply any law other than what has been properly established as a matter of customary international law.

270. The reasoning of the Chamber reflects a dangerous over-extension of international criminal law. That over-extension, which is based on no State practice and, indeed, is contradicted by widespread State practice, risks destroying international criminal law as a body of law that demands, and is based on, universal acceptance. International criminal law will simply be rejected by States with the power to control its jurisdiction, and imposed on those that do not. The legitimacy of international criminal law will be eroded, thus weakening its normative force in ongoing or future conflicts.

271. These are the larger issues underlying the specific errors identified in Part III. Ground 16 demonstrates that customary international law does not support a definition of aiding and abetting based purely on "awareness" or "knowledge" of the probability that, in the aggregate, the recipient of assistance will use some of the assistance in the commission of crimes. Grounds 17 through 20 show that the Chamber, even assuming that it was entitled to apply a "knowledge standard",

misapplied this standard to the evidence, or that it drew inferences that no reasonable trier of fact could have drawn from the evidence.[641] Grounds 21 through 34[642] identify the Chamber's errors in respect of the assistance allegedly provided by Mr. Taylor. Much of the assistance imputed to Mr. Taylor was based on findings that could not possibly have been reached by a reasonable trier of fact properly directing itself as to the evidence. Even assuming that those errors were not unreasonable, the assistance imputed to Mr. Taylor was too remote from the crimes to fulfil the *actus reus* of aiding and abetting – which requires that the assistance contribute substantially to the commission of the crime. The Chamber itself vacillated between attempting to establish that the assistance provided was used in crimes, and dispensing with the need for such findings. No reasonable trier of fact, properly applying the law, could have found that any of the alleged assistance provided had a substantial effect on the commission of any crime.

b. ERRORS RELATING TO THE MENTAL ELEMENT

i. GROUND OF APPEAL 16: The Trial Chamber erred in law in defining the *mens rea* of aiding and abetting as requiring no more than that an action is performed with an awareness of a substantial likelihood that the action would provide some "practical assistance" to a crime.

(i) Overview

272. The Chamber articulated and applied an erroneous *mens rea* standard of aiding and abetting. The Chamber held that the *actus reus* need be performed only with an "awareness" of the perpetrator's criminal intent. International practice and the domestic law of many states do not support such a standard. Although "knowledge" of the perpetrator's criminal intent is a necessary condition of aiding and abetting, it is not alone sufficient. Article 25(3)(c) of the Rome Statute, which was actively debated by State representatives, requires that the *actus reus* be performed "[f]or the purpose of facilitating" the principal's crime. The ICC standard, and the negotiations leading thereto, shows that the *opinio juris* of States does not favour mere knowledge of the perpetrator's intent as the *mens rea* of aiding. The Chamber erred not only as to the

[641] No separate arguments are presented in respect of Ground of Appeal 18, as those arguments are sufficiently expressed in the other Grounds concerning *mens rea*. The ground of appeal is nevertheless maintained on the basis of those arguments.

[642] Ground 35 is hereby withdrawn. No separate arguments are presented in respect of Ground of Appeal 34, as those arguments are sufficiently expressed in the other Grounds concerning *actus rea*. The ground of appeal is nevertheless maintained on the basis of those arguments.

standard applied: it erred by failing to even attempt to ascertain the *opinio juris* of States.

273. The Chamber committed a separate and independent error by applying a misconceived and erroneous version of "knowledge". The Chamber held that the aider and abettor need not have actual knowledge of the principal's intent in performing the *actus reus*, but could be found guilty based merely on knowledge of a "probability" of that intent. This approach derives from a misinterpretation of ICTY and ICTR jurisprudence, and is not reflected in the *opinio juris* of States.

274. Third, the Chamber erred on a more technical level by not defining the *mens rea* in relation to the *actus reus*. The *actus reus* as defined by the Chamber requires assistance that has a "substantial effect" on the commission of the crime, whereas the *mens rea* is defined in relation to assistance in any degree. If knowledge is the required *mens rea*, then the accused must know that his assistance will have a "substantial effect" on the commission of the crime, not merely that it would assist the crime to a lesser degree.

275. These errors, whether separately or together, invalidate the Chamber's conviction of Mr Taylor for aiding and abetting. Although the Appeals Chamber does have a discretion after correcting a legal error to assess whether the proper standard is met on the facts, no such assessment is possible in the present case. The Chamber made no factual findings showing that it would have convicted Mr. Taylor had it applied the correct standard; indeed, the Chamber's findings fall distinctly below that threshold. The only just remedy, given the gravity of the Chamber's error, is to quash all convictions based on aiding and abetting.

(ii) Standard Applied By the Trial Chamber

276. The Trial Chamber defined the *mens rea* of aiding and abetting as follows:

> i. The Accused performed an act with the knowledge that such act would assist the commission of a crime or underlying offence, or that he was aware of the substantial likelihood that his acts would assist the commission of underlying offence; and
> ii. The Accused is aware of the essential elements of the crime committed by the principal offender, including the state of mind of the principal offender.[643]

277. This formulation therefore addresses knowledge in respect of two different states: (i) the assisting character of one's own acts (at least "aware[ness] of the

[643] Judgement, para. 486.

substantial likelihood"); and (ii) the principal's acts and intentions ("aware[ness]"). Logically speaking, of course, the former could not arise without the latter.

278. The Chamber found that Mr. Taylor "knew that his support to the RUF/AFRC would provide practical assistance, encouragement or moral support to them in the commission of crimes in the course of their military operations in Sierra Leone"[644] and that he "was aware of the 'essential elements' of the crimes he was contributing to, including the state of mind of the perpetrators."[645] The Chamber deemed this knowledge and awareness was continuous in respect of any and all of Mr. Taylor's acts from August 1997 onwards, as the Trial Chamber found:

> The sole reasonable inference to be drawn from this evidence is that as early as August 1997, the Accused as President of Liberia and a member of the ECOWAS Committee of Five, was informed in detail of the crimes committed by the AFRC/RUF members during the Junta period, including murder, abduction of civilians including children, rape, amputation and looting. He would therefore have been aware of the likelihood that the AFRC/RUF would commit similar crimes in the future.[646]

279. It is said to have been "public knowledge" "after 1997" that AFRC/RUF forces were committing crimes,[647] and that Mr. Taylor by his own admission knew, by April or July 1998, that the AFRC/RUF had an "operational strategy and intent to commit crimes."[648]

(iii) The Trial Chamber Erred In Applying Mere "Awareness", Or Knowledge, As a Sufficient Mental State For Accessorial Liability

(a) The Law To Be Applied By the Special Court, Including Modes of Liability, Is Jurisdictionally Limited By Customary International Law

280. This Court is jurisdictionally limited to applying modes of liability established as a matter of customary international law.[649] As explained by the ICTY Appeals Chamber in respect of its own Statute:

> The scope of the Tribunal's jurisdiction *rationae materiae* may therefore be said to be determined both by the Statute, insofar as it sets the jurisdictional framework of the International Tribunal, and by customary international law, insofar as the Tribunal's power to convict an accused of any crime listed in the Statute depends on its existence *qua* custom at the time this crime was allegedly committed.... [T]he principle of legality demands that the Tribunal shall apply the law which was binding upon individuals at the

[644] Judgement, para. 6949.
[645] Judgement, para. 6950.
[646] Judgement, para. 6882.
[647] Judgement, para. 6883.
[648] Judgement, para. 6885.
[649] *AFRC* Indictment Decision and Order, para. 24.

> time of the acts charged. And just as is the case in respect of the Tribunal's jurisdiction *rationae materiae*, that body of law must be reflected in customary international law.[650]

281. The Secretary-General, in his Report preceding the adoption of the ICTY Statute, declared that "the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are *beyond any doubt part of customary law* so that the problem of adherence of some but not all States to specific conventions does not arise."[651] The Secretary-General's report on the creation of this Court reflects the same principle, noting for example that a particular version of conscription or enlistment of children had been excluded from the Statute because of its "doubtful customary nature."[652] These declarations reflect the intent of the Security Council that this Court be jurisdictionally limited to applying only such law as meets the threshold for recognition in customary international law.

282. This is no formality. The jurisprudence of this Court, as well as the other United Nations or hybrid tribunals, is of "persuasive value" in defining customary international law.[653] States and their leaders are not directly bound by pronouncements of this Court, but this Court's pronouncement are a persuasive indication of the content of the law by which they are bound. Every such pronouncement is important given that this a "unique, and still emerging" body of law, with potentially grave consequences for those who would violate it.[654] It follows that States, as subjects of that law and as the sponsors of this institution, have the right to insist that this Court adhere strictly to the law as it is, and to follow the established principles for the elaboration of this law.

283. International criminal law, as is well-established, is determined according to customary international law. A legal principle or standard, according to the ICTY Appeals Chamber, may be recognized only if a court is "satisfied that State practice recognized the principle on the basis of supporting *opinio juris*" of States.[655] This

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[650] *Milutinović* JCE Decision, paras. 9-10.
[651] U.N. Secretary General, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993, para. 34 (italics added).
[652] U.N. Secretary General, Report of the Secretary General on the Establishment of a Special Court for Sierra Leone, S/2000/915, 4 October 2000, paras. 12 and 18.
[653] *AFRC* Indictment Decision and Order, para. 25.
[654] *AFRC* Indictment Decision and Order, para. 22.
[655] *Hadžihasanović* Command Responsibility, para. 12. See *Tadić* Jurisdiction Decision, para. 133 (referring to *opinio juris* on the issue of whether criminal responsibility arises for violations of

must be "always ascertain[ed]."[656] Courts are, of course, entitled to rely on their own previous jurisprudence insofar as they have already properly ascertained the state of customary international law, or to determine whether to apply a recognized principle to a novel situation;[657] but any *modification* of a previously-ascertained standard must, in principle, be verified on the basis of customary international law. As explained in the ICC Statute: "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."[658]

284. Customary international law is established with reference to the practice and "*opinio juris*" of States. *Opinio juris*, as explained in the ICJ in the *North Sea Continental Shelf Case*, is determined by examining the practice of States, and States' understanding of that practice: "[n]ot only must the acts concerned amount to settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."[659] One ICTY Appeals Chamber Judge has stated in relation to criminal law that "state practice has to be virtually uniform, extensive and representative."[660] This high standard reflects the unique character of international law, whose binding character derives from the consent of its subjects. This is as much true for international criminal law as any other branch of international law.

285. The requirement that a legal standard be recognized in customary international law is not just a question of jurisdiction or institutional integrity. Article 15(1) of the International Covenant on Civil and Political Rights enunciates that "[n]o one shall be held guilty of any criminal offence on account of an act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed." International criminal law incorporates this right.[661] Fundamental fairness requires not only that the prohibition have existed at the time of the alleged

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international humanitarian law in respect of internal armed conflicts); *Tadić* AJ, para. 223 (referring to *opinio juris* to determine the existence of "joint criminal enterprise" liability).

[656] *Galić* AJ, para. 85 ("while binding conventional law that prohibits conduct and provides for individual criminal responsibility could provide the basis for the International Tribunal's jurisdiction, in practice the International Tribunal always ascertains that the treaty provision in question is also declaratory of custom.")

[657] *Hadžihasanović* Command Responsibility Decision, para. 12.

[658] Rome Statute, Art. 22(2).

[659] *North Sea* Judgement, para. 77.

[660] *Dragomir Milošević* Dissenting Opinion, para. 6 (partly dissenting opinion, but not on this point).

[661] *Galić* AJ, para. 71.

crime, but also that it was "sufficiently accessible and foreseeable" to an accused.[662] These concepts collectively constitute the principle of *nullum crimen sine lege*.

286. *Nullum crimen sine lege* and customary international law require clarity and consensus. The absence of consensus does not mean that a Chamber may simply override significant State opinion to the contrary – that would run directly contrary to the foregoing definition of *opinio juris*. This raises a theoretical difficulty in the realm of criminal law. Assume that all States recognize a mode of liability, but differ significantly as to its constituent elements. The doctrine of *opinio juris* does not compel the absurd result that no mode of liability may be recognized; the principle requires instead that no standard may be adopted that does not lead unanimously to the same result notwithstanding the difference of standards.

287. Curial discussions of customary international law, reflecting the importance of this threshold, are often extensive and refer to the practice of many States.[663] The seminal *Tadić* Appeal Judgement, to take but one example, ascertained the doctrine of joint criminal enterprise based on three indicators of State practice: post-World War II caselaw of quasi-international courts; a multi-lateral treaty; and the ICC Statute.[664] National law was also referred to in that Judgement to explain and elucidate these three indicators of customary international law.[665]

288. International criminal law therefore requires international judges to depart from the method familiar to common law judges in at least two ways. First, a doctrine of liability or criminal norm can be recognized for the first time, only if its existence is reflected in the practice and *opinio juris* of States. Every doctrine of liability or criminal norm must be confirmed as existing in customary international law.[666] Second, although an international court is not obliged to mechanically re-establish the customary foundation of the principle every time it is applied,[667] such independent

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[662] *ECCC* JCE Decision, para. 45; *Milutinović* JCE Decision, paras. 39-43. *Vaslijević* TJ, para. 193 ("[f]rom the perspective of the *nullum crimen sine lege* principle, it would be wholly unacceptable for a Trial Chamber to convict an accused person on the basis of a prohibition which, taking into account the specificity of customary international law and allowing for the gradual clarification of the rules of criminal law, is either insufficiently precise to determine conduct and distinguish the criminal from the permissible, or was insufficiently accessible at the relevant time.")

[663] See e.g. *Galić* AJ, paras. 86-98; *Bagosora* AJ, para. 729.

[664] *Tadić* AJ, paras. 194-223.

[665] *Tadić* AJ, para. 225.

[666] *Hadžihasanović* Command Responsibility Decision, para. 44.

[667] The *Krajišnik* Appeals Chamber, for example, declined to re-evaluate whether JCE principles complied with customary international law because "JCE counsel fail to address the jurisprudence holding that the notion of JCE as established in Tadić does not violate the *nullum crimen sine lege* principle." *Krajišnik* AJ, paras. 669-70.

verification is necessary whenever (i) a party brings new evidence that a previously ascertained standard does not comply with customary international law,[668] or (ii) when a standard or concept is being significantly modified or extended. Many examples of this independent verification are to be found in the jurisprudence of the ICTY when existing principles were sought to be modified or extended, including: (i) whether customary international law permits a superior to be responsible for failing to punish crimes committed before he or she assumed effective control of a perpetrator ("no");[669] (ii) whether a crime committed pursuant to a JCE may be committed by someone who is used by, but not a part of, the JCE ("yes");[670] (iii) the application of JCE liability for crimes that are a foreseeable result, but not specifically contemplated by, the common purpose of a JCE ("yes" at the ICTY and ICTR, "no" at the ECCC);[671] (iv) whether the previously-decided pain threshold for torture was correct in light of the practice to the contrary by only one State ("yes");[672] and (v) whether unlawful targeting of civilians arises even in the absence of a showing of death, serious injury, or other negative effects ("no").[673] Though the answer in every one of these cases, applying a purely common law approach, could have been "yes", customary international law, in some cases, dictated a different outcome. The Appeals Chamber of the ICTY, in light of this possibility, has been particularly alert to the need to re-evaluate any new indications of customary international law when raised by the parties.[674]

289. Customary international law sets the parameters not only for the definition of crimes but also the definition of modes of criminal responsibility. The seminal *Tadić* decision concerned modes of responsibility. The ICTY, ICTR and ECCC have developed their conceptions of "commission" and "superior responsibility" only subject to verification with customary international law.[675]

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[668] This was notably the case in *Hadžihasanović* Command Responsibility Decision, where the Chamber noted that the ICC Statute "necessarily excludes criminal liability" on the question before it, and embarked on a full-scale consideration of the matter according to customary international law, para. 46.
[669] *Hadžihasanović* Command Responsibility Decision, paras. 44-6.
[670] *Brđanin* AJ, paras. 393-410.
[671] *ECCC* Decision on Applicability of JCE, para. 38.
[672] *Brđanin* AJ, paras. 244-252.
[673] *Kordić & Čerkez* AJ, paras. 47-68 (finding customary international law to be "unsettled").
[674] *Delalić* AJ, paras. 151-73 (extensively reconsidering, based on the the Defence's arguments, whether Common Article 3 gave rise to individual criminal liability in customary international law).
[675] *Tadić* AJ, para. 194 ("However, the Tribunal's Statute does not specify (either expressly or by implication) the objective and subjective elements (actus reus and mens rea) of this category of collective criminality. To identify these elements one must turn to customary international law.

(b) Customary International Law Reflects No Aiding and Abetting Liability Based on an Actus Reus Performed With Anything Less Than Purpose

290. The Appeals Chamber of the Special Court has never conducted its own analysis of the proper elements of aiding and abetting, let alone conducted any analysis of customary international law. The pronouncement in the *Brima* case cites to just two ICTY Appeal Judgements, neither of which could be properly described as the leading cases on the subject.[676] The *Fofana* and *Sesay* Judgements merely advert briefly to the pronouncement in *Brima* with no further analysis.[677] This Chamber, notwithstanding the provisions of Article 20(3) of the Statute, has an overriding jurisdictional obligation to assure itself that the law it applies meets the threshold of customary international law.[678] The issue now raised is therefore a matter of first impression for this Court.

291. No practice or *opinio juris* of States has crystallized around the *mens rea* standard applied by the Chamber, namely that the aider and abettor perform the *actus reus* with no more than *awareness* that it assists – or even just *may* assist – the perpetrator. The clearest indication of an absence of practice and *opinio juris* is the ICC Statute's provision on aiding and abetting, Article 25(3)(c):

> 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: ...
> (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.

As made clear by the first ICC decision to interpret this provision, "article 25(3)(c) of the Statute requires that the person act with the purpose to facilitate the crime; *knowledge is not enough for responsibility under this article.*"[679]

Customary rules on this matter are discernible on the basis of various elements: chiefly case law and a few instances of international legislation")(JCE I); *Milutinović* JCE Decision, paras. 9-44 (JCE I); *Brđanin* AJ, paras. 393-410 (JCE I); *ECCC* Decision on Applicability of JCE (JCE III); *Hadžihasanović* Command Responsibility Decision, paras. 10-51 (superior responsibility); *Delalić* AJ, paras. 220-241 (defining the minimum *mens rea* of superior responsibility).

[676] *AFRC* AJ, para. 243; citing *Blaškić* AJ, para. 50 and *Simić* AJ, para. 86.

[677] *CDF* AJ, paras. 366-7; *RUF* AJ, para. 546.

[678] *AFRC* Indictment Decision and Order, paras. 24-25 ("Like the Special Court, the ICTYand the ICTR are bound to apply customary international law .... It is for this reason that this court applies persuasively decisions taken at the ICTY and ICTR .... The Chamber will, however, where it finds it necessary or particularly instructive, conduct its own independent analysis of the state of customary international law or a general principle of law.")

[679] *Mbarushimana* Confirmation Decision, para. 274 (italics added).

292. The salient issue, it must be recalled, is not whether Article 25(3)(c) declares customary international law; the issue, 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. Article 25(3)(c) decisively indicates that the knowledge standard does not, and did not from 1996 through 2002, have the required support in State practice and *opinio juris* to be recognized as customary international law.

293. First, there is no indication that Article 25(3)(c), unlike some other provisions,[680] deviated from a well-established customary international law norm. The general significance of the ICC Statute has been aptly described by the ICTY Appeals Chamber, specifically in the context of modes of liability:

> As for the Rome Statute, it is still [in 1998] a non-binding international treaty (it has not yet entered into force.) It was adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference and was substantially endorsed by the General Assembly's Sixth Committee on 26 November 1998. In many areas the Statute may be regarded as indicative of the legal views, i.e. *opinio juris* of a great number of States.... Depending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallize them, whereas in some areas is creates new law or modified existing law. At any event, the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States.[681]
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> ...
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> [T]he [Rome] Statute is still a non-binding international treaty, for it has not yet entered into force. Nevertheless, it already possesses significant legal value. The Statute was adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference and was substantially endorsed by the Sixth Committee.... This shows that that text is supported by a great number of States and may be taken to express the legal position i.e. *opinio juris* of those States. This is consistent with the view that the mode of accomplice liability under discussion [JCE] is well-established in international law and is distinct from aiding and abetting.[682]
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> ...
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> In fact, there are indications that militate against the existence of a customary rule [imposing superior responsibility for failure to punish crimes committed prior to the assumption of effective control over the subordinate]. For example, Article 28 of the Rome Statute of the International Criminal Court provides that.... Under the Rome Statute, therefore, command responsibility can only exist if a commander knew or should have known that his subordinates were committing crimes, or were about to do so. This language necessarily excludes criminal liability on the basis of crimes

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[680] Cassese, Antonio, *International Criminal Law*, Oxford University Press (Oxford, 2nd ed., 2008), p. 279 (arguing that the inclusion of a defence of mistake of law arising from superior orders as a defence to war crimes deviates from well-established customary international law).
[681] *Furundžija* TJ, para. 227.
[682] *Tadić* AJ, para. 223.

> committed by a subordinate prior to an individual's assumption of command over the subordinate.[683]

294. Even if there could be some doubt as to whether Article 25(3)(c) is declarative of customary international law, the provision strongly negates that there is State practice or *opinio juris* in favour of a *mens rea* standard based purely on knowledge. States were fully aware during the negotiation of Article 25(3)(c) that the knowledge standard was one of the options available. Working drafts contained the alternative words "[intent]" and "[knowledge]" until late in the negotiations.[684] The final wording of Article 25(3)(c), as participants have confirmed, reflected a compromise between these two positions. Even a fierce advocate of the knowledge standard admits that this is precisely what occurred:

> It was a very contentious provision, with some delegations seeking explicit reference to intention, notwithstanding the important complication that the word "intention" has different meanings in different legal systems.... Other delegations were wedded to the term "knowledge," believing that it better reflected the standard that was employed in their national practice and that had been endorsed in the [international] jurisprudence.... Negotiators struggled to find compromise wording and ultimately settled on using neither "intent" nor "knowledge" but "purpose."[685]

295. The origin of the compromise wording is well-known. As another participant in the negotiations has written: "[t]he expression 'for the purpose of facilitating' is borrowed from the Model Penal Code" of the United States.[686] That provision, in order to understand the origin of the language adopted in the ICC Statute, provides:

> 2.06(3) A person is an accomplice of another person in the commission of an offense if:
> (a) with the purpose of promoting or facilitating the commission of the offence, he ...
> (ii) aids or agrees or attempts to aid such other person in planning or committing it.[687]

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[683] *Hadžihasanović* Command Responsibility Decision, para. 46

[684] Bassiouni, M. C., *The Legislative History of the International Criminal Court*, v. II, Transnational Publishers (Ardsley,,2005), p. 194.

[685] Brief of David J. Scheffer, *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 131 S. Ct. 79 (2010), No. 09-1262, On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit, 19 May 2010, ("Scheffer Brief") p. 12. One author claims that the provision ultimately adopted was "borrowed" from the Model Penal Code: K Ambos 'Article 25' in O. Triffterer, ed., *Commentary on the Rome Statute*, Beck (Munich 2nd edn, 2008) ("Ambos Article 25 – Triffterer"), p. 757.

[686] Ambos Article 25 – Triffterer, p. 757. *Mbarushimana* Transcript, p. 5 ("I was a part of the German delegation in Rome and I was participating in the working group of general principals which negotiated, among others, this provision.") See M. E. Badar, The Mental Element in the Rome Statute Of the International Criminal Court: A Commentary From a Comparative Criminal Law Perspective, 19 (3-4) Criminal Law Forum 473, 507.

[687] United States Model Penal Code, § 2.06(3)(a)(ii).

The Model Penal Code defines "purpose" in the following manner: "A person acts purposely with respect to a material element of an offence 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."[688] Though the aider and abettor need not intend the crime itself, the accused must at least undertake his actions with the "conscious object" of "promoting or facilitating" the offence by the perpetrator.

296. One eminent English commentary assists in understanding the policy implications underlying the "purpose" requirement:

> the "knowledge" standard "would also lead to the conviction of a shopkeeper who knows that his customer plans to use a certain item for a crime and who nevertheless sells the item, and it is dissatisfaction with this outcome which led the framers of the American Model Penal Code to impose the more stringent requirement that the accomplice should have acted with the purpose of promoting or facilitating the offence. The effects of that narrower doctrine is to ensure that citizens are not treated as their fellow citizens' keepers, a sturdy individualist approach.[689]

297. Article 25(3)(c) of the ICC Statute must also be viewed in conjunction with Article 30(1), which provides that "unless otherwise provided" a person is criminally responsible "only if the material elements are committed with intent and knowledge." The unanimous view of commentators and the one judicial pronouncement on the issue confirms that the default standard of Article 30 is elevated by the purpose standard of Article 25(3)(c).[690]

298. No other State practice or *opinio juris* demonstrates that the international community has accepted that mere knowledge suffices for the *mens rea* of aiding and

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[688] United States Model Penal Code, § 2.02(2)(a).

[689] Ashworth, A., *Principles of Criminal Law,* Oxford University Press (Oxford 2009), p. 417.

[690] *Mbarushimana* Confirmation Decision, para. 274 ("knowledge is not enough for responsibility under this article"); A. Eser, "Individual Criminal Responsibility" in A. Cassese, P. Gaeta, J. Jones, *The International Criminal Court: A Commentary*, Oxford University Press (Oxford, 2009), p. 801 (the purpose requirement "means more than the mere knowledge that the accomplice aids the commission of the offence"); Ambos Article 25 – Triffterer, p. 757; B. Goy, "Individual Criminal Responsibility Before The International Criminal Court: A Comparison With the *Ad Hoc* Tribunals," 12 International Criminal Law Review (2012), 1, 63 (Article 25(3)(c) "introduces a subjective threshold which goes beyond the subjective elements required by Article 30 ICC Statute"); M. E. Badar, The Mental Element in the Rome Statute Of the International Criminal Court: A Commentary From a Comparative Criminal Law Perspective, 19 (3-4) Criminal Law Forum 473, 507; S. Finnin, "Mental Elements Under Article 30 of the Romes Statute of the International Criminal Court, 61(2) International Criminal Law Quarterly p. 325, 357; K. Heller, "The Rome Statute of the International Criminal Court," in Heller, K. and Dubber, M., *The Handbook of Comparative Criminal Law*, Stanford University Press (Stanford, 2011), p. 608.

abetting. Article 16 of the ILC's Draft Articles on Responsibility for Internationally Wrongful Acts provides that a State may be responsible for the acts of another State when it "aids or assists another State in the commission of international wrongful act with knowledge of the circumstances of the internationally wrongful act." The Commentary expressly states, however, that the assistance, in addition to being given with knowledge, must be given "with a view to facilitating commission of that act":

> First, the relevant State organ or agency providing aid or assistance must have been aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act....[691]

299. Even though this provision is directed at State responsibility, it is analogous for purposes of individual responsibility to aiding and abetting. States would not likely have intended a lower *mens rea* standard for the imposition of criminal liability on, for example, a head of State, than the standard for holding the State itself responsible to pay, for example, compensation.

300. The ILC's 1996 Draft Code of Crimes does propose a "knowingly" standard for the *mens rea* of aiding and abetting, but this Code was never adopted or even negotiated directly by States. Indeed, at the very moment the Draft was adopted, States were directly negotiating the ICC Statute. Those negotiations, the signatures on the treaty, and its subsequent ratification by more than 120 States is a far stronger indication of State practice, and constitutes a direct repudiation of the proposal in the 1996 Draft Code.

301. The Chamber relied on ICTY caselaw in applying a knowledge standard for the *mens rea* of aiding and abetting. The Defence respectfully submits that this caselaw is manifestly incorrect and requests that this Appeals Chamber exercise its authority to independently evaluate the content of the customary international law in respect of aiding and abetting.

302. The first ICTY judgement to address aiding and abetting in any depth – the *Furundžija* Trial Judgement – was decided six months after the signing of the ICC Statute.[692] Yet that Judgement makes no reference to Article 25(3)(c) of the ICC

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[691] ILC Draft Articles on State Responsibility, p. 66. See also, Crawford, James, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002).

[692] The *Furundžija* Trial Judgement discussion has frequently been relied upon in ICTY and ICTR appeals jurisprudence in lieu of any independent inquiry into the state of customary international law. See e.g. *Aleksovski* AJ, para. 162; *Krnojelac* AJ, para. 51; *Krstić* AJ, para. 140; *Mrkšić* AJ, para. 159. The *Krstić* Judgement does offer a brief discussion of the state of customary law, but only in the context of determining whether a person accused of aiding and abetting genocide must share the

Statute to determine the proper *mens rea* of aiding and abetting. Such a glaring oversight in a Judgement that has been repeatedly cited as the basis of subsequent ICTY caselaw, in itself, should provoke close scrutiny of the correctness of that decision.

303. The *Furundžija* Trial Judgement relies on three sources to reach its determination about the *mens rea* of aiding and abetting: (i) the ILC's 1996 Draft Code of Crimes; (ii) Article 30 of the ICC Statute and (iii) four post-World War II cases. None of these sources, taken alone or cumulatively, supports a knowledge standard for the *mens rea* of aiding and abetting.

304. The first two sources relied on by the Chamber have already been discussed. The Draft Code is of little weight given its direct repudiation by Article 25(3)(c) of the ICC Statute. Article 30 is only a default rule and yet, astonishingly, the Trial Chamber relies on that provision without regard to the elevated *mens rea* expressly set out in Article 25(3)(c). Even though the *Furundžija* Chamber did not at that time have the benefit of the *Mbarushimana* Confirmation Decision or the academic commentary, it is hard to understand how it could have ignored, to the point of not even mentioning, the requirement in Article 25(3)(c) that aiding and abetting be performed "for the purpose of facilitating the commission of such a crime...." The Chamber thus proceeded to find that the applicable *mens rea* for aiding and abetting was "knowledge that these acts assist the commission of the offence."[693]

305. The *Furundžija* Chamber purports to find this standard in Word War II cases, but its discussion is manifestly incorrect, incomplete and insufficient to establish State practice and *opinio juris*. In fact, none of the four cases relied on by the Chamber were before an international bench. The conviction relied upon in the *Einsatzgruppen* case, heard by a U.S. court, referred not only to the accused's knowledge of the principal's criminal intent, but also explains that "[h]e was an active leader and commander."[694] The *Zyklon B* case, before a British tribunal, did turn primarily on the issue of knowledge, but this was because the accused had pleaded that he had no relevant knowledge, thus rendering all other issues superfluous. The court's decision was two lines long, neither of which addresses the standard of aiding and abetting

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genocidal intent. The discussion, oriented to that specific question, does not address Article 25(3)(c) of the Rome Statute or other indications in customary international law that "purpose" is the requisite standard.

[693] *Furundžija* TJ, para. 249.

[694] *Ohlendorf* Judgement, p. 569.

applied.[695] The *Schonfeld* case, also before a British court, does confirm that actual knowledge of the principal's criminal intent is a necessary condition of liability, but says nothing about whether it is sufficient.[696] The final case, *Hechingen*, before a German court, actually rejects the knowledge standard. On appeal the court held that an accessory must share the perpetrator's *mens rea*.[697] These four cases are not, on any proper construction, indicative of any State practice or *opinio juris* remotely approaching the threshold necessary for recognition of customary international law. Half of the cases cited – *Einstzgruppen* and *Hechingen* – are ambiguous, and one quarter are actually contrary to the proposition in question. The larger methodological deficiency, however, is that three verdicts by national military courts cannot on any proper view be accepted as a basis for determining international criminal law.

306. The *Furundžija* Chamber's discussion of that jurisprudence was, in any event, incomplete. A United States military court in the *Ministries Case*, in a declaration of striking relevance to the present case, acquitted a banker, Karl Rasche, of aiding and abetting enslavement and other crimes notwithstanding that he had loaned money to the SS in full knowledge that the money would be used for business operations applying those practices:

> 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[e] the funds in financing enterprises which are employed in using labor in violation of either national or international law? .... 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.[698]

307. The ICTY Appeals Chamber, possibly recognizing the incompleteness of the standard adopted in *Furundžija*, soon thereafter added an element to the requirements

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[695] *Tesch* Judgement, pp. 93, 100-101, 102.

[696] *Schonfeld* Judgement, p. 64. In any event, the "Notes" accompanying the case suggest, at page 72, that the court made no real effort to apply international law, but instead relied upon English law.

[697] A. Cassese, G. Acquaviva, M. Fan, A. Whiting, eds., *International Criminal Law: Cases and Commentary*, Oxford University Press (Oxford 2011), pp. 382-386; A. Cassese, "Modes of Participation in Crimes Against Humanity," *Journal of International Criminal Justice*, Vol. 7, pages 131-154 (2009).

[698] A. Cassese, G. Acquaviva, M. Fan, A. Whiting, eds., *International Criminal Law: Cases and Commentary*, Oxford University Press (Oxford 2011), pp. 382-386; A. Cassese, "Modes of Participation in Crimes Against Humanity," *Journal of International Criminal Justice*, Vol. 7, page 389 (2009). *Weizsaecker* Judgement, p. 622.

for aiding and abetting: the assistance must be "*specifically directed* to assist, encourage or lend moral support to the perpetration of a certain specific crime."[699] The Appeals Chamber did not at first say whether this requirement should be part of the *mens rea* or *actus reus*, though it was later categorized as falling under the rubric of *actus reus*.[700]

308. The similarity of "specifically directed" or "specifically aimed" and "purpose" is evident. One could not, for example, assess whether selling a gun to someone was "specifically aimed" at the commission of an offence without considering the mental state of the seller. Regardless of whether the concept is formally categorized as part of *actus reus* rather than *mens rea*, there is no gainsaying its resemblance to "for the purpose of facilitating". Perhaps not coincidentally, although the *Furundžija* Trial Judgement had made no reference to Article 25(3)(c) of the ICC Statute in its discussion of *mens rea*, there was such a reference in relation to *actus reus*.[701] The similarity of "specifically aimed" and "purpose" is illustrated in the *Blagojević* Appeal Judgement, where the evidence was found to foreclose the possibility that the accused's "acts were directed towards another goal."[702] For as long as the "specifically aimed" requirement remained part of the ICTY's standard of *actus reus* for aiding and abetting, it provided a rough equivalent to the "purpose" requirement in Article 25(3)(c) in the ICC Statute.

309. That situation arguably changed in 2009 when the ICTY Appeals Chamber, in the context of aiding and abetting by omission, departed from its previous jurisprudence and announced that "'specific direction' is not an essential ingredient of the *actus reus* of aiding and abetting."[703] The *Mrkšić* bench, with one dissent, held

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[699] *Tadić* AJ, para. 229 (italics added).

[700] See e.g. *Ntagerura* AJ, para. 370 ("to establish the material element (or actus reus) of aiding and abetting under Article 6(1) of the Statute it must be proven that the aider and abettor committed acts *specifically aimed* at assisting...") (italics added); *Nahimana* AJ, para. 482 ("The *actus reus* of aiding and abetting is constituted by acts or omissions *aimed specifically* at assisting ....") (italics added); *Seromba* AJ, para. 44 ("to establish the *actus reus* of aiding and abetting under Article 6(1) of the Statute, it must be proven that the alleged aider and abettor committed acts *specifically aimed* at assisting....") (italics added); *Muvunyi* AJ, para. 79 ("an aider and abettor carries out acts *specifically directed* to assist....") (italics added);

[701] *Furundžija* TJ, para. 231. Although the "specific direction" requirement was not adopted in that Judgement, two of the judges sitting in that case later sat on the appeals bench in the Tadić case that did adopt the "specific direction" requirement.

[702] *Blagojević* AJ, para. 223.

[703] *Mrkšić* AJ, para. 159. The Appeals Chamber claimed that it was merely relying on a pronouncement in Blagojević, although this claim, at the least, debatable and had no impact on the outcome of that case. Mrškić constitutes the first deviation from the "specific direction" requirement. See e.g. *Perišić* Dissenting Opinion, para. 9.

that the *actus reus* would be satisfied whenever acts "assist, encourage or lend moral support to the perpetration of a specific crime, and which have a substantial effect upon the perpetration of a crime."[704]

310. The ICTY Appeals Chamber, in purporting to abandon the "specifically directed" and "specifically aimed" language, failed to analyze whether this complied with customary international law. Curiously, this innovation has not yet been adopted by the ICTR Appeals Chamber, which has continued, notwithstanding *Mrkšić* to reaffirm the "specifically directed" and "specifically aimed" language.[705] Even the *Perišić* Trial Judgement returned to the formulation, albeit removing the "specifically" from the requirement that acts be "directed at" assisting the crime.[706]

311. The overall position, notwithstanding the isolated deviation reflected in *Mrkšić*, is that a concept analogous to "purpose" has usually been recognized in the jurisprudence of the ICTY and ICTR, albeit by way of a "specific direction" element. Special Court jurisprudence has also consistently adopted and applied the "specific direction" requirement.[707]

312. The Chamber's finding that the "*actus reus* of aiding and abetting does not require 'specific direction'"[708] is therefore wrong for two reasons. First, as a matter of jurisprudence and Article 20(3) of the Statute, it failed to be guided by the law that continues to prevail at the ICTR Appeals Chamber. Second, adopting a pure knowledge standard has no justification in customary international law. Indeed, no attempt has ever been made to properly justify it as a matter of customary international law. The Chamber was bound to do so.

313. The domestic practice of States is not directly indicative of State practice, but it can assist in understanding State practice. The *Tadić* Appeals Judgement, for example, reinforced its findings on JCE on the basis "that the notion of common

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[704] *Mrkšić* AJ, para. 81. Judge Vaz did not specifically dissent on this point, but since she disassociated herself from all findings on *mens rea* and *actus reus*, it cannot be stated whether she supported the abandonment of the specific direction requirement.

[705] *Ntawukulilyayo* AJ, para. 214 ("Chamber recalls that the *actus reus* of aiding and abetting is constituted by acts or omissions specifically aimed at assisting, encouraging, or lending moral support to the perpetration of a specific crime") (December 2011); *Kalimanzira* AJ, para. 86 ("The Appeals Chamber has explained that an 'aider and abettor commits acts *specifically aimed* at assisting....") (italics added); *Rukundo* AJ, para. 52 ("an 'aider and abettor commits acts specifically aimed at assisting ...") (italics added).

[706] *Perišić* TJ, para. 126. The ICTY Appeals Chamber has also used the expression "directed" in *Orić* and *Simić* , but the prevailing formulation is with the adjective "specifically": *Simić* AJ, para. 85; *Orić* AJ, para. 43.

[707] *RUF* TJ, para. 277; *CDF* TJ, para. 229.

[708] Judgement, para. 484.

purpose upheld in international criminal law has an underpinning in many national systems."[709]

314. The domestic practice of States provides similar assistance in respect of the purpose standard of aiding and abetting adopted in the ICC Statute. German doctrine applies a higher standard than mere awareness or knowledge. The elevated *mens rea* standard emerges with particular clarity in respect of "*neutral*" vocational conduct ("*berufstypisches Verhalten*") that the recipient/perpetrator can use either lawfully or unlawfully. The accused will only be liable as an aider and abettor if he has a supplementary, heightened intent amounting to "solidarity with the principal offender". The doctrine is illustrated by the case of two former East German deputy border commanders charged with aiding and abetting crimes for their alleged contribution to the placement of mines along the border. The German Federal Court of Justice (BGH) dismissed the charges:

> [T]he BGH has established the following principles in cases of vocation-specific ("*berufstypisch*") 'neutral' acts: If the acts of the principal offender are solely aimed at a criminal act, and the person assisting him knows this, then the assistance should be regarded as aiding and abetting. Under these circumstances, his acts lose the ordinary, everyday character and should instead be viewed as solidarity with the principal offender. Otherwise, the assistance is not unlawful. The annual orders [by the border commander] did not solely concern criminally relevant conduct in relation to the border crossing, but also legitimate matters of national security of the former DDR, as well as external border protection. The contribution of the two accused to the issuance of order no. 40 was limited to their military tasks which had been delegated to them, and which were not connected to the laying of mines along the border. The contribution was therefore vocation-specific and, in relation to the crimes, 'neutral'. Although the accused knew that the annual orders also included directions about the laying, maintenance and operation of mines, their own contributions had an independent meaning. They remained relevant without the unlawful acts of the principal offenders and can be legally evaluated independently from those acts. In light of these facts, the conduct of the accused in relation to the giving of the annual orders did not unlawfully contribute to the crimes.[710]

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[709] *Tadić* AJ, para. 225.

[710] German Federal Court of Justice (BGH), Case No. 4 StR 453/00, Judgement of 8 March 2001, p. 10. See also I. Strafsenat Urteil vom 14. November 1904 g. B. u. Gen. Rep. 1178/04, pp. 323-324 (acquitting a lawyer who had given incorrect advice to the wife and son of a prison inmate on furlough that they were legally permitted to assist his escape: "To establish knowledge (*Wissentlichkeit*) equivalent to intention (*Vorsätzlichkeit*) it is not sufficient that the aider is aware that the perpetrator intends to commit the relevant offence. For the subjective element of the offence it is necessary that the perpetrator gives his help and advice in the knowledge that through his acts the commission of the offence intended by the principal offender is furthered, and that thereby also the intention (*Wille*) of the person giving advice is directed towards this commission (*Erfolg*).... If the lawyer ... intends nothing more than to give his professional and advice in accordance with his duty, and he is aware that his expert opinion leads to the commission of an offence, but his intention (*Wille*) has nothing to do with the consequence of his legal advice, then knowing/deliberate (*wissentlichen*) aiding is out of the question. But if his conscious and deliberate/intentional acts (*Geistes und Willenstätigkeit*) are not only

315. German doctrine is influential amongst other modernized civil law jurisdictions, and may have had some impact on the position in French and Italian courts requiring that an accessory have acted "together and in concert" with the perpetrator.[711] Italy notably requires for accessorial liability "that each of them has acted for a purpose with a unitary awareness of the role played by others and their will to act in common."[712] Opinions appear to diverge in Poland, but at least one leading commentary on the new criminal code argues that purpose is required.[713]

316. Standards vary dramatically amongst, and sometimes within, common law jurisdictions. In the United States, a majority of states as well as some federal circuits apply *at least* the standard set out in § 2.06(3) of the Model Penal Code,[714] with some applying the even higher standard of shared criminal intent set out in Penal Code § 2.06(4).[715] The Canadian Criminal Code, like Article 25(3)(c) of the ICC Statute, also

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directed to practicing his profession in giving advice, but also to promote the commission of a crime by means of his professional advice, then, and only then, does aiding exist within the meaning of the criminal code.")

[711] Stefani, G. *et al.*, *Droit pénal génénal*, Dalloz (Paris, 2000), p. 290 ("En tous cas, il faut, selon la formule des arrêts , que le complice et l'auteur principal aient agi 'ensemble et de concert', en vue d'obtenir le resultat delictueux"); Cass. pen., sez. VI 12-06-2003 (21-03-2003), n. 25705 - Pres. Acquarone R - Rel. Colla G - Salamone ed altri - P.M. (Conf.) Viglietta G *(massima 2)* ("For the purposes of establishing the existence of an accessorial responsibility, either it is needed the proof of a prior agreement between the accomplices, or it is necessary to demonstrate that each of them has acted for a purpose with unitary awareness of the role played by others and their will to act in common.")

[712] Cass. pen., sez. VI 12-06-2003 (21-03-2003), n. 25705 - Pres. Acquarone R - Rel. Colla G - Salamone ed altri - P.M. (Conf.) Viglietta G *(massima 2)*.

[713] Rejman Genowefa (ed.) *Kodeks karny część ogólna – Komentarz*, Wydawnictwo C.H. Beck (Warszawa 1999) ("1. New criminal code introduces the new formula of assistance, which differs from the concept established by Article 18§2 of the repealed code of 1969. The list of major changes includes: a) Mens rea of the assistance has been determined only by the word "intent" / dolus [polish: zamiar], whereas the repealed code had explicitly stated that the assistance might be given also with dolus eventualis. Nowadays, under the new code, the issue will be disputable. The legislator did not unequivocally include dolus eventualis into assistance's mens rea. It should be noted nevertheless, that the definition of incitement precisely requires dolus directus [zamiar bezpoœredni], therefore when in the next paragraph the legislator uses only the word intent / dolus [without any adjectives], it implies that both types of intent / dolus(es) are included. Such linguistic interpretation is possible, but not definitive. Although Codification Committee commentary to the Code mentions also dolus eventualis, what matters in the end is the text of the bill, not its commentary.")

[714] Courteau, C., "The Mental Element Required for Accomplice Liability: A Topic Note," 59 Louisiana Law Review 325, 333 ("Courteau") ("A majority of states, in line with the Model Penal Code, require that the accomplice have the 'intent to promote or facilitate the offense.'") A small number of states, such as New York, appear to have adopted "criminal facilitation" statutes that permit imposition of liability on a knowledge or "believing it probable" standard, but these states remain in the small minority: Robinson, P. and Dubber, M., "The American Model Penal Code: A Brief Overview," 10 *New Criminial Law Review* 319, 337 (2007); Courteau, p. 340-1.

[715] United States Model Penal Code, § 2.06(4). See e.g. *United States v. Peoni*, 100 F.2d 401, 402 (2nd Cir 1938). See US Model Penal Code, s. 206(4)("When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of the offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense); *State v. Moreno*, 104 P.3d 628, 631 (Or. Ct. App. 2005) (acquitting a

relies on "purpose" as the *mens rea* threshold,[716] although it appears that in practice the standard is lower than that generally applied in the United States. The "purpose" threshold sometimes emerges distinctly, as when there is some indication that the assistance was rendered with some other lawful purpose in mind, so that any assistance to the crime is "incidental."[717] The English Court of Appeal, which is not bound by any codified standard and whose decisions are therefore varied, has also on occasion applied a purpose standard to acquit an accused person where he had a lawful purpose for his action, despite an awareness of a probability that a crime might thereby be assisted.[718] Hong Kong courts tend to more consistently apply a purpose standard than in Canada or England, typically requiring that the assistance be given "with the intention of assisting or encouraging the principal."[719] Indian courts also apparently apply a form of intent in relation to the ultimate crime, in that "the defendant must have intended that the person abetted carry out the conduct abetted."[720]

317. This domestic backdrop assists in understanding the reason for the particular language adopted in Article 25(3)(c) of the Rome Statute. In the face of a variety of

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person selling large number of over-the-counter drugs to purchasers whom he knew were likely to concentrate the products into illegal drugs, on the basis that "the mental state required for criminal liability on and aid and abet theory is essentially the same as for the principal's liability in this circumstance.").

[716] Criminal Code, R.S.C. 1985, c. C-46, s. 21(b).

[717] *F.W. Woolworth Co. Ltd. (1974)*, 18 C.C.C. *(2d)* 23, 32 (Ont. CA.) (after a full discussion of the knowledge requirement, the Court of Appeal then found "another reason why ... the convictions cannot stand. Section 21 requires that an alleged party must do or omit to do something for the purpose of aiding the principal to commit the offence. That purpose must be the purpose of the one sought to be made a party to the offence but if what is done *incidentally* and accidentally assists in the commission of an offence that is not enough to involve the alleged party.")

[718] *Gillick v. West Norfolk and Wisbech A.H.A.*, [1986] AC 112.

[719] Jackson, M., "Criminal Law", in Gaylord, M. *et al.*, *Introduction to Crime, Law and Justice in Hong Kong*, Hong Kong University Press (Hong Kong 2009), p. 28; *Halsbury's Laws of Hong Kong*, s. 130.055 ("there must be a common purpose between the principal and the aider and abettor and an intention to aid or encourage the persons who commit the offence or, a readiness to aid and encourage them if required."); *R. v. Lam Kit*, [1988] 1 HKC 679, 680 ("it is not only necessary to prove that he was present while the offence is committed, that he knew an offence was being committed and that his presence, in fact, gave encouragement to the perpetrators but it must be proved that he intended to give that encouragement, that he *wilfully* encouraged"); *R. v. Leung Tak-yin* [1987] 2 HKC 250 ("But the fact that a person was voluntarily and *purposely* present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had the power so to do, or at least to express his dissent, might, under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted") (italics added) (citing to *R. v. Clarkson* 1971 55 Cr. App. R. 445).

[720] Yeo, S., "India", in Heller, K. and Dubber, M., eds. *The Handbook of Comparative Criminal Law*, Stanford University Press (Stanford:, 2011), p. 296, citing *Mohd Jamal v. Emperor*, A.I.R. 1953 All 668. ("The offence of abetment, however ... cannot be made out. Appellant 2 certainly aided appellant 1 in driving the car but it cannot be said that he intended that it should be driven rashly and negligently").

diverse practices, compromise was required to find consensus. Consensus was reached only after a vigorous process of negotiation, and the consensus option "ha[d] an underpinning in many national legal systems."[721]

(c) Conclusion and Remedy Requested

318. The foregoing discussion shows that Article 25(3)(c) was vigorously and actively negotiated; that the language adopted has a strong foundation in the domestic law of States, and that there was no intention amongst States other than to express the best, consensus view possible as to the international standard of accessorial liability that would bind them. The *opinio juris* of States has coalesced around the purpose standard set out in Article 25(3)(c). Even assuming there is still some doubt about that, one point is beyond doubt: the *opinio juris* of States has not coalesced around a knowledge standard of *mens rea* for aiding and abetting.

319. This Appeals Chamber, as previously mentioned, has never had to squarely address the issue now posed, nor has the outcome of any previous case in this Court turned on the appropriate standard.[722] A departure would nevertheless arguably be required from the current jurisprudence of other international courts. This Chamber has both the power and the responsibility to do so, notwithstanding Article 20(3) of the Statute. The overriding obligation of all international courts is to not exceed the bounds of customary international law. Aside from the fact that this Chamber is not bound by any doctrine of *stare decisis* in respect of the appellate tribunals of other international courts, any court has the authority to alter its jurisprudence on the basis of "cogent reasons in the interests of justice," which can arise "'usually because the judge or judges were ill-informed about the applicable law.'"[723] The Supreme Court of the ECCC in similar circumstances departed from the ICTY and ICTR's established jurisprudence concerning JCE III.

320. This Appeals Chamber is therefore called upon to recognize that the *opinio juris* of States does not support a standard of mere knowledge, much less knowledge of a probability, for the *mens rea* of an accessory in customary international law. The minimal acceptable standard is expressed in Article 25(3)(c) of the ICC Statute: "*For the purpose of facilitating the commission of such a crime*, aids, abets or otherwise

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[721] *Tadić* AJ, para. 225.
[722] *AFRC* AJ, para. 243; *CDF* AJ, paras. 366-7; *RUF* AJ, para. 546.
[723] *Aleksovski* AJ, para. 109.

assists in its commission or its attempted commission, including providing the means for its commission."

(iv) The Chamber's Elaboration of Knowledge As Being Equivalent to An "Awareness of a Substantial Likelihood" Was Erroneous

(a) Awareness of a Substantial Likelihood Is Not the Knowledge Standard Accepted in International Criminal Law

321. The Trial Chamber asserted that an aider and abettor need be "aware of the substantial likelihood" that his acts would provide assistance to that crime.[724]

322. The "substantial likelihood" standard is not the correct standard of knowledge in international criminal law. ICTY jurisprudence prescribes – and has repeatedly affirmed despite requests to the contrary by the Prosecution – that the accused must have *actual* knowledge both of the criminal intentions of the perpetrator and of the nature of the one's own acts as assistance. The ICTY and ICTR Appeals Chambers have repeatedly affirmed the following standard, which makes no mention of "probability":

> The Appeals Chamber considers it firmly established that, to satisfy the *mens rea* requirement for aiding and abetting, "[i]t must be shown that the aider and abettor knew that his own acts assisted the commission of that specific crime by the principal" (for example, murder, extermination, rape, torture) and that the aider and abettor was "aware of the essential elements of the crime which was ultimately committed by the principal." Where the *mens rea* of the principal perpetrator is an element of the principal crime, the aider and abettor need not share the intent of the principal perpetrator, but he or she must be aware of the intent of the principal perpetrator.[725]

323. The Prosecution in *Blagojević* and *Haradinaj* urged the Appeals Chamber to adopt an "awareness of a probability" interpretation of "knowledge", arguing that this would harmonize the *mens rea* of aiding and abetting with other modes of liability, such as planning, instigating, and ordering.[726] The Appeals Chamber in both cases expressly rejected these efforts and reaffirmed the existing standard quoted above. In *Blagojević*, the the Appeals Chamber made the following pronouncement of particular relevance to Mr. Taylor's alleged situation:

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[724] Judgement, paras. 486, 6904.

[725] *Haradinaj* AJ, para. 58. See *Vasiljević* AJ, para. 102 ("the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal"); *Rukundo* AJ, para. 53; *Kalimanzira* AJ, para. 86; *Karera* AJ, para. 321; *Muvunyi* AJ, para. 79; *Seromba* AJ, para. 56 ("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").

[726] *Haradinaj* AJ, para. 54; *Blagojević* AJ, para. 220.

> Thus, the Trial Chamber did not decline to find that Blagojević knew about the mass killing operation because he lacked certainty, but because it could not rule out the equally reasonable inference that he thought *that his acts were directed towards another goal*. Accordingly, the Trial Chamber did not err in its formulation of the *mens rea* requirement for aiding and abetting and the Appeals Chamber dismisses this sub-ground of appeal.[727]

The Appeals Chamber gave similar reasons in the *Haradinaj* case, noting that the evidence

> at best, shows that Idriz Balaj put vulnerable women in contact with KLA soldiers who had a reputation for violence. The Prosecution does not point to any evidence as to what happened to the women between the time that they were last seen alive and the time that they were killed, in particular which KLA soldiers killed them or under what circumstances they were killed. As the Trial Chamber correctly noted, none of the evidence shows that Idriz Balaj was aware that a crime would be committed against the women at the relevant time.[728]

324. These cases distinctly show that the ICTY has never accepted – and has in fact expressly rejected – the claim that "knowledge" can include mere "awareness of a probability." Imposing a foresight requirement to intentional modes of liability is very different from imposing it in respect of accessorial liability. None of the ICTY cases referred to by the Chamber at footnote 1146 adopt a probability standard in respect of knowledge.[729] On the contrary, the *Blaskić* Appeals Chamber overturned the Trial Chamber's insertion of a "possible and foreseeable consequence" standard.[730]

325. The only authority relied upon by the Chamber was the Appeal Judgement in *Sesay* which, in turn, quotes from the *Brima* Appeal Judgement which, in turn, is based only on the ICTY Appeals Chamber judgements in *Blaskić* and *Simić*.[731] As previously discussed, the pronouncement of this standard was *obiter*, and apparently

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[727] *Blagojević* AJ, para. 223 (italics added).
[728] *Haradinaj* AJ, para. 60.
[729] *Vasiljević* AJ, para. 102 ("In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal. By contrast, in the case of participation in a joint criminal enterprise, i.e. as a co-perpetrator, the requisite *mens rea* is intent to pursue a common purpose"); *Perišić* TJ, para. 129 ("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.")
[730] *Blaškić* AJ, para. 49 ("In relation to the *mens rea* of an aider and abettor, the Trial Chamber held that 'in addition to knowledge that his acts assist the commission of the crime, the aider and abettor needs to have intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct.' However, as previously stated in the *Vasiljević* AJ, knowledge on the part of the aider and abettor that his acts assist in the commission of the principal perpetrator's crime suffices for the mens rea requirement of this mode of participation. In this respect, the Trial Chamber erred.")
[731] *AFRC* AJ, paras. 242-3. Cf. *Simić* AJ, para. 86: "The requisite *mens rea* for aiding and abetting is knowledge that the acts performed by the aider and abettor assist in the commission of the specific crime of the principal perpetrator."

had no impact on the outcome of those cases, nor is it apparent whether the issue was raised by the appellants and respondents. This is, accordingly, the first case before this Appeals Chamber where the issue is squarely raised, and the definition of knowledge defined by the ICTY Appeals Chamber's clear and consistent jurisprudence should be accurately and faithfully transposed as part of the law of this Court, in accordance with Article 20(3) of the Statute.

326. Incidentally, some States applying a knowledge standard for aiding and abetting liability in their domestic law, such as South Africa and Israel, do permit imposition of liability on a mere "awareness of a probability" standard. This expansive domestic approach, even if it could somehow illuminate customary international law, is in the clear minority.[732] There is, therefore, no support in the practice of international criminal law for a "knowledge of a probability" standard, much less any practice coming close to a consensus that would demonstrate that it has been accepted as a matter of international criminal law; and no indirect support that there is any consensus amongst States amounting to a general principle of law or any expression of *opinio juris* that that standard should be accepted as a matter of international criminal law.

327. What happens, however, when the principal commits a crime different from the one anticipated by the accessory (i.e. "knew", but ultimately was wrong about in the event), and for which assistance was provided? As the ICTY Appeals Chamber explained in *Blaskić*:

> The Trial Chamber agrees with the statement in the *Furundžija* Trial Judgment 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

[732] *R. v. Roach* (Ontario Court of Appeal) Docket C38012, 3 June 2004, para. 44 ("knowledge will include actual knowledge or willful blindness but will not include recklessness"); *Giorgianni v. The Queen*, High Court of Australia (1985) 156 CLR 473, 507-509; Cass. pen., sez. I 03-03-1987 (09-02-1987), n. 2656 - Pres. CARNEVALE C - Rel. DINACCI U - GRAZIANI - P.M. (CONF) GUASCO (massima 2) ("The *mens rea* standard required for the accessorial liability is the knowledge of cooperate with others in realizing a crime: i.e. the full awareness of the others conducts, in the past or in the future. The identity of the individuals will it is therefore essential and their participation has to be directed to commi t the offense, i.e. they have to share and have the precise knowledge of the crime they intend to commit."); G. Stefani, G. Levasseur, B. Bouloc, *Droit pénal génénal* (Paris: Dalloz, 2000), p. 290 ("l'auteur d'une faute d'imprudence ne peut pas être pousuivi comme complice, même si cette imprudence ou cette negligence constitue une faute au point de vue civile") (English Translation: "A person who is liable of recklessness cannot be cannot be held criminally responsible as an accomplice, even though this recklessness or negligeance would engage his civil liability.")

> commission of that crime, and is guilty as an aider and abettor." The Appeals Chamber concurs with this conclusion.[733]

328. The conclusion is unexceptionable: an aider and abettor can be held responsible as long has he or she has actual knowledge that at least one crime is going to be, or is being, committed. The Prosecution attempted to extrapolate a different meaning from the word "probably," arguing in subsequent cases that this language had modified the pre-existing jurisprudence that the accessory must "know" and be "aware" of the crime and his or her assistance thereto. The Appeals Chamber firmly rejected this interpretation in *Blagojević*, explaining that:

> The Appeals Chamber, however, recalls its position from the *Blaskić* 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. The *Blaskić* Appeal Judgement did not extend the definition of aiding and abetting.[734]

329. The law is therefore clear. The language concerning the case where a crime different than the one anticipated was not intended to disturb or alter the existing and well-established standard: actual knowledge. The Chamber erred in adopting a different standard.

(b) The Trial Chamber Failed to Define, Or Erred As To, the Mens Rea in Respect of Assistance of Future Crimes

330. The Chamber asserted that an aider and abettor also needs to be aware that the principal "committed" a crime.[735]

331. The Chamber's definition is temporally incoherent. The *mens rea* in respect of the principal's criminal intentions is expressed in the past tense ("committed"), whereas the knowledge of the assisting effect of the accessory's acts is formulated in the future tense ("would assist").[736] The Chamber's formulation presupposes that the criminal act occurs before the *actus reus* of assistance, since the awareness is described in relation to a past event. The Chamber offers no further clarification.

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[733] *Blaškić* AJ, para. 50.
[734] *Blagojević* AJ, para. 222. See *Haradinaj* AJ, paras. 54-7 (rejecting the probability standard); *Rukundo* AJ, para. 53 (omitting the "probability" passage from *Blaškić* in its definition of the applicable *mens rea* for aiding and abetting); *Muvunyi* AJ, para 79 (omitting the "probability" passage from *Blaškić* in its definition of the applicable *mens rea* for aiding and abetting); *Seromba* AJ, para. 56 (omitting the "probability" passage from *Blaškić* in its definition of the applicable *mens rea* for aiding and abetting).
[735] Judgement, paras. 486, 6904.
[736] Judgement, paras. 496, 6904.

332. While it is possible to aid and abet a past crime (provided that the crime was committed on the basis of an agreement that the *post facto* assistance would be provided), this was not the basis of the Chamber's aiding and abetting conviction of Mr. Taylor.[737] The Chamber, therefore, entered a conviction without ever articulating the accessory's mental state at the moment of the *actus reus*. This simultaneity, as with the *actus reus* and *mens rea* of any crime or mode of responsibility, is a requirement of accessorial liability.[738]

333. The Chamber went on in its "Legal Findings on Responsibility" to declare that Taylor "was aware of the 'essential elements' of the crimes he was contributing to, including the state of mind of the perpetrators."[739] This language presupposes, unlike the Chamber's initial statement of *mens rea*, that the assistance and the crimes are contemporaneous. This was not the basis on which the Chamber imposed aiding and abetting liability on Taylor, who was convicted of provided assistance used in crimes committed significantly in the future.[740] The legal standard is therefore again not apposite to the facts as found by the Chamber. It makes no difference that some assistance and some crimes were, in the Chamber's view, ongoing in parallel: the relevant question is the accused's mental state in giving the assistance that was used in the crime allegedly assisted.

334. The Chamber's failure is unsurprising because neither the ICTY nor the ICTR have ever, until the *Perišić* case, had to articulate such a standard. The reason is that the crime has always occurred before, simultaneous with, or immediately after the alleged assistance – so immediate that knowledge by the accessory of the perpetrator's present intentions could suffice. Anto Furundžija, for example, was convicted of remaining present during a rape and lending express or implied support to the continuation of the crime;[741] Mitar Vasiljević was convicted for guarding and escorting a group of men to a location believing that that is where the perpetrators intended to kill them, and where they were, in fact killed;[742] Francois Karera

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[737] Judgement, paras. 6950-1.
[738] See e.g. *Blagojević* AJ, para. 295. Bouloc, B., *Droit pénal génénal*, Dalloz (Paris, 2009), p. 234 ("Il faut que l'élément moral se joigne a l'élément material (qu'il apparaisse avant ou au même moment) pour que l'infraction soit constitué") (English Translation: "A mental element must accompany the material element (whether it exists before or during the commission of the crime) in order for the crime [of complicity] to exist.")
[739] Judgement, para. 6950.
[740] Judgement, paras. 6907-53.
[741] *Furundžija* TJ, paras. 273-5.
[742] *Vasiljević* AJ, paras. 134-5.

possessed the relevant knowledge that a crime would result by telling *Interahamwe* that a particular person was an *Inyenzi*, which led to his murder.[743] No uncertainty arose in any of these cases because of any temporal lapse between the assistance and the crime. The issue is usually precluded because a substantial temporal lapse usually precludes a finding of "substantial assistance" under the *actus reus*. In *Nahimana*, for example, the ICTR Appeals Chamber quashed all convictions for instigation based on statements made prior to the commencement of the genocide in Rwanda on the basis, *inter alia*, that:

> [w]hile there is probably a link between the Appellant's acts, because of his role in Kangura, and the genocide, owing to the climate of violence to which the publication contributed and the incendiary discourse it contained, the Appeals Chamber considers that there was not enough evidence for a reasonable trier of fact to find beyond reasonable doubt that the Kangura publications in the first months of 1994 substantially contributed to the commission of acts of genocide between April and July 1994.[744]

The Appeals Chamber expressly noted the effect of the lapse of time on the "substantial contribution" requirement of aiding and abetting, noting that "the longer the lapse of time between a broadcast and the killing of a person, the greater the possibility that other events might be the real cause of such killing and that the broadcast might not have substantially contributed to it."[745] The Appeals Chamber in *Kupreškić* quashed a finding of aiding and abetting based on an alleged delivery of weapons six months before an attack.[746] In *Ndindabahizi*, the ICTR Appeals Chamber quashed a conviction for an *actus reus* of instigation committed six days before the crime by the principals, noting that victims had "been killed at the roadblock even before the Appellant's visit" and that it was unclear whether the words of instigation actually had an impact on those who did the killing six days later.[747] The ICJ has itself implied that the crime in question cannot be too far in the future, but must be, at the most, "about to take place."[748]

335. The *Perišić* Majority, unlike the Chamber, at least assays a standard by which to infer "knowledge" in the unprecedented context of events occurring in the significant future, variably describing the accused's state of knowledge at the time of

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[743] *Karera* AJ, para. 322.
[744] *Nahimana* AJ, para. 519.
[745] *Nahimana* AJ, para. 513.
[746] *Kupreškić* AJ, para. 277.
[747] *Ndindabahizi* AJ, para. 116.
[748] *Bosnia v. Serbia* Judgement, para. 422.

the *actus reus* as being that "other similar crimes *would probably* occur";[749] a "*high likelihood*" that they would occur;[750] "*very probable*" that they would occur;[751] or just that their occurrence was "*foreseeable*" to Perišić.[752]

336. The Chamber, though not setting out its view of the applicable standard in respect of its findings, in one isolated passage suggests that it may have adopted an even lower standard than adopted in *Perišić*: Taylor is determined at one point to "have been aware of the likelihood that the AFRC/RUF would commit similar crimes in the future."[753] The "likelihood" standard would facially appear to be even lower than most of the terms used in *Perišić*.

337. A reasoned opinion is an elemental component of the right to the fairness of proceedings, including the appellate stage.[754] An accused can make a "useful exercise" of his right of appeal only if properly informed of the basis of his or her conviction at first instance.[755] The failure to state such reasons also impairs the statutory function of the Appeals Chamber.[756] The Appeals Chamber should not normally adjudicate factual issues *de novo* – a practice which, if resulting in a conviction, deprives the accused of any opportunity to comment on their correctness, much less to seek review thereof before an appellate body.[757] The prejudice in such a scenario is clear. However, and even if it were assumed that the Chamber applied a "likelihood" or a "substantial likelihood" standard in respect of knowledge of the perpetrators' criminal intent, the Defence submits that such a standard is legally untenable.

338. Regardless of whether knowledge is considered a sufficient condition of liability, or whether it is a necessary component of purpose, the only appropriate standard of knowledge in international criminal law, as discussed in the previous section, is actual knowledge. The predictability of future events warrants no exception to this standard. The "substantial likelihood", much less mere "likelihood" that a crime will be committed in the significant future using the assistance provided does

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[749] *Perišić* TJ, para. 1632.
[750] *Perišić* TJ, para. 1635.
[751] *Perišić* TJ, para. 1637
[752] *Perišić* TJ, para. 1646.
[753] Judgement, para. 6882.
[754] *Kvočka* AJ, para. 23.
[755] *Hadžihasanović* AJ, para. 13. *Naletilić* AJ, para. 603 (a reasoned opinion "makes it possible for an individual to exercise their right of appeal").
[756] *Karera* AJ, para. 20; *Limaj* AJ, para. 81.
[757] See e.g. *Rutaganda* AJ, Separate Opinion of Judges Meron and Jorda, p. 1; *Mrkšić* AJ, Partially Dissenting Opinion of Judge Pocar, para. 12.

not satisfy this standard. Unless the assister can be said to have actual knowledge of the criminal intention of the principal, then the assistance is too remote to satisfy the *mens rea* requirement. Indeed, in the specific context of future events, the ICJ has interpreted complicity as requiring that an accused be "clearly aware" that the crime "was about to take place or was under way".[758]

339. A standard that further clarifies the circumstances in which an accused would be "clearly aware" of the predictability of future events, that complies with international criminal law as discussed in the previous section, is offered by the United States Model Penal Code:

> A person acts knowingly with respect to a material element of an offense when: .... 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.[759]

340. This standard is commendable as complying with the ICTY and ICTR jurisprudence discussed in the previous section rejecting a probability standard of awareness. It also fits with the broader hierarchy of modes of liability recognized in international criminal law. Liability for JCE III arises where: (i) the crime was foreseeable; and (ii) the accused willingly took the risk that they would occur – "that is, being aware that such crime was a possible consequence of the execution of that enterprise, and with that awareness, the accused decided to participate in that enterprise."[760] Accessorial liability cannot justly be imposed on roughly the same knowledge standard as that imposed for JCE III liability. The latter case involves a perpetrator who possessed direct criminal intent, even if the crime turned out differently than expected. The accessory, who has no direct criminal intent whatsoever, cannot justly be subject to criminal liability on the same standard of awareness. As the form of liability with the lowest level of culpable intent, whether that standard be purpose or knowledge, the limits of accessorial liability should be carefully drawn to maintain the highest level of cognitive certainty about the character of one's own acts.

(v) The Imposition of a Knowledge Standard, Including By Awareness of a Probability, Risks Interfering With Traditional And Well-Established Prerogatives of States

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[758] *Bosnia v. Serbia* Judgement, para. 422.
[759] US Model Penal Code, § 2.02(2)(b).
[760] *Vasiljević* AJ, para. 101.

341. The standard of aiding and abetting liability adopted by the Chamber would, in practice, overturn the limits of state responsibility set out in the *Nicaragua Case*. At paragraphs 115 and 116, the International Court of Justice held:

> All the forms of United States participation mentioned above, and even the general control by the respondent State [the United States] over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant state [Nicaragua]. Such acts could well be committed by members of the contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operation in the course of which the alleged violations were committed. [116] The Court does not consider that the assistance given by the United States to the contras warrants the conclusion that these forces are subject to the United States to such an extent that any acts they have committed are imputable to that State.[761]

342. The ICJ recently refused to lower this threshold of responsibility even in the context of the crime of genocide, finding that it was "settled jurisprudence" and reflective of customary international law.[762] The acts of VRS forces, despite their dependence on Serbia, were found not to be imputable to the Government of Serbia.[763]

343. An awareness of a probability standard of accessorial liability would extend international criminal law dramatically beyond the contours of state responsibility. State officials who provide assistance to rebel forces in other states could incur criminal liability if they were aware of the commission of crimes by those forces, even if those forces were not under the command of the state providing assistance. Thus, President Reagan, or any other official with knowledge of the provision of support to the contras, would have been open to liability as a war criminal for aiding and abetting any war crimes committed by the *contras* in Nicaragua even though, according to the settled law of state responsibility, the United States would not be responsible. It is noteworthy in this regard that the Chamber acquitted Mr. Taylor of responsibility as a superior under Article 6(3) of the Statute, finding that he did not exercise effective control over the RUF and the AFRC.[764]

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[761] *Nicaragua* Judgement, paras. 115-6.
[762] *Bosnia v. Serbia* Judgement, paras. 406-7.
[763] *Bosnia v. Serbia* Judgement, paras. 413-5.
[764] Judgement, paras. 6979, 6986.

344. Other recent examples that presumably would attract the same divergent outcomes include those members of NATO who offered assistance to Libyan insurgents who were widely reported to be committing war crimes;[765] states that are currently supporting insurgents – or for that matter, the government – in Syria if there are any reports of the commission of war crimes by those forces;[766] and states that may be supporting insurgents now involved in conflicts in the Democratic Republic of Congo.[767]

345. Defining a mode of liability to encompass such actions would have far-reaching consequences. States would then have universal jurisdiction over such acts and, depending on the crime, even an obligation under international criminal law to prosecute them.[768] The consequences seem anomalous: the law of State responsibility would insist that the State cannot be held responsible, whereas States would have a mandatory obligation under international criminal law to prosecute State officials responsible for providing the assistance, even when motivated by traditionally legitimate purposes in the realm of state action such as self-defence. Whereas such a bifurcation seems justifiable and appropriate where the individual state official intends a criminal act, the "knowledge of a probability" standard requires neither intention nor control over the perpetrators. Accessorial liability would therefore stand alone as the only form of international criminal liability that would involve neither: (i) the intentional (and therefore highly volitional) commission of an act that is prohibited by customary international law; nor (ii) a level of control over the perpetrator that does not correspond to the established ICJ's standards for imputing state responsibility.

346. The doctrine propounded by the Chamber either risks unduly interfering with the customary prerogatives of States or the total destruction of the universalist aspirations of international criminal law. The enduring significance of these principles for the international community as a whole was eloquently expressed in *The Ministries Case*:

> [W]e are here to define a standard of conduct of responsibility, not only for Germans as the vanquished in war, not only with regard to past and present events, but those which in the future can be reasonably and properly applied to men and officials of every state and nation, those of the victors as well as

[765] Libya Article.
[766] Syria Report.
[767] Chair of the Secuirty Council Committee Letter, paras. 1-13.
[768] *Belgium v. Senegal* Judgement, para. 102.

> those of the vanquished. Any other approach would make a mockery of international law and would result in wrongs quite as serious and fatal as those which were sought to be remedied.[769]

(vi) The Required Mens Rea, Assuming That The Chamber Correctly Adopted a "Knowledge" Standard, Requires Knowledge that the Assistance Provided Would Have a "Substantial Effect on the Commission of the Crime", Not Merely That It Would "Assist The Commission of a Crime"

347. The Chamber erroneously failed to align the required *mens rea* with its own definition of the *actus reus*. The actus reus as defined by the Chamber requires (i) "practical assistance ... to the perpetration of a crime"; and (ii) the assistance must have had "a substantial effect upon the commission of the crime."[770]

348. In defining the mens rea, however, the Chamber required that the accused only be aware of the first prong of the *actus reus*, but not the second. This is an error: the mens rea, in addition to any special intent that may be required in respect of a crime, always requires as a minimum that the accused know the character of the *actus reus*.

349. This elemental principle of criminal law is expressly articulated in Article 30 of the ICC Statute which requires at a minimum in respect of any crime that a person shall be criminally responsible for a crime only if "the material elements are committed with intent and knowledge."[771] The material element of a crime committed through aiding and abetting is that the assistance has a *substantial* effect, not merely that it has *some* effect. It follows that, at a minimum, the Chamber erred by adopting a standard requiring knowledge that the act would only "assist", rather than "substantially assist," the commission of a crime.

(vii) These Errors, Given Their Severity and the Complexity of the Factual Record, Require That the Judgement Be Set Aside

350. The erroneous standard of aiding and abetting invalidates the conviction on that basis. The departure from the proper standard is substantial, must have pervasively, if not always expressly, affected the Chamber's reasoning, and cannot now be effectively remedied based on a review of the complex record based on the proper standard. The only proper remedy is to set aside all convictions entered on the basis of aiding and abetting liability.

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[769] *Weizsaecker* Judgement, p. 527.
[770] Judgement, para. 482.
[771] S. 20 of the California Penal Code, to take one illustration from national law, requires that there "exist a union, or joint operation of act and intent, or criminal negligence."

ii. GROUND OF APPEAL 17: The Trial Chamber erred in fact and in law in finding that the RUF and AFRC, throughout the indictment period, had a continuous "operational strategy" to commit crimes, from which it inferred Charles Taylor's continuous mental state for aiding and abetting.

(i) Overview

345. The Chamber found that Mr. Taylor supplied or facilitated the supply of materiel to Sam Bockarie on several occasions throughout the Indictment period. Notably, the Chamber found that he supplied or facilitated the supply of three large shipments ("Magburaka", between September and December 1997; "Burkina Faso", November or December 1998; and to Bockarie directly, March 1999), and a series of small shipments. Mr. Taylor's primary position, set out in Ground 23, is that no reasonable trial chamber, evaluating the evidence properly, could have found that Mr. Taylor participated in any or all of these shipments. The *actus reus* is therefore not proven. But even assuming such a finding was possible, no reasonable trier of fact, as is addressed here, could have inferred that Mr. Taylor knew that the materiel supplied would be used in, or have a substantial effect on, the commission of crimes.

346. The Chamber's findings exclude that Mr. Taylor provided support "for the purpose" of facilitating crimes.[772] However, even applying the erroneous "knowledge" *mens rea* standard, no reasonable trier of fact could have found, for the reasons that follow, that this standard was satisfied on the evidence beyond a reasonable doubt.

347. The essence of the Chamber's reasoning is that Mr. Taylor gave assistance and advice to the RUF/AFRC at a time when "the operational strategy of the RUF and AFRC was characterized by a campaign of crimes against the Sierra Leonean population."[773] The Chamber found that "the RUF and later the AFRC/RUF" pursued this strategy starting with "Operation Stop Election" in 1996.[774] The Chamber, on this basis, equates any assistance to these forces from then onwards as assistance to crimes: "any assistance towards these military operations of the RUF and RUF/AFRC

[772] Judgement, para. 6896 ("it was in the interest of the Accused and the RUF to join forces against their common enemies"); para. 6897 ("Cooperation between the NPFL and RUF was limited in its purpose and it was military, not criminal, in its nature"); para. 6898 ("the evidence relating to the support provided indicates that there was a *quid pro quo* in the relations between the RUF and the Accused").
[773] Judgement, para. 6905.
[774] Judgement, para. 6790.

constitutes direct assistance to the commission of crimes by these groups."[775] Despite this "direct assistance" formulation, the Chamber proceeded to link specific shipments to six specific crime groupings – implying that that was a necessary feature of proving "substantial assistance" to crimes.[776]

348. The Chamber did not find that Mr. Taylor knew about this "operational strategy" of terrorization from the beginning of the RUF's activities, defining instead a two-step evolution of his knowledge over time. During the first stage, which commences "as early as August 1997, the Accused knew of the atrocities being committed against civilians in Sierra Leone by the RUF and RUF/AFRC forces and their propensity to commit crimes."[777] Propensity is different from "operational strategy", which only emerges, according to the Chamber, "by April 1998" when the "Accused knew of the AFRC/RUF's operational strategy and intent to commit crimes."[778] The Chamber's finding, therefore, is that (i) from August 1997 to April 1998, Taylor was aware of a "propensity" of some RUF or AFRC soldiers to commit crimes, whereas (ii) from April 1998 onwards he was aware of an "operational strategy" to commit crimes. The Chamber found that both mental states satisfied the *mens rea* of aiding and abetting.

349. This finding encompasses three errors, the first legal, and the second and third factual. First, the knowledge as found by the Chamber during the first period (August 1997 to April 1998) does not satisfy the knowledge *mens rea* of aiding and abetting. Second, no reasonable trier of fact could have found that the RUF and AFRC had a continuous operational strategy in 1998, known to Taylor, to commit crimes. Third, no reasonable trier of fact could have found that the RUF and AFRC had a continuous operational strategy from 1999 onwards, known to Mr. Taylor, to commit crimes. Any of these errors, alone or in combination invalidate, in whole or in part, the findings that Mr. Taylor aided and abetted the crimes as found in the Judgement.

350. The Chamber's own findings show that RUF/AFRC soldiers, rather than implementing a continuous policy to commit crimes, tended to commit such crimes opportunistically and when pushed to the brink of defeat. Sporadic crimes occurred at other times as well, but the RUF and AFRC leadership tried to impose discipline and

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[775] Judgement, para. 6905. The statement is contrary to the *actus reus* of aiding and abetting, which requires assistance that is directed to the crime, not to some lawful activity that may form the context for the crime. That error is discussed below, in Ground 21.
[776] See Ground 23.
[777] Judgement, para. 6947.
[778] Judgement, paras. 6884-5.

punish soldiers who committed crimes. Indeed, the leadership publicly apologized for those crimes and promised to take corrective measures against them in the future. These apologies were widely publicized. Imposing discipline was hampered by infighting and, as the Chamber itself acknowledged, the formation of splinter groups.[779]

(ii) The Chamber's Findings Show That Mr. Taylor Did Not Have Criminal Mens Rea In Respect of the Two Arms Shipments During the Junta Period, 1997-early 1998

351. The Chamber recognized that, at its inception, the RUF was a legitimate force with laudable goals[780] but that in "Stop Election" in 1996 it adopted "terror against the Sierra Leonean population as a primary *modus operandi* of their political and military strategy."[781] The Defence disputes this finding as an over-generalization, but the issue is only of peripheral significance for two reasons. First, the Chamber made no finding that Taylor provided any support, material or otherwise, to the RUF during this period.[782] Second, whatever may have previously been the strategy of the RUF altered significantly in May 1997 when it joined the AFRC-dominated junta government and was formally subordinated to the "Supreme Council".[783] The RUF thereafter made a public declaration apologizing for any crimes that its forces may have committed *before* the Junta government:

> For the past six years or so, we have been living in an environment of hatred and divisiveness. We looked at our brothers and killed them in cold blood, we removed our sisters from their hiding places to undo their femininity, we slaughtered our mothers and butchered our fathers. It was really a gruesome experience which has left a terrible landmark in our history.[784]

As one Prosecution witness characterized it, this was the RUF's effort to "make their peace with the civilian population".[785]

352. The evidence does not show the AFRC or RUF during the Junta period – i.e. between May 1997 and 14 February 1998 – pursued a "policy" or *modus operandi* of violence against the civilian population. Indeed, the Chamber stopped short of making that finding, though it did find that there were "ongoing crimes" being "committed by

[779] Judgement, paras. 65 and 5742.
[780] Judgement, para. 6789.
[781] Judgement, para. 6790.
[782] Judgement, paras. 6901-53.
[783] Exh. D-9; TT, TF1-334, 17 Apr. 08, p. 7875-6; Adjudicated Fact 4; Exh. D-85.
[784] Judgement, para. 526. See Judgement, para. 6880.
[785] TT, TF1-371, 1 Feb. 2008, p. 2838 (closed session).

the Junta government."[786] The critical issue, of course, is what the Accused knew. The Chamber held that "as early as August 1997, the Accused knew of the atrocities being committed against civilians in Sierra Leone by the RUF and RUF/AFRC forces and of their *propensity* to commit crimes."[787] The Chamber further found that Taylor "was informed in detail of crimes committed by the AFRC/RUF members during the Junta period, including murder, abduction of civilians including children, rape, amputation and looting."[788]

353. RUF and AFRC soldiers did commit some crimes during this period. No war, and particularly not a bloody civil war, is waged without some crimes being committed by armed forces, to say nothing of crimes committed by civilians who take advantage of a chaotic situation. However, even the ECOWAS reports from August 1997, which are highly critical of the AFRC/RUF's takeover of power, do not accuse them of terrorizing the civilian population.[789] The reports refer instead to "massive looting of property, murder and rape" and to "national assets" being "vandalized and looted", but do not accuse AFRC/RUF forces of being the perpetrators.[790] Precious few findings are to be found in the Judgement itself of violent crimes committed by RUF/AFRC soldiers during the Junta period. The total number of victims of unlawful killings, as found by the Judgement, is fourteen in Kenema and three in Tongo Fields.[791] Most of these killings were characterized as "revenge killings" of alleged "collaborators", or extreme and summary punishment of criminals who were masquerading as RUF soldiers.[792] While none of these explanations render the killings lawful, they demonstrate no indiscriminate policy or "*modus operandi*" to terrorize the civilian population.

354. The Chamber's inference as to Mr. Taylor's state of mind reflects the sporadic and relatively isolated nature of the crimes committed during the Junta period. The Chamber found that it could only infer that Mr. Taylor must have known of a

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[786] Judgement, para. 6879.
[787] Judgement, para. 6947 (italics added).
[788] Judgement, para. 6882.
[789] Exh. D-135; Exh. D-136.
[790] Exh. D-135, p. 2.
[791] Judgement, paras. 588-624 (Kenema); paras. 628-642. The Judgement also notes that an additional 18 were killed during this period by RUF/AFRC forces, but that these findings could not be taken into account to establish guilt, paras. 631, 635.
[792] Judgement, para. 595 (the main witness describing at least one of the victims as a "'notorious criminal'" and another as a thief "who was impersonating the rebels"); 632 ("AFRC/RUF forces carried out revenge killings after suffering heavy casualties").

"propensity"[793] of AFRC/RUF forces to commit crimes, and that "military support *could* facilitate the commission of crimes."[794] The choice of the word "could" – instead of *would* – is significant: the Chamber could only infer Mr. Taylor's knowledge of a *possibility* that assistance might be used in *possible* crimes.

355. This does not satisfy any known standard of aiding and abetting *mens rea*, including the erroneously-low standard adopted by the Chamber which requires that an accused must at least be aware of the substantial likelihood that his acts *would* – not *could* – assist the underlying offence.[795] This standard is not met, according to the Chamber's own findings. Accordingly, the Chamber erred in finding that Mr. Taylor possessed the requisite *mens rea* during this first period, prior to February 1998. This therefore excludes liability for any and all assistance provided through at least February 1998, including the Magburaka shipment and that allegedly provided through Tamba.[796]

356. This same reasoning applies to the materiel allegedly used to assist the Kono crimes, allegedly supplied in "early 1998".[797] The Chamber concluded that the operations against Kono relied on supplies facilitated by Taylor, but makes no finding as to the specific date when those supplies were provided.[798] The absence of such a finding, in case of doubt, must inure to the benefit of the accused in accordance with the principle of reasonable doubt. There is a reasonable possibility, indeed likelihood based on the evidence, that the supplies allegedly used in those crimes were provided at a time when, according to the Chamber, there was still only a possibility – not a probability – that any resources would be used for the commission of crimes.[799] Indeed, it is only after the very crimes that Taylor is alleged to have aided and abetted that this awareness would, in the Chamber's view, have become inevitable.[800] The

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[793] Judgement, para. 6947.
[794] Judgement, para. 6881.
[795] Judgement, para. 486.
[796] See Judgement, paras. 5559-60 (finding that weapons provided in the Magburaka shipment and by Tamba were used for crimes committed both before and after the fall of the Junta).
[797] See e.g. Judgement, paras. 5587 (describing the supply as arriving "shortly after the Intervention"); 5591 (characterizing the timing of the supply as being "in early 1998").
[798] Judgement, paras. 5593, 5835 (xxix) ("materiel supplied by the Accused was used in operations in the Kono District in early 1998, before Operation Fitti-Fatta and the commission of crimes in those operations").
[799] Judgement, paras. 6881, 6883.
[800] Judgement, para. 6883. The official reports listed in footnotes 15475 through 15482, which are supposedly the basis for saying that Taylor must have known of the notorious and widespread crimes and which are, in turn, the basis for inferring a modus operandi of terrorizing the civilian population, confirm that this information would not have been available until late-March 1998: Exh. D-155 (Fourth Report of the Secretary-General on the Situation in Sierra Leone, 18 March 1998); Exh. P-130 (Fifth

Chamber's own findings do not sustain its conclusion that the alleged assistance provided to the crimes in Kono was provided with the requisite *mens rea*.

(iii) No Reasonable Trial Chamber Could Have Inferred The Existence Of, Let Alone Taylor's Knowledge Of, A Constant and Continuous RUF/AFRC Operational Policy That Encompassed the Indictment Crimes Committed Up To the Freetown Attack (1998)

(a) Overview

357. The Chamber found that Taylor supplied a large quantity of materiel to Bockarie in November or December 1998 and small quantities of materiel during that year through intermediaries including Daniel Tamba. Mr. Taylor's involvement in any such shipments is challenged below in Ground 23; the issue here is, assuming that such shipments were made with the approbation or knowledge of Taylor, the evidence showed that he provided the assistance knowing that it would be used in crimes.

358. The Chamber found that Mr. Taylor had knowledge of an operational strategy to terrorize the civilian population by the RUF/AFRC as of April 1998.[801] In substance, the Chamber infers that because of the notoriety and seriousness of the crimes committed by some forces within the RUF/AFRC alliance, in particular during their retreat from Freetown in February and March 1998, anyone facilitating the supply of arms thereafter, notably in the form of the Burkina Faso shipment in November or December 1998, would have had to know that those arms would be used in the commission of crimes.[802]

359. This knowledge is relevant to three *actus reus* events between the fall of the Junta Government and the Freetown Invasion at the beginning of 1999: (i) supplying small amounts of military materiel "in 1998 and 1999" to the RUF in its strongholds in the east of Sierra Leone through Daniel Tamba and others;[803] (ii) giving Bockarie "sizeable amounts of materiel … although not comparable in quantity" to the three

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Report of the Secretary-General on the Situation in Sierra Leone, 9 June 1998). Even an Amnesty International report, dated 24 July 1998, referred to in footnotes 15475, 15476 and 15477 (Exh. P-078), which Taylor did not read (Taylor, 25 November 2009, p. 32393), describes a "deliberate and systematic campaign" as having "emerged since April 1998", not before).

[801] Judgement, para. 6905.

[802] Judgement, paras. 6791-3; 6883-6.

[803] Judgement, para. 4965 ("[t]he Prosecution has proved beyond reasonable doubt that supplies of arms and ammunition were sent to the RUF/AFRC in Buedu between February 1998 and December 1999 by the Accused, through, inter alia, Daniel Tamba (a.k.a. Jungle), Sampson Weah and Joseph (a.k.a. Zigzag) Marzah. However, there is insufficient evidence to establish beyond reasonable doubt that, except for the Burkina Faso shipment of November/December 1998, the amounts of materiel provided by the Accused in 1998 and 1999 … were large"; para. 5561.

large shipments, to take to his base in Buedu;[804] (iii) "around November/December 1998", facilitating "a large quantity of arms and ammunition for the RUF from Burkino Faso."[805] The Chamber found that these supplies were (i) "used in operations in the Kono District in early 1998 ... and the commission of crimes during those operations";[806] (ii) during the Fitti-Fatta operation around June 1998;[807] and by the AFRC group headed by SAJ Musa in Mongor Benguda and Kabala "which included the commission of crimes", and by the AFRC group headed by Gullit in Koinadugu and Bombali Districts from June to October, "which included the commission of crimes";[808] and (iii) in the offensives leading to the capture of Freetown, including "in attacks in Kono and Kenema in December 1998 ... and in the commission of crimes in the Kono and Makeni Districts" as well as "in the commission of crimes in Freetown and the Western Area."[809]

360. No reasonable trier of fact could have found, as addressed in Ground 23, that Taylor provided or procured these supplies for the RUF. But even assuming he did, no reasonable trial chamber could have inferred that at the time Taylor supplied this materiel, he did so for the purpose of, and with knowledge that, it would contribute substantially to the crimes committed.

(b) Mr. Taylor's Own Acknowledgements, Contrary to the Chamber's Interpretation, Do Not Constitute An Admission of Mens Rea For Aiding and Abetting

361. The Chamber places heavy reliance on Mr. Taylor's acknowledgements that in April 1998 he was aware that serious crimes were being committed in Sierra Leone. Thus, Mr. Taylor was asked whether anyone providing support to "the RUF/AFRC as of April 1998 ... would be supporting a group engaged in a campaign of atrocities against the civilian population of Sierra Leone". Mr. Taylor responded "[w]ell, to an extent you could say yes, anybody that would supply would be doing it against the civilians, yes."[810] Mr. Taylor also agreed that in May 1998 "there were news reports"

[804] Judgement, paras. 5030-1, 5561.
[805] Judgement, paras. 5527, 5561.
[806] Judgement, para. 5593.
[807] Judgement, para. 5632.
[808] Judgement, paras. 5666-7.
[809] Judgement, paras. 5719-20.
[810] TT, Charles Taylor, 25 Nov. 2009, p. 32395; Judgement, para. 6884.

of a "horrific campaign being waged against the civilian population in Sierra Leone."[811]

362. Horrendous atrocities were, as Mr. Taylor acknowledged, indeed committed during this period by elements of the AFRC and RUF. These crimes occurred in the aftermath of the defeat of RUF/AFRC forces in Freetown and the disorderly retreat that followed, and appears often to have been inflicted as retaliation against civilians perceived to have collaborated with the enemy, and in situations where they operated without proper command and control. Acknowledgement of those crimes does not mean: (i) that they had been approved by the RUF central leadership, including Sam Bockarie, at any time; or (ii) that this was a tactic that they would pursue in any future operations. Indeed, as discussed below, the UN reports of the time draw no such conclusions. The recognition that serious crimes had been committed by some members of these forces does not constitute a recognition that these forces had adopted a tactic or a *modus operandi* of attacking civilians.

363. Taylor in his testimony repeatedly emphasized that his knowledge of events in Sierra Leone, along with the events themselves, changed over time, and that it was not possible to speak of an unchanging state of affairs, or an unchanging state of knowledge.[812] The specific question asked above related to the context of the post-Intervention retreat from Freetown,[813] and Taylor elsewhere underlined in respect of this time period that "we are talking about at this particular time."[814] His acknowledgements cannot, therefore, be taken as an admission – as the Chamber apparently did – that he knew that he was providing assistance to an organization adopting such a *modus operandi*. This was not the case.

364. As expressed by Judge Moloto in the *Perišić* case:

> [I]t is important to recognize that situations during a war can change dramatically over time. What Perišić knew or thought he knew about the activities and propensities of the VRS during the initial break-up of the SFRY cannot be equated with his understanding of circumstances during later stages of the war.[815]

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[811] TT, Charles Taylor, 8 Sept. 2009, p. 28274.
[812] TT, Charles Taylor, 25 Nov. 2009, p. 32390 ("It depends on when. You've been switching me between '99 and '98.")
[813] TT, Charles Taylor, 25 Nov. 2009, p. 32394: ("Q. You understand strategically the junta, the RUF and its AFRC allies, were retreating and weakened, correct? A. Definitely. We received reports on that, yes.")
[814] TT, Charles Taylor, 25 Nov. 2009, p. 32416.
[815] *Perišić* Dissenting Opinion, para. 49.

(c) The Circumstantial Evidence Does Not Show That Mr. Taylor Knew The RUF Had Adopted a Modus Operandi to Terrorize the Civilian Population From April 1998 Onwards

365. The Chamber also relied on circumstantial evidence of Mr. Taylor's alleged *mens rea* at the relevant times. Proof by circumstantial evidence requires that the challenged finding is the *only*, not merely one possible, reasonable inference available on the evidence:

> It is common place that a criminal tribunal may convict on circumstantial evidence provided that the only reasonable inference to be drawn from such evidence leads only to the guilt of the accused. When such evidence is capable of any other reasonable inference it is not reliable for the purposes of convicting an accused.[816]

The Chamber held that Taylor had the requisite *mens rea* – i.e. that he knew that crimes would probably be committed with the assistance provided – based on the finding that the RUF/AFRC had a continuous *modus operandi* to terrorize the civilian population, and that Taylor knew that this *modus operandi* was in effect on each occasion that he provided the alleged assistance to the RUF/AFRC. The Chamber, in the absence of any direct evidence of Mr. Taylor's mental state, inferred it based on circumstantial evidence.

366. The finding that Taylor must have had that mental state is not the only reasonable inference available, for several reasons. First, the violence perpetrated by the RUF/AFRC was concentrated, as the Chamber itself acknowledged, in the wake two events: "after the ECOMOG Intervention and the end of the Junta Government"[817] and during the retreat from Freetown.[818] This is not to say that crimes did not occur on other occasions, but that they were far less notorious, severe and widespread. The fact that violent crimes against civilians were concentrated around these two events suggests that rather than being a reflection of organizational policy, they were acts of indiscipline, desperation and revenge for perceived collaboration. This in no way excuses the crimes or the lack of adequate measures to control them; but the circumstances suggest that the crimes may not have been a function of a general policy. A further indication of the absence of such a policy is that the

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[816] *CDF* AJ, para. 200; *Delalić* AJ, para. 458 ("It is not sufficient that [the finding of guilt] is a reasonable conclusion available from that evidence. It must be the *only* reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted.")

[817] Judgement, paras. 6883-4.

[818] See e.g. Judgement, paras. 785-8; 805-8; 830-1; 839-41.

Chamber could not find that any crimes were committed in the course of the RUF's two major offensives of 1998: Fitti Fatta in June; and the capture of Kono and Makeni in December.[819] Crimes would have been widespread and notorious during these operations if it had been the RUF's operational policy to commit crimes.

367. Second, this doubt would be reinforced by the substantial evidence from Prosecution witnesses that the RUF did attempt, particularly after the excesses of the Freetown retreat in 1998, to discipline criminal acts by its soldiers. Prosecution witnesses Conteh, TF1-274, TF1-101, TF1-314, and TF1-367 all testified that the RUF did attempt, during 1998 and 1999, to instil discipline and punish those who committed crimes against civilians.[820] The Chamber disregarded, and apparently did not consider, this evidence.

368. Third, the Chamber's own findings contradict the claim that there was a continuous *modus operandi* to commit crimes. The Chamber found that the AFRC had committed crimes following the ECOMOG Intervention,[821] but also found that SAJ Musa ordered the main AFRC faction "to proceed to Freetown without killing, looting or burning, indicating that he did not have a campaign of terror in mind, as Bockarie did."[822] This finding reveals that the Chamber itself accepted that the commission of crimes, even atrocities, by elements of the AFRC did not mean that

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[819] Judgement, paras. 2950-1 (failing to find that any crimes were committed during the Fitti-Fatta attack); para. 5632 (finding that materiel supplied by Mr. Taylor was used in Fitti-Fatta, but omitting to find that any crimes were committed there). See Ground 23(iii)(e)(2) discussing the absence of such findings in respect of Kono and Makeni.

[820] TT, TF1-227, 27 Oct. 2008, p. 19303 ("Q. And did [Brigadier Five-Five] not go on to say, 'There is not going to be any kind of ruthless behaviour on the civilians'? A. He said that. Q. In fact, he went further, did he not, and said that – he told the abducted civilians and rebels twice during the muster parade that you should observe certain rules such as no fighting amongst yourselves, no stealing, no raping or killing, is that right? A. Yes."), p. 19306 ("Q. But the point is you never saw anyone ordering anyone to carry out those crimes in terms of senior commanders? A. No."); TT, TF1-274, 11 Dec. 2008, p. 22155 ("Q. ... '5. Do not harass any civilians or take anything from them as it is against our code of conduct.' Pausing there. Foday Sankoh had always been very anxious that the RUF did not harass and harm civilians, hadn't he? A. Yes. Q. And he punished people who were caught harassing and harming civilians, didn't he? A. Well, that that he saw, those that he heard about"); TT, TF1-314, 20 Oct. 2008, p. 18785 ("Q. But in Makeni, during the period you were there and Issa was in charge, the MP's imposed discipline, didn't they? A. Yes. Q. So that, for example, if a soldier raped he would be executed, wouldn't he? A. Yes.... I saw Issa kill one person because he set an example, he said because they said that persona had raped, that was in my presence. I saw that with my own eyes where he shot him. ... 'Q. So he ordered no raping, no killing, am I right? A. Yes. Q. No looting, am I right? A. Yes. Q. No burning people's properties, am I right? A. Yes. Q. No harm of any kind no harassment of civilians; am I right? A. Uh-huh. Q. If he discovered any of those things had been done execution was a real possibility? A. Yes, more for rape, because as regards looting, if you are caught looting you would take the things and return them from – to the civilians from where you took them. You would be flogged and you would be locked in the guardroom. After two or three days you would be freed"); TT, TF1-101, 14 Feb. 2008, p. 3928-9.

[821] Judgement, paras. 5664, 5666.

[822] Judgement, para. 3124.

SAJ Musa had adopted that approach as a policy, let alone a policy that he would apply in his actions at the end of 1998.

369. Fourth, the RUF/AFRC was a fractious hodge-podge of elements that often defied orders or simply splintered into separate factions. At least three and possibly four factions emerged within what had been the "RUF/AFRC" alliance in the course of 1998 alone.[823] Not only were orders flagrantly disobeyed on occasion[824] and rival leaders arrested,[825] but there was outright combat between different groups[826] and alleged assassinations.[827] Commanders in individual areas sometimes treated the areas under their control as fiefdoms, defying central command where they could get away with it. Crimes committed by undisciplined groups were therefore highly likely, and no reasonable observer, absent more information, could have necessarily inferred that these crimes were adopted or approved by the central leadership of the RUF. Indeed, to speak of a single organizational policy under these circumstances, or to draw inferences about the intentions of the whole based on the actions of some faction, would not have been a reasonable assumption during 1998.

370. Fifth, Taylor would not have been able to infer anything about the *modus operandi* of military operations based on the fearsome labels given to them by the RUF/AFRC. The names "Operation Pay Yourself", or "Operation No Living Thing", or even "Operation Spare No Soul" would no more indicate a policy to commit crimes than "Operation Dracula" would suggest that British forces had adopted a tactic of sucking the blood of their enemies at night time during their offensive to retake

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[823] Judgement, para. 6755.

[824] Judgement, para. 6754 ("Koroma ... was arrested by Sam Bockarie, Issa Sesay and other RUF fighters. His diamonds were taken from him and his wife was sexually assaulted"); para. 6758 ("SAJ Musa ordered his troops to stop all communications with Bockarie"); p. 2389, para. 6755 (("Prior to Koroma's arrival in Buedu, SAJ Musa was furious when he learned about Koroma's decision – that the AFRC should be subordinate to the RUF command, as he would not accept the notion that untrained RUF fighters could be in charge of former soldier... As a result, SAJ Musa, and a significant number of AFRC troops loyal to him, opted not to participate in or support the operation.").

[825] Judgement, para. 6754 ("Koroma ... was arrested by Sam Bockarie, Issa Sesay and other RUF fighters. His diamonds were taken from him and his wife was sexually assaulted.").

[826] Judgement, para. 6755 ("a dispute erupted over command and control issues resulting in hostilities between the two factions [the AFRC faction led by SAJ Musa and the RUF] and the deaths of several fighters."); para. 6756 ("In October 1998, Superman and SAJ Musa fought over the killing of a recruit which resulted in an armed clash between Superman and SAJ Musa, causing Musa to leave Koinadugu for Rosos"); para. 6760 (Superman and Gibril Massaquoi engaged in infighting with Boackarie and Issa Sesay, which resulted in the death of Boston Flomo (a.k.a. RUF Rambo) and Superman's forces taking over Makeni, in around late March/early April 1999); para. 6763 ("in around October 1999, fighting again broke out in Makeni, involving Issa Sesay, Superman and Brigadier Mani from the AFRC. This resulted in Sesay taking over command of Makeni. During this infighting, RUF fighter Senegalese was killed.").

[827] Judgement, para. 6758 ("Some witnesses suggested in their testimony that Boackarie and Gullit conspired to kill SAJ Musa.").

Rangoon in World War II.[828] The purpose of such names, which is in no way illegitimate or unlawful, is to instil fear in the enemy. The Yemeni military, in a year when it received $70 million in military support from the United States, launched an operation against militants called "Scorched Earth."[829] No reasonable trier of fact moderately acquainted with military practice could have properly inferred that these names reflected a policy to commit crimes or, more importantly, that any outside observer would have inferred such a policy on that basis.[830]

371. Sixth, though there can be no doubt that the United Nations had reported that serious crimes had been committed by RUF/AFRC soldiers in the aftermath of their ouster from Freetown, even these reports refrained from describing an organizational "*modus operandi*" or tactic. The UN Secretary-General's Fifth Report, dated 9 June 1998, describes "armed former junta elements" or "groups of rebels" engaging in attacks civilians.[831] The description, which Taylor admitted that he read,[832] notably refrains from suggesting that the RUF had adopted such tactics as an organizational policy. Amnesty International did make that claim in late July 1998, but there is no evidence that Taylor read this report, nor that it would have been entitled to credence.[833]

372. Seventh, an accused must know – have actual knowledge – that his assistance will substantially contribute to the future crime. Taylor had no reason to know whether the assistance would have any impact at all on the incidence of future crimes. The most severe crimes, according to the reports, were apparently retaliation in defeat against civilians for perceived collaboration.[834] Allowing the RUF to avoid cataclysmic defeat might well have been understood as a way to avoid a repetition of

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[828] Other notably fearsome names of military operations include "Atilla" (Turkey); "Urgent Fury" (United States); "Carthage" (Royal Air Force), referring to the devastating Roman sack of Carthage on which Tacitus remarked: "They made a desert and called it peace"); "Rathunt" (Canadian Navy).

[829] *The Guardian* Article; *Al Jazeera* Article ("The army launched operation "Scorched Earth" on August 11 in an attempt to finally crush an uprising in which thousands of people have been killed since it first broke out in 2004").

[830] Judgement, para. 6905 ("This strategy entailing a campaign of terror against the civilian population is explicitly demonstrated by the overt names of their military campaigns, such as 'Operation Pay Yourself', 'Operation No Living Thing', and 'Operation Spare No Soul.'").

[831] Exh. P-130, paras. 15 ("former junta elements"), 26 ("several groups of rebels"), 27 ("former junta elements").

[832] TT, Charles Taylor, 25 Nov. 2009, p. 32393 ("I only read the Secretary-General's reports.").

[833] Cf. TT, Charles Taylor, 11 Nov. 2009, p. 32393 ("Q. Did you read reports or get summaries of reports of the international human rights community, people like Amnesty, Human Rights Watch, and their reports that of the atrocities that were being carried out by the RUF and its allies in Sierra Leone? A. No, no, I did not. I only read the Secretary-General's reports.").

[834] See e.g. Judgement, para. 6830 (noting that "AFRC casualties are known to be high and many civilians have been killed and injured").

those attendant crimes. Indeed, the Chamber accepted that Taylor did not intend the perpetration of the crimes that occurred, but that his interests were military, strategic and commercial.[835] As Taylor candidly testified, he did not view the defeat of the RUF and AFRC as in the best interests of the people of Sierra Leone, and that the best solution was a negotiated "return to peace and the recognition of the Kabbah government."[836] This view finds support in an ECOWAS report from 1997, reporting that the "Chiefs of Staff" of ECOMOG that "extreme poverty and other socio-economic factors would inevitably lead to the appearance of numerous factions, putting Sierra Leone at risk of disintegration."[837] These are reasonably possible views as to why Taylor would have provided assistance to the RUF leadership. This state of mind would have been reinforced given Taylor's testimony that Bockarie, during their first meeting "showed interest in what I had to say ... what we were interested in was making sure that we had peace and a return to the 1996 agreement that had been signed in la Côte d'Ivoire".[838]

373. The circumstantial evidence did not establish that the *only reasonable possibility* was that Taylor knew in the course of 1998 that a *modus operandi* had been adopted by the RUF to attack civilians, and that that *modus operandi* would be adopted in respect of any future operations. Another reasonable possibility was that even though he knew some RUF fighters had committed despicable crimes in the retreat from Freetown, he nevertheless believed that this was not the policy of the RUF leadership. This view may have been wrong, even recklessly wrong. But neither of these mental states suffices for the *mens rea* for aiding and abetting. That *mens rea* standard, as discussed in Ground 16, excludes negligence, gross negligence, or even recklessness. As long as the evidence does not exclude as unreasonable the possibility that Mr. Taylor could genuinely have held this view, the conviction for aiding and abetting must be quashed.

374. The circumstantial evidence does not establish, in providing the alleged assistance, that he had that knowledge. A plausible view of the evidence is that Taylor provided the materiel to assist the RUF to hold its positions; to avoid cataclysmic defeat that would have led to its further disintegration with potential negative consequences for peace; and to consolidate its position without a repetition of the

[835] Judgement, pp. 2444-5, paras. 6896-9.
[836] TT, Charles Taylor, 25 Nov. 2009, p. 32396.
[837] Exh. D-136 (Sixteenth Meeting of ECOWAS Chiefs of Staff, 26-27 August 1997), p. 19.
[838] TT, Charles Taylor, 25 Nov. 2009, p. 32431.

crimes committed against civilians during its flight from ECOMOG forces. Indeed, this view is in line with the Chamber's own description of Taylor's purpose in providing the assistance.[839]

(iv) No Reasonable Trial Chamber Could Have Inferred The Existence Of, Let Alone Taylor's Knowledge Of, A Constant and Continuous RUF/AFRC Operational Policy That Encompassed the Indictment Crimes Committed After the Freetown Invasion (1999-2002)

375. The Chamber found that Taylor supplied a large quantity of materiel to Bockarie in March 1999; and unspecified or small quantities of materiel in January and September or October 1999; and in small quantities in 2000 and 2001. The existence of these shipments is challenged below in Ground 23; the issue here is whether, assuming that such shipments were made with the approbation or knowledge of Taylor, the evidence showed that he provided the assistance knowing that it would be used in crimes.

376. The Accused's state of knowledge would not have substantially changed following the crimes committed in Freetown and during the retreat following the ECOMOG counter-offensive. Most forces present in Freetown, and those most likely to have committed crimes there, were the AFRC forces that had spearheaded the attack from the north. Even though the Chamber found that Gullit obeyed some of Bockarie's command, and even though the Chamber found that Bockarie ordered the commission of some crimes in Freetown, there is no evidence that Taylor was informed of either of these facts at the time. The Chamber's findings regarding the extent to which he received "updates" concerning the evolution of the attack on Freetown have been challenged above in Ground 12. But even assuming that there was some contact, the evidence was insufficient to establish – and the Judgement's findings reflect this in the rejection of three of the four instructions allegedly relayed from Taylor to Bockarie[840] – demonstrate that the information provided by Bockarie was not necessarily reliable or accurate.

377. Regardless of the chaotic and disorderly events during and after the Freetown invasion, the evidence shows that by early 1999, the RUF had committed itself to the peace process. On 18 May 1999, the RUF/AFRC signed a ceasefire with the

[839] Judgement, paras. 6896-9.
[840] Judgement, paras. 3567, 3581-610.

Government of Sierra Leone and signed the Lomé Peace Accord in July 1999.[841] Little evidence was adduced concerning unlawful killings or physical violence such as amputations during this period, although the Chamber did find that children were used to participate actively in hostilities; that women were pressed into sexual slavery;[842] that civilians were enslaved to work at certain mines and that one or more were killed who refused; and that a number of UNAMSIL peacekeepers were taken as hostages.[843] There is no indication, however, that any of these crimes were used as a *modus operandi* of combat, or that the nature of these crimes or the manner of their commission would have been in any way foreseeable based on the crimes committed earlier in Freetown in early 1999. The Chamber made no findings that Taylor would have known that these crimes in 1999, 2000 and 2001 were going to be committed by the RUF, much less that any military materiel that he provided would be used in the commission of any of these crimes.

(v) Conclusion and Remedies

378. First, the Chamber's own findings, as discussed in section (ii) above, compel the conclusion that the *mens rea* for aiding and abetting was not met in respect of crimes committed with weapons supplied throughout the Junta period. Based on the Chamber's own findings, this means that the convictions must be quashed in respect of crimes committed immediately after the ECOMOG Intervention,[844] and crimes committed in Kono in early 1998.[845]

379. Second, no reasonable trier of fact could have inferred that Taylor supplied materiel to the Sam Bockarie in 1998 knowing that it would substantially contribute to the commission of crimes. The evidence does not exclude the reasonable possibility that Taylor genuinely thought, albeit mistakenly, that Bockarie would use the materiel to consolidate the RUF's position, and that he would use it for that purpose within the bounds of legality. Any convictions resting on aiding and abetting crimes at Fitti-Fatta, by the AFRC in the north of the country, or by the AFRC or the RUF in Freetown and thereafter, are invalid and must be quashed.

380. Third, no reasonable trier of fact could have inferred, beyond a reasonable doubt, that Taylor supplied materiel to Sam Bockarie and then to Issa Sesay knowing

[841] Judgement, para. 6233.
[842] Judgement, para. 5744.
[843] Judgement, paras. 5750-1.
[844] Judgement, paras. 5559-60.
[845] Judgement, para. 5593.

that it would substantially contribute to the commission of crimes. Any conviction resting on aiding and abetting these crimes is invalid and must be quashed.

iii. GROUND OF APPEAL 19: The Trial Chamber erred in law and fact in failing to make particularized findings concerning Charles Taylor's knowledge or purpose in respect of specific acts of alleged assistance.

381. As argued in Ground 16, the minimum *mens rea* standard in customary international law is purpose. This standard, given the Chamber's own findings, which do not suggest that Mr. Taylor had any such purpose, requires an acquittal on all counts for aiding and abetting. Further, as argued in Ground 23, the Chamber erred in its factual findings that Mr. Taylor facilitated some shipments of materiel into Sierra Leone.

382. Even assuming that neither of these Grounds is sustained, the Chamber committed a legal error by not requiring, or finding, that Mr. Taylor must performed the alleged *actus reus* knowing that it would contribute *substantially* to the commission of crimes. The Chamber, in paragraphs 5528 through 5842, makes findings concerning the nature of Taylor's material assistance to six sets of crimes, defined geographically and/or temporally: (i) crimes by AFRC/RUF forces during the Junta period at Tongo fields and in fighting in Freetown before, during and after the Intervention, and by Sam Bockarie in Kenema during the Junta;[846] (ii) operations in Kono District in early 1998, including during Operation "Pay Yourself";[847] (iii) "Operation Fitti-Fatta in Kono";[848] (iv) Operations in the North in mid-1998, "on Mongor Bengedu and Kabala" and "in the Koinadugu and Bombali Districts from June to October 1998";[849] (v) the December 1998 offensives and the Freetown Invasion;[850] (vi) post-Freetown crimes.[851] The Chamber relies on the conjunction of two subsidiary findings to reach these conclusions: (i) identifying which supply shipments into Sierra Leone Taylor was responsible for facilitating;[852] and (ii) determining which operations or battles those supplies were used in.[853] In determining whether Mr. Taylor's alleged actions had a "substantial effect" on the commission of

[846] Judgement, paras. 5531-60.
[847] Judgement, para. 5593.
[848] Judgement, paras. 5594-632.
[849] Judgement, paras. 5633-67.
[850] Judgement, paras. 5668-721.
[851] Judgement, paras. 5722-53.
[852] Judgement, paras. 4624-5527.
[853] Judgement, paras. 5528-835.

crimes, the Chamber attempted to make findings as to the quantum of material supplied in each alleged shipment, and to verify that the deliveries made their way and were used by the perpetrators, or that they otherwise permitted the capture of supplies that were then used in the commission of crimes.[854]

383. In contrast to these particularized findings about the *actus reus* of aiding and abetting, the Chamber makes only very general findings about Mr. Taylor's *mens rea*. It found that he knew "as early as August 1997" that crimes were being committed by "AFRC/RUF members during the Junta period" and might recur,[855] referring to this as a "propensity";[856] and as of April 1998 that knowledge appears to be somewhat elevated to knowledge that the AFRC/RUF was engaged in a "campaign" of crimes.[857] On the basis of those findings, the Chamber inferred that every *actus reus* of assistance was performed with the requisite *mens rea* for accessorial liability from August 1997 onwards without any particularized analysis of Mr. Taylor's alleged state of mind when he performed these alleged acts of assistance.

384. This was not a safe or sufficient approach. The Chamber's own analysis of *actus reus* shows, whether crimes actually were committed with the supplies allegedly provided by Mr. Taylor was often serendipitous, uncertain and, therefore, unpredictable. The Chamber was ultimately not able to find beyond a reasonable doubt in several cases that the supplies were so used. Indeed, there is good reason to believe based on those findings that the vast majority of supplies provided were not used in crimes, and were used for lawful purposes. Given the variability of circumstances and result, no analysis could have properly omitted to consider whether Mr. Taylor knew that the facilitation of particular supplies would substantially contribute to the commission of crimes, rather than being used for lawful purposes.

(i) Aiding and Abetting Requires, By the Chamber's Own Standards, That the Actus Reus Be Performed With Knowledge That The Actus Reus Will Contribute Substantially to the Crimes

385. Aiding and abetting future crimes involves a prediction. The alleged accessory must be able to predict that the *actus reus* will assist the crime. The prediction must not merely be that the *actus reus* will provide some minor, remote or indirect

[854] These findings are addressed in Ground 23.
[855] Judgement, para. 6882.
[856] Judgement, paras. 6884-5, 6947.
[857] Judgement, para. 6884. Those errors are discussed in Ground 17. The present ground is applicable whether or not Ground 17 is sustained.

assistance, but that the *actus reus* will have "a substantial effect on the realisation of that crime."[858] Other cases formulate the quantum of assistance as requiring that the "conduct substantially contributed to the crime"[859] or require that "the contribution must ... always be substantial."[860]

386. *Mens rea* based on predictions as to future events involves some uncertainty. The doctrine of joint criminal enterprise permits some uncertainty in respect of the ultimate crimes because there must always be a predicate criminal intent. This high volitional element justifies extending liability beyond the crime intended, to crimes that were not intended but foreseeable. Aiding and abetting does not involve this high volitional element which, as explained in *Tadić*, which narrows the permissible scope for imposing liability based on predictions of future events:

> The aider and abettor carries out carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose.[861]

387. Whether or not "specifically directed" is or is not now a legal element of aiding and abetting,[862] the frequent repetition of the phrase shows that it is a common, if not mandatory feature of aiding and abetting. The actus reus must be performed with a high level of probability, nearing certainty, that the crime is going to be committed *and* that the *actus reus* will contribute substantially to that crime. This must be assessed prospectively, from the point of view of the accessory, and in relation to each crime, in order to constitute part of the *mens rea*. In *Limaj*, for example, the accused "played a pivotal role in the functioning of a prison camp."[863] The Trial Chamber nevertheless conducted a detailed analysis of the extent of Limaj's knowledge of various crimes and entered convictions in respect of only two of the

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[858] *Rukundo* AJ, para. 52; *Muvunyi* AJ, para. 79; *Seromba* AJ, para. 44; *Ntawukulilyayo* AJ, para. 214; *Ndinabahizi* AJ, para. 117.
[859] *Kalimanzira* AJ, para. 74; *Karera* AJ, para. 321; *Nahimana* AJ, para. 482; *Ntagerura* AJ, para. 338.
[860] *Brđanin* AJ, para. 277.
[861] *Tadić* AJ, para. 229. See *Vasiljević* AJ, para. 102.
[862] See the discussion in Ground 22. The ICTR Appeals Chamber has so far declined to follow the 3-2 pronouncement in *Mrkšić* and has subsequently reaffirmed that *actus reus* of aiding and abetting must be "specifically aimed" at the crime. *Ntawukulilyayo* AJ, para. 214; *Rukundo* AJ, para. 52; *Kalimanzira* AJ, para. 74.
[863] *Limaj* AJ, para. 123.

crimes.[864] The analysis would have been very different had Limaj possessed the intent to participate in a JCE to commit these crimes through the prison system over which he had authority. This was not the case, and a conviction for aiding and abetting required a more fine-grained analysis of his knowledge of the crimes.

388. The Chamber's broad brush approach to mens rea in this case contrasts with its own approach to *actus reus*. As a matter of *actus reus*, the Chamber found – as more fully discussed in Ground 23, that most of the deliveries of materiel allegedly facilitated by Taylor were of indeterminate[865] or small quantity[866] – in some cases, no more than what could fit in a pick-up truck. This is true of (i) the supplies of arms and ammunition were sent through, *inter alia*, Tamba (a.k.a. Jungle), Marzah and Weah;[867] (ii) the materiel provided to Sesay during trips he made to Liberia in 2000 to 2001;[868] and (iii) the materiel transported by TF1-567.[869] Given the small size of these shipments, the Chamber had an obligation to determine whether Mr. Taylor not only knew about the deliveries, but also whether he knew that they *would substantially contribute* to the commission of the crimes. Neither an awareness that they *might* substantially assist crimes, nor a certainty that they *might* facilitate crimes less than substantially, does not satisfy the well-established legal requirements for aiding and abetting. The Chamber failed to make any distinct findings (and could not, based on the evidence) that Mr. Taylor knew that these finding would substantially contribute to the crimes for which he was convicted.

389. The absence of those legal findings is not surprising given the absence of underlying factual findings. The Chamber seldom identifies with precision the nature of Mr. Taylor's act of "facilitation"; the timing of the "facilitation"; whether Mr. Taylor knew the composition or size of the supplies; or whether Mr. Taylor knew what happened to the supplies after their arrival in Sierra Leone. The Chamber's own factual findings show that Mr. Taylor could not be presumed to have known that such supplies were used in crimes. The Chamber was unable to conclude beyond a reasonable doubt that even the supposedly large Burkina Faso shipment was used in the commission of crimes, since it could not conclude that crimes were committed

[864] *Limaj* AJ, para. 123; *Limaj* TJ, paras. 654-63.
[865] Judgement, para. 4965; paras. 5160-1; paras. 5223-4; para. 5249.
[866] Judgement, para. 4965; paras. 5160-1.
[867] Judgement, para. 4965; paras. 5160-1.
[868] Judgement, paras. 5223-4.
[869] Judgement, para. 5249.

during the initial stage of the Freetown offensive of early 1999.[870] Mr. Taylor could well have believed, especially in respect of the small shipments, that those minimal supplies would do no more than prevent the defeat of the RUF, an event that could potentially have unleashed more bloodshed, crimes and instability then just holding their positions.

390. Other findings by the Chamber, or lack thereof, show that it was certainly not a safe to conclude beyond a reasonable doubt that supplies provided at various times would substantially contribute to crimes, much less the specific crimes for which Mr. Taylor was convicted. No findings were made that it was foreseeable, much less probable or nearly certain, that supplies provided to the Junta Government would contribute substantially to massacres following an ECOMOG counter-attack that would drive RUF and AFRC forces into a chaotic retreat from Freetown, accompanied by looting. No findings were made that it was foreseeable, much less probable or nearly certain to him, that supplies would make their way to the North where they substantially contributed to the commission of crimes by the AFRC factions. This is not a case where the precise crime was committed in an unusual manner, whereas the overall type of crime was known to the accused. On the contrary, these are cases where the materiel provided could have been used perfectly lawfully in – and indeed was urgently needed for – combat operations to ensure the very survival of the RUF.

(ii) Conclusion

391. The Chamber failed to find that Taylor knew that his acts of facilitation, whatever they may have been, were performed knowing that they would substantially contribute to the crimes for which he was convicted. The Chamber, in light of its detailed findings as to how assistance was rendered to specific crimes, was required to consider whether those events were foreseeable such that he would have known that the assistance to crimes would be provided, and that that assistance would contribute substantially to their perpetration.

392. The absence of such findings is particularly notable and ambiguous in respect of the alleged acts of assistance that were not found to contribute substantially to crimes, as was the case in the Burkina Faso shipment; and in respect of the shipments that the Chamber acknowledged were not large and, therefore, whose effect on crimes

[870] See Ground 22.

was inherently uncertain. No finding could have been made that the effect of these amounts of supplies was to "substantially" contribute to crimes.

393. The *actus reus* of aiding and abetting need not be a *sina qua non* of the perpetration of the crime, but nor does it automatically satisfy the *actus reus*. The assistance must have a substantial effect on the crime. Corresponding to this requirement, the accused must know that the assistance will have that substantial effect. The Chamber failed to make that finding, thus invalidating its conclusion.

iv. GROUND OF APPEAL 20: The Trial Chamber erred in fact in finding that the accused was aware of the trans-shipment of arms and ammunition through Liberia to Sierra Leone, or that he was aware of other alleged assistance from or via Liberia, including the three main shipments of arms and ammunition identified by the Trial Chamber.

394. For the reasons expressed under Ground 23 showing that the Chamber made no, or no sufficient findings, to show that Taylor knew about, or that he facilitated, the delivery of supplies to Liberia, it follows that he could not have possessed the *mens rea* for aiding and abetting those acts.

c. ERRORS RELATING TO THE MATERIAL ELEMENT: MILITARY SUPPORT

i. GROUND OF APPEAL 21: The Trial Chamber erred, or misdirected itself, in law and fact in finding that any alleged military assistance to the RUF or AFRC constituted assistance to crimes.

395. War crimes, regrettably, have been a feature of almost every major armed conflict. The standard of aiding and abetting adopted by the Chamber would mean that any assistance to the parties of a conflict would constitute aiding and abetting war crimes because the supplier would be able to foresee that the assistance, in the aggregate, would contribute to the commission of at least some crime. The level of foreseeability would be even higher in respect of states or armed groups that had had difficulty imposing discipline on their soldiers, or where there had been sporadic but repeated incidents of crimes being committed.

396. This interpretation has strikingly broad consequences. Suppliers of weaponry to armed forces in these circumstances would give rise to liability for aiding and abetting war crimes. The punishment of the principals would not relieve the aider and abettor of responsibility. As long as, to use the Chamber's words, "it was recognized

that any military support could facilitate the commission of the crimes",[871] or that there was "a likelihood ... [of] similar crimes in the future,"[872] that would be sufficient to affix accessorial liability.

397. The Chamber found that it could safely infer that Mr. Taylor knew the content of Amnesty International reports,[873] which implies that any supplier of arms should be deemed on notice of any crimes reported in Amnesty International reports. Based on this standard, support to the Afghan government constitutes aiding and abetting torture, ill-treatment and arbitrary detention;[874] support for the Pakistani government constitutes aiding and abetting torture, arbitrary detention, persecution and murder;[875] and support for the Yemeni government constitutes aiding and abetting arbitrary and unlawful killings, torture, arbitrary detention, indiscriminate targeting in armed conflict.[876] Many States continue to support these countries, viewing the stability of these governments to be in their national interest. These countries do not provide such assistance for the purpose of assisting crimes; their purpose is "military, not criminal"[877] and are part of a "*quid pro quo*"[878] to exclude terrorist organizations from their territory. The leaders of these States would probably be surprised to learn that their purpose in providing support is irrelevant, and that mere awareness of the probability that the support may be used in the commission of crimes is enough for the imposition of international criminal responsibility.

398. This doctrine is belied by the widespread practice of States. In 2010, the Yemeni security forces received $155.3 million from the United States Department of Defence "for two specified purposes – counterterrorism and stability operations."[879] The assistance included "small airplanes and helicopters and other aircraft support to the Yemeni air force."[880] That U.S. Department of State that same year reported that, according to "Human Rights Watch (HRW) and other humanitarian organizations, witnesses reported four separate air raids on September 16 in which government

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[871] Judgement, para. 6881.
[872] Judgement, para. 6882.
[873] Judgement, para. 6883, fns. 15476-15482 (making extensive reference to reports by Amnesty International and Doctors Without Borders).
[874] Afghanistan Human Rights.
[875] Pakistan Human Rights.
[876] Yemen Human Rights.
[877] Judgement, para. 6897.
[878] Judgement, para. 6898.
[879] Serafino Issues for US Congress, p. 2.
[880] Serafino Issues for US Congress, p. 31.

bombs killed almost 90 civilians, mostly women, children, and the elderly."[881] The Report goes on to describe a litany of other possible crimes committed within and outside the context of armed conflict. The standard adopted by the Chamber *prima facie* criminalizes the conduct of any American official who approved or even knew about this support, while also knowing of the probability that that support could, at one time or another, be used in crimes.

399. This cannot be correct. The error, as it turns out, is startlingly straightforward: the assistance must be to the crime, as such. The mother of a criminal does not become an accessory to his crimes by feeding him, allowing him to live in the basement, and even buying tools for him, even if she knows that it is probable that any or all of these things sustains his existence and therefore, in a manner of speaking, has a "substantial effect" on the crimes. The seller of a gun is not liable for murder, even though large manufacturers of handguns in the United States can say with certainty that many of their products will, indeed, contribute substantially to the commission of crime, whether it be robbery or murder. None of these acts constitute aiding and abetting because the assistance must be to the crime.

400. The illegality of the alleged assistance is irrelevant to the categorization of the act as aiding and abetting. The getaway driver for a gang of robbers is as guilty of being an accessory whether he drives above or below the speed limit. Similarly, whether a gun-seller does so legally or through the black market is irrelevant to the issue of their accessorial liability for the crime committed by someone to whom they sell the gun. The essential difference in these cases is not *mens rea*, but that the assistance must be to the crime itself, not something else such as a causal precondition for the crime, such as the existence of the perpetrator or their association together. This incidentally assists in understanding why it is not coherent to speak of "aiding and abetting a joint criminal enterprise."[882] The language of "specifically aimed"[883] and "specifically directed"[884] assists in understanding the "substantial contribution" must be to the criminal conduct itself. Although this is a "fact-based inquiry," the inquiry must always be framed properly: did the assistance encourage the crime in particular? Failure to focus the question in this manner would lead to an improperly

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[881] US Yemen Report.
[882] *Kvočka* AJ, para. 91.
[883] *Rukundo* AJ, para. 52; *Kalimanzira* AJ, para. 53; *Muvunyi* AJ, para. 79; *Simić*, AJ, para. 86.
[884] *Ntawukulilyayo* AJ, para. 214 (actus reus consists of acts "specifically aimed at assisting ... the perpetration of a specific crime"); *Seromba* AJ, para. 44; *Ntagerura* AJ, para. 370. See also *Kayishema* AJ, para. 198 ("directly and substantially contributed").

broad definition that would criminalize the actions that States now routinely undertake.

401. The Chamber eliminated this focus in its approach to Taylor's alleged assistance to the RUF. The Chamber asserts, for example, that the "crimes were inextricably linked to the strategy and objectives of the military operations themselves" and that "therefore … any assistance towards these military operations of the RUF and RUF/AFRC constitutes direct assistance to the commission of crimes by these groups."[885] This assertion is, in turn, based on a six paragraph analysis that describes alleged crimes of the RUF over time, invoking a series of crimes and the names of certain operations, that allegedly reflect a "a *modus operandi* based on a campaign of terror against civilians."[886]

402. The categorization of the RUF as, in effect, a criminal organization by-passes the usual standard for determining individual criminal responsibility in the context of collective action. No case at the ICTY or the ICTR has deemed any organization criminal as a means of criminalizing assistance thereto: not the *Interahamwe*, not the Rwandan Government Forces, not the Rwandan Presidential Guard or Paracommando Battalion, not the VRS, not even any of the smaller militia that engaged in many crimes over a long period of time. The London Charter specifically provided in Article 9 that an organization could be deemed a criminal organization, and yet the only organization that was so categorized was the SS – not the not the SA, the Bundeswehr, not even the General Staff of the Army.

403. The reluctance to define organizations as criminal is logical. Article 7(1) defines the modes of liability for individual liability, and declaring organizations criminal simply undermines, and subverts, those standards. As explained in *Tadić*, the whole enterprise of international criminal law is personal, not collective, responsibility: "nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*)."[887] Thus, criminal liability for individuals acting in an association has been addressed extensively through JCE. Declaring entire parties to be criminal as such would not only re-introduce collective responsibility and undermine Article 6(1) of the Statute, but would also have dangerous and unforeseen consequences on

[885] Judgement, para. 6905.
[886] Judgement, para. 6791.
[887] *Tadić* AJ, para. 186.

international humanitarian law. The whole system is predicated on not outlawing one side or the other. It also risks moving into the realm of criminal law matters that ought to be questions of policy, by deeming organizational assistance to be criminal. Unless individual culpability, as defined by the orthodox criteria of Article 7(1), remains the basis of international criminal law, the entire edifice of international humanitarian law is put at risk. The Chamber's declaration of the RUF and AFRC as a "criminal organization" is therefore inappropriate, unsubstantiated, and dangerously over-extends basic principles of individual criminal liability.

404. All of these consequences are avoided simply by adhering to a simple and, one would think, obvious proposition: assistance must be to the crime. The Chamber deviated from fundamental principle by its tendentious and unsubstantiated declaration that "any assistance towards these military operations of the RUF and the RUF/AFRC constitutes direct assistance to the commission of crimes by these groups."[888] That statement does not accord with reality. The RUF and AFRC were fighting a civil war that required bullets, guns and other supplies. Taylor is alleged to have provided supplies that were appropriate for that purpose. He did not provide, for example, 10,000 machetes in boxes labelled "military supplies", which could have no legitimate purpose in the armed conflict.

405. The Chamber does not suggest that the assistance, though neutral in its nature relative to the crimes, was provided for the purpose of facilitating RUF crimes. The Chamber found the contrary, explaining that prior to the Indictment period "cooperation between the NPFL and RUF was limited in its purpose and it was military, not criminal, in its nature."[889] This is the relationship that Taylor continued to have with the RUF, according to the Judgement: "the Accused and the RUF were military allies and trading partners, but it is an insufficient basis to find beyond reasonable doubt that the accused was part of any JCE."[890]

406. Even assuming that Taylor provided some military materiel to the RUF/AFRC, this does not constitute assistance, much less substantial assistance, to the crimes. The RUF was entitled to fight, and the materiel provided was appropriate to that purpose. Crimes committed as a by-product of bad practices, excesses, poor command and control deserve punishment; but declaring the entire RUF a criminal

[888] Judgement, para. 6905.
[889] Judgement, para. 6897.
[890] Judgement, para. 6899.

organization as a means of affixing criminal liability on Taylor abuses basic concepts of criminal law, undermines international humanitarian law, and risks casting an inappropriately wide net of liability over State practice that only serves to undermine the legitimacy of international criminal law.

ii. GROUND OF APPEAL 22: The Trial Chamber erred in law and fact in characterizing resources captured from the enemy as resources provided by Charles Taylor.

(i) Overview

407. The Chamber found that the *actus reus* of aiding and abetting crimes committed in relation to the Freetown offensive could be assessed not only in relation to materiel allegedly provided by Taylor, but also on the basis of any materiel *captured* using the materiel allegedly supplied by Taylor. The Chamber therefore considered it unnecessary to consider the extent to which captured resources had sustained those operations, explaining that "in relation to the materiel captured in Kono, the Trial Chamber notes that the Burkina Faso shipment was causally critical to the success of the Kono operation, and hence the materiel captured there."[891] The consequence was that these captured resources were "directly referable" to the materiel supplied by Taylor and that, together, the resources supplied "formed an amalgamate of fungible resources" that contributed to crimes.[892]

408. The Chamber's approach is unprecedented and incorrect. The *actus reus* of aiding and abetting must "substantially contribute[]"[893] or have a "substantial effect"[894] on the perpetration of the crime. The ICTY Appeals Chamber has interpreted this to mean, in accordance with fundamental principles of criminal responsibility, that the accused's "ability to affect the commission of the crime was substantial."[895] The capture of resources from ECOMOG depended on a whole range of variables over which Taylor neither controlled nor would have been able to foresee. The very fungibility of the materiel by the Chamber makes it improper to attribute any and all consequences from the use of those resources to Taylor.

(ii) The Chamber's Own Approach to Crimes In 1997 and 1998 Rejected the Theory Applied to the Freetown Crimes

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[891] Judgement, para. 5715.
[892] Judgement, paras. 5715-6. See also Judgement, paras. 5719-21.
[893] *Ntawukulilyayo* AJ, para. 216; *Kalimanzira* AJ, para. 74; *Karera* AJ, para. 321.
[894] *Muvunyi* AJ, para. 79; *Seromba* AJ, para. 44; *Blaškić* AJ, para. 46.
[895] *Blagojević* AJ, para. 191.

409. The "fungible resources" approach is rejected in the Chamber's own analysis of responsibility for crimes committed in 1997 and 1998. In respect of all four crime-sets in 1998 (during and immediately after the fall of the Junta, including in Operation Pay Yourself;[896] in Kono, between March and June 1998;[897] in Fitti-Fatta;[898] and in crimes by AFRC forces in the North in 1998[899]), the Chamber attempted to connect the resources used to shipments facilitated by Taylor. In respect of crimes committed in the North, the Chamber addressed the issue of whether any of the supplies allegedly provided by Taylor for use in Kono District made their way to AFRC forces in the North and were used in crimes there in the latter half of 1998.[900] The Chamber noted that the evidence suggested that the ammunition allegedly supplied by Taylor was not of a substantial quantity, and could "fit into one vehicle."[901] The Chamber carefully distinguished between this supply and other sources of ammunition – notably, ammunition captured from the enemy: "The Trial Chamber considers that in such circumstances, and accounting for captured materiel from military engagements, it is not implausible that the materiel [supplied by Taylor] lasted for several months, until September and October 1998."[902] The Chamber went on to conclude that it was "satisfied that the materiel used by the SLA commanders Brima and Kamara in northern Sierra Leone after the attack on Koidu Geiya *was supplied by the accused*."[903] As if requiring added emphasis, the Chamber repeated that despite the absence of direct evidence that this ammunition had an effect on the capture of children who were pressed into military service, it could "nonetheless reasonably infer that it was used by SLA commanders Brima and Kamara in the course of their activities."[904] An outer limit of this finding is then given by the Chamber to the effect that "Bobson Sesay did not testify, nor does the Prosecution allege, that this ammunition was used after the capture of Rosos."[905] The reason that it could not infer that subsequent crimes had also been committed using these resources is the

[896] Judgement, paras. 5546-59 ("the AFRC coup in May 1997 to the retreat from Freetown in February 1998").
[897] Judgement, paras. 5560-93 ("Operations in Kono in early 1998").
[898] Judgement, paras. 5594-632 ("Fitti-Fatta in mid-1998").
[899] Judgement, paras. 5633-67 ("Operations in the North"). The Chamber is unclear whether it applied this doctrine in respect of crime after close of Freetown operations. Judgement, para. 5745.
[900] Judgement, paras. 5633, 5638-9 (describing operations "through June to October 1998"), 5659.
[901] Judgement, para. 5655 (Bobson Sesay).
[902] Judgement, para. 5655.
[903] Judgement, para. 5657 (italics added).
[904] Judgement, para. 5659.
[905] Judgmenet, para. 5658.

possibility that other supplies were captured from ECOMOG: "in or around September 1998, [AFRC troops] ... had to make a number of attacks on ECOMOG positions to supplement their dwindling stocks of arms and ammunition, suggesting that after arriving at Eddie Town, Brima's group obtained other sources of materiel."[906]

410. The Chamber's reasoning shows that it rejected the "fungible resources" theory. Assistance was attributed to the Accused beyond a reasonable doubt only where the Chamber was able to distinctly ascertain whether resources were in the possession of forces at the time and at the place where the crimes were committed. Crimes for which no such finding was possible, notably because of the possibility that the arms or ammunition had been captured from the enemy, were found to be beyond the scope of accessorial liability.

411. The Chamber applied this same reasoning to crimes in Kono in 1998, in operation Fitti-Fatta, and those committed during the Junta period and in "Operation Pay Yourself." The Chamber found that ammunition used in field operations in Kono had come from Taylor via Bockarie or Tamba.[907] This finding is challenged in Ground 23, but the salient aspect of the reasoning for present purposes is that the Chamber would not have had to make any such findings if it had simply adopted the "fungible resources" theory. The Chamber similarly found in respect of Fitti-Fatta that "there were several sources for the materiel for Fitti Fatta, and that one of these sources was the Accused."[908] The Defence again challenges the factual correctness and legal sufficiency of this finding in Grounds 23 in Ground 21, respectively; the salient point here is that the Chamber's findings reflect that it could not resort to the "fungible resources" theory as a way around the need to make these findings. The same approach was taken to crimes committed during the Junta period and in Operation Pay Yourself.[909]

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[906] Judgement, para. 5658.
[907] Judgement, paras. 5587-9 ("their accounts consistently support the involvement of the Accused in the supply of material for operations in Kono before Operation Fitti-Fatta"); para. 5591 ("the Trial Chamber is satisfied that the Accused supplied materiel that was used in operations by the RUF and AFRC in Kono in early 1998, before Operation Fitti-Fatta"; para. 5593 ("the Prosecution has proved beyond a reasonable doubt that materiel supplied by the Accused was used in operations in the Kono District in early 1998, before Operation Fitti Fatta and the commission of crimes during those operations").
[908] Judgement, para. 5628.
[909] Judgement, para. 5559-60.

412. The Chamber's own reasoning therefore shows that the approach to the Freetown crimes was incorrect.

(iii) Attributing To Taylor Responsibility for the Materiel Captured From the Enemy Improperly Broadens the Actus Reus of Aiding and Abetting

413. The Chamber acknowledged that the "AFRC forces who led the Freetown invasion captured sufficient ammunition *en route* to Freetown to enable them to enter Freetown."[910] Even though the Chamber found that the AFRC had obtained supplies from Taylor earlier in the year, it did not purport to attribute these captured supplies to Taylor. The Chamber accordingly found that AFRC forces were able to take over Freetown without the assistance of *any* materiel supplied by, or otherwise attributable to, Taylor.[911]

414. These findings contrast with those concerning the RUF. The Chamber heard and apparently accepted that the RUF, using materiel from the Burkina Faso shipment allegedly facilitated by Taylor, captured from ECOMOG "large quantities of materiel ... in Kono in December 1998."[912] The captured materiel apparently included substantial quantities of missiles, arms, ammunition and vehicles.[913] Neither the captured materiel nor the Burkina Faso materiel arrived in Freetown until "the third week of January 1999 when Gullit's forces retreated from Freetown."[914] Once it did arrive, however, it was found to have been "used in attacks by the RUF and AFRC on the outskirts of Freetown after the withdrawal of Gullit's forces from the city, and in the commission of crimes committed in the Western Area."[915]

415. The Chamber made a key factual finding about the resources that reached Freetown in the third week of January: "it is not possible to differentiate whether the materiel brought by Issa Sesay ... or generally that the materiel used by the troops on the outskirts of Freetown came from the Burkina Faso shipment or further materiel

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[910] Judgement, para. 5825.

[911] Judgement, para. 5704 ("The Prosecution does not contend that materiel from the Burkina Faso shipment was ever directly supplied to Brima's forces before their entry into Freetown"); para. 5658 ("Bobson Sesay did not testify, nor does the Prosecution allege, that this ammunition [allegedly from supplied provided by Taylor in 1998] was used after the capture of Rosos.... [I]t has been judicially noticed that once the AFRC troops arrived in Colonel Eddie Town, in or around September 1998, they had to make a number of attacks on ECOMOG positions to supplement their dwindling stocks of arms and ammunition"). None of the findings concerning "fungible resources" relate to the AFRC forces that drove into Freetown; those findings all relate to "materiel captured from the December 1998 offensives in Kono". Judgement, paras. 5715-6, 5721.

[912] Judgement, para. 5713.

[913] TT, TF1-367, 20 Aug. 2008, pp. 14184-5, 14188; TT, TF1-375, 23 June 2008, pp. 12543-54; TT, TF1-375, 24 June 2008, pp. 12559-62, 12581-2, 12600; TT, TF1-568, 17 Sept. 2008, pp.16417-9.

[914] Judgement, para. 5709.

[915] Judgement, para. 5721.

captured from the offensives in Kono and Makeni."[916] The Chamber found, however, that it did not need to make that finding for two reasons: (i) the Burkina Faso shipment "was causally critical to the success of the Kono operation, and hence the materiel captured there" and is therefore "directly referable" to the materiel that had been purportedly facilitated by Taylor;[917] and (ii) "therefore ... the materiel captured from Kono and the shipment brought by Dauda Aruna Fornie together formed an amalgamate of fungible resources from which Issa Sesay supplied Gullit's troops as they were withdrawing from Freetown."[918] This explanation suggests that Taylor's accessorial responsibility for the crimes arises from the fact he was personally responsible for having provided all the available supplies of materiel: one supply he facilitated or provided directly; one supply for which he is responsible because the assistance he provided previously was "causally critical" to obtaining that supply. The Chamber, in effect, treats that captured materiel in just the same way as if it had been facilitated or supplied directly by Taylor.

416. The notion that Taylor could be held responsible for the captured materiel is incompatible with established definitions of the *actus reus* of aiding and abetting, which requires "acts or omissions specifically aimed at assisting, encouraging, or lending moral support to the perpetration of a specific crime, and which have a substantial effect upon the perpetration of the crime."[919] The ICTR Appeals Chamber, by whose jurisprudence the SCSL is uniquely required to be guided, has declined to dispense with "specifically aimed" as a legal element of the *actus reus* of aiding and abetting notwithstanding the 3-2 majority judgement in *Mrkšić*.[920] Whether "specifically aimed" is a legal requirement or not, the language offers meaningful guidance as to the usual attributes of the nature of the acts that qualify as the *actus reus* of aiding and abetting. Thus, in *Blagojević*, where the ICTY Appeals Chamber suggested for the first that "specific direction" was only an "implicit part of the *actus reus* of aiding and abetting" rather than a legal element,[921] the Chamber conditioned its conviction of the accused on the basis that his "ability to affect the commission of the crime was substantial."[922]

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[916] Judgement, para. 5713.
[917] Judgement, para. 5715.
[918] Judgement, para. 5716.
[919] *Ntawukulilyayo* AJ, para. 214.
[920] *Ntawukulilyayo* AJ, para. 214; *Rukundo* AJ, para. 52; *Kalimanzira* AJ, para. 74.
[921] *Blagojević* AJ, para. 189.
[922] *Blagojević* AJ, para. 191.

417. This characteristic is missing in respect of the materiel captured in Kono. Numerous variables affected whether the RUF captured the materiel in Kono, including their autonomous decision to attack Kono; the tactics adopted; the amount of resistance by ECOMOG; the outcome of the battle; the quantity and nature of ECOMOG supplies deployed in Kono; the decision to continue to advance beyond Kono towards Freetown; the decision to use the resources captured in Kono during that subsequent advance; the decision to share that materiel with the AFRC. These various events and decisions occurred over a period up to two months between Taylor's alleged actions of assistance and the crimes that he supposedly assisted. All of these steps, many of which involve unpredictable human agency, intervene between the Burkina Faso shipment and the crimes committed during the retreat from Freetown.

418. The *actus reus* of aiding and abetting has been denied in circumstances where similar steps intervened between alleged support and crime. Thus, *Kalimanzira*'s conviction for aiding and abetting genocide was quashed because of the lack of any proven immediate connection between the speech and specific killings.[923] Similarly, genocidal exhortations in a newspaper prior to the commencement of genocide in Rwanda were found not to fulfil the *actus reus* of aiding and abetting. Even though there was "probably a link" between the accused's actions and the killings, the Appeals Chamber considered that "there was not enough evidence for a reasonable trier of fact to find beyond a reasonable doubt that the Kangura publications in the first months of 1994 substantially contributed to the commission of acts of genocide between April and July 1994."[924] A third striking example involved an exhortation to kill Tutsi at a roadblock, followed by a killing at that roadblock six days later. The ICTR Appeals Chamber quashed a conviction for aiding and abetting genocide, finding that "it is unclear whether the Appellant's acts substantially contributed to Mr. Nors's killing … six days after these acts or even later."[925] These cases illustrate the level of connection between act and crime that is necessary to fulfil the *actus reus* of aiding and abetting. The captured materiel was not supplied by Taylor and cannot be attributed to him based on any recognized interpretation of the *actus reus* of aiding and abetting.

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[923] *Kalimanzira* AJ, paras. 72-80.
[924] *Nahimana* AJ, para. 519.
[925] *Ndindabahizi* AJ, para. 116.

(iv) The Only Appropriate Remedy, Given the Chamber's Own Findings, Is That the Actus Reus Was Not Fulfilled For Crimes In Relation to Freetown

419. The Chamber's findings imply that had it not attributed the captured materiel to Mr. Taylor, it could not have found beyond a reasonable doubt that the crimes committed during the retreat from Freetown were committed with arms supplied or facilitating by Mr. Taylor. This follows from the Chamber's own approach to the crimes committed in 1997 and 1998, where it required specific proof that crimes were committed using supplies provided by Mr. Taylor, as well as the Chamber's recognition that the captured materiel was "large" in quantity.

420. Any other approach would not meet the requirement of proof beyond a reasonable doubt that the materiel found to have been provided by the accused "substantially contributed" to the crimes.

421. The Chamber was unable to find beyond a reasonable doubt that crimes were committed during the attacks on Kono and Makeni in which the arms from the Burkina Faso shipment was allegedly used. The Chamber states at paragraph 5717 that certain crimes were committed, referring back to its "Factual and Legal Findings on Alleged Crimes." A review of those findings shows that the Chamber was unable to conclude when these crimes were committed and, in particular, whether they were committed during this offensive using the Burkina Faso shipment.[926] The Chamber apparently recognizes this at paragraph 5718 noting that "even if it were the case that no crimes were committed" in Kono, Kenema and Makeni, Mr. Taylor should be held responsible for crimes in Freetown and the Western Area.[927] The Chamber then contradicts itself in paragraph 5719, stating that there were "crimes in the Kono and Makeni Districts," even though its own findings were that it could not ascertain beyond a reasonable doubt that the crimes in question were committed in December and as part of this offensive[928] The Chamber then appears to correct itself in its ultimate findings, however, omitting any reference to the commission of crimes in the Kono and Makeni Districts during this offensive.[929] Mr. Taylor's conviction is instead based on allegedly aid to crimes committed "in Freetown and the Western Area.".[930] In the final analysis, despite the one erroneous statement at paragraph 5719, the

[926] Judgement, para. 1424 ("approximately December 1998"); para. 1540 ("approximately August through December 1998"); para. 1694 ("approximately December 1998 onwards").
[927] Judgement, para. 5718.
[928] Judgement, para. 5719.
[929] Judgement, para. 5835 (xxxiii).
[930] Judgement, para. 5835 (xxxiv).

Chamber did not find that crimes were committed as part of this offensive. Accordingly, in the absence of the connection to crimes in Freetown and the Western Area, no finding could have been made that the Burkina Faso shipment was used in, much less substantially contributed to, the commission of crimes.

422. The Chamber's erroneous approach to the captured materiel was essential to its findings that Taylor aided and abetted crimes committed in the retreat from Freetown. The cause of the error appears to have been partly an error of law and partly and error of fact. In any event, the errors invalidate the finding and occasioned a miscarriage of justice, requiring reversal.

iii. GROUND OF APPEAL 23: The Trial Chamber erred in law and in fact in finding that Charles Taylor facilitated the transportation of arms and ammunition into territories of the RUF or AFRC, by road and air, by using emissaries (including, Daniel Tamba, a.k.a. Jungle; Joseph Marzah, a.k.a. Zigzag; Sampson Weah; Ibrahim Bah; Abu Keita; and Varmuyan Sherif) as couriers, facilitators and/or security escorts of such materiel and that such facilitation played a vital role in the operations of the RUF or AFRC

(i) Overview

423. The Chamber found that Taylor facilitated the flow of military materiel to the RUF/AFRC, which was "critical in enabling the operational strategy of the RUF and AFRC" including the commission of crimes.[931] The Chamber found that materiel contributed to six sets of crimes, defined geographically and temporally: (i) crimes by AFRC/RUF forces during the Junta period at Tongo fields and in fighting in Freetown before, during and after the Intervention, and by Sam Bockarie in Kenema during the Junta;[932] (ii) operations in Kono District in early 1998;[933] (iii) "Operation Fitti-Fatta in Kono";[934] (iv) Operations in the North in mid-1998, "on Mongor Bengedu and Kabala" and "in the Koinadugu and Bombali Districts from June to October 1998";[935] (v) the December 1998 offensives and the Freetown Invasion;[936] (vi) post-Freetown crimes.[937] The Chamber found in respect of each of these sets of crimes that "the

[931] Judgement, para. 6914.
[932] Judgement, paras. 5531-60.
[933] Judgement, para. 5593.
[934] Judgement, paras. 5594-632.
[935] Judgement, paras. 5633-67.
[936] Judgement, paras. 5668-21.
[937] Judgement, paras. 5722-53.

provision and facilitation of the supply of arms and ammunition to the RUF/AFRC had a substantial effect on the commission of crimes charged."[938]

424. To find that Taylor performed the actus reus of aiding and abetting crimes falling within these periods and locations, the Chamber was required to make two findings beyond a reasonable doubt: first, that Taylor provided or facilitated the materiel; second, that the materiel in question substantially assisted crimes.

425. No reasonable trier of fact, properly assessing the evidence, could have concluded that Taylor was involved in most of the alleged arms shipments. The Chamber's assessment of the Magburaka shipment, as well as many of the other arms shipments, is deficient, manifestly incorrect, has occasioned a miscarriage of justice, and requires reversal.

426. Even assuming that some of the factual errors fall within the bounds of the Chamber's discretion, no reasonable trial chamber could have found beyond a reasonable doubt that the materiel allegedly supplied by Taylor substantially contributed to the crimes mentioned. Indeed, the Chamber's own findings manifestly reflect reasonable doubt. The Chamber repeatedly indicated that it could not "find conclusively" whether the materiel allegedly facilitated by Taylor was used in these crimes, let alone whether they substantially contributed to them.[939] On other occasions, the Chamber speculated or drew inferences that do not meet the standard for proof by circumstantial evidence.[940] These findings are unsustainable both because of the Chamber's own findings, and the absence of evidence that could have supported any reasonable chamber to make those findings.

427. The present ground is divided into six sections, corresponding to the sets of crimes as defined by the Chamber; within each of these six sections, the errors relating to Taylor's alleged involvement in facilitating materiel will be discussed first,

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[938] Judgement, para. 6915.

[939] Judgement, para. 5745 ("the evidence of relevant witnesses is not sufficiently precise to find conclusively that the materiel supplied by the Accused was used to commit crimes or used even in specific locations"); para. 5751 ("the evidence of the relevant witnesses is not sufficiently precise to find conclusively that the materiel supplied by the Accused was specifically used to commit these crimes or conduct these activities, particularly in light of evidence that the RUF had recourse to alternate sources of material during this period").

[940] Judgement, paras. 5628 ("the evidence that materiel used by the RUF and AFRC for Fitti-Fatta came from other sources does not preclude part of that materiel also being sourced from the Accused, and indeed TF1-275 suggests that the materiel for Fitti-Fatta came from multiple sources"); para. 5558 ("although there is no direct evidence as to how the shipment brought by Tamba was applied except that it was kept by Bockarie in Kenema, the Trial Chamber can nonetheless reasonably infer that it was used by the AFRC and RUF forces under Bockarie's command in the course of their activities in the Kenema District, which included the commission of crimes").

followed by a discussion of the evidence pertaining to the effect of the materiel on the crimes alleged.

(ii) No reasonable chamber could have found that Taylor substantially contributed to crimes during and immediately after the Junta period by facilitating the Magburaka Shipment or the Tamba delivery

(a) Overview

428. The Chamber found that Taylor was involved in arranging two shipments of materiel to Sierra Leone during this period: (i) a large shipment of materiel to Sierra Leone which arrived at the Magburaka airfield sometime between September and December 1997; and (ii) a non-large truckload of materiel through Daniel Tamba in 1997.[941] The former delivery, according to the Chamber, was used in crimes committed in mining operations during the Junta period and in "'Operation Pay Yourself' and subsequent offensives on Kono"; the latter in crimes "in the Kenema District".[942]

429. No reasonable trial chamber could have concluded that Charles Taylor had any involvement in the Magburaka shipment.[943] Only one witness, TF1-371, connected Taylor to these events,[944] and no reasonable trial chamber could have found that Isaac Mongor and Samuel Kargbo – whose testimony the Chamber largely rejected – provided any corroboration of TF1-371's account. Indeed, the Chamber's own findings show that their testimony did not coincide in any significant regard. Nor could any reasonable trial chamber could have found that Taylor knew about, or was involved, in Tamba supplying one truckload of materiel. The Chamber's own language shows that it entertained doubts given the paucity of evidence and the small-scale of the delivery.

430. Even assuming the evidence could show that either of these deliveries of materiel was provided with the participation of Taylor, no reasonable trier of fact could have inferred that these supplies were used in the crimes mentioned. The Chamber's own findings recognizing the existence of other sources of ammunition reflect this doubt.

431. Sub-sections (b) and (d) examine the errors relating to Taylor's participation in the Magburaka and Tamba supplies, respectively; sub-sections (c) and (e) examine the

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[941] Judgement, para. 4845; para. 5835 (v).
[942] Judgement, paras. 5559-60.
[943] Judgement, paras. 5386, 5388; para. 5396; paras. 5406-8.
[944] Judgement, para. 5393.

errors relating to the finding that these shipments, respectively, substantially contributed to the crimes.

(b) The Evidence Does Not Establish Beyond a Reasonable Doubt Taylor's Knowledge of, or Participation in, the Magburaka Shipment

(1) The testimonies of TF1-371, Isaac Mongor and Samuel Kargbo are not corroborative

432. The Chamber found that Ibrahim Bah arranged a delivery of military supplies including ammunition to the Magburaka airfield in the fall of 1997, and that he did so with the involvement, knowledge and support of Taylor. The latter part of the finding is based on the testimony of TF1-371, who testified that Ibrahim Bah informed him that he, Bah, had been sent by Charles Taylor to help the Junta government to secure arms and ammunition, and that he was paid in diamonds to do so.[945] TF1-371 never expressly stated that this particular shipment had been arranged by Bah on behalf of Taylor, although the Chamber evidently drew that inference.[946]

433. The Chamber asserts that this account, and in particular the fact that Bah "had been sent by the Accused to Freetown," was "corroborated" by two other witnesses, Isaac Mongor and Samuel Kargbo.[947] An examination of the Chamber's reasons shows, however, that there was no corroboration; on the contrary, their testimony deviates markedly from and even largely contradicts that of TF1-371, requiring the Chamber to largely reject their testimony in order to credit TF1-371. First, Kargbo never testified, as did TF1-371, that Bah came to Freetown during this period. Kargbo testified instead that a delegation went to Sierra Leone, following a conversation between Taylor and Koroma about a promise of arms.[948] The Chamber rejected this account, finding Kargbo's testimony to be of "little probative value"[949] and that the "Prosecution did not adduce evidence regarding the procurement of the arms and ammunition, nor of Taylor's direct involvement in making these arrangements."[950]

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[945] Judgement, para. 5390.
[946] Judgement, para. 5390.
[947] Judgement, para. 5393 "TF1-371's testimony is corroborated by the testimony of TF1-532and TF1-597, both of whom testified that Ibrahim Bah came to Freetown on behalf of the Accused and both of whom linked the arms transaction to Magburaka as well as to the Accused. While these witnesses recount different meetings, the content of what they heard in these meetings consistently indicates that Ibrahim Bah was acting on behalf of the Accused in arranging the arms deal. TF1-371 testified that following these meetings Bah left Freetown with Bockarie, and Kargbo testified that Bah went from Freetown to Liberia").
[948] Judgement, paras. 5361; para. 5380; para. 5390.
[949] Judgement, para. 5380.
[950] Judgement, para. 5390.

One of the main reasons for rejecting Kargbo's testimony was his claim that Mike Lamin had been part of the delegation to Sierra Leone, whereas TF1-371 denied that to have been the case.[951] Second, both Kargbo and Mongor claimed that Koroma and Taylor were in direct contact, possibly about the procurement of arms.[952] The Chamber expressly rejected this testimony: "[t]he Prosecution did not adduce evidence regarding the procurement of arms and ammunition, nor of Taylor's direct involvement in making these arrangements."[953] Third, Kargbo testified that the arms actually arrived at Magburaka direct from Liberia, and were accompanied by a second AFRC delegation that had travelled there and returned on the same airplane.[954] The Chamber rejected this account as inaccurate and unreliable, finding "Kargbo's testimony in this regard to be of little probative value ... [and] is contradicted by another Prosecution witness, TF1-371."[955] Fourth, Kargbo's only information about Taylor's involvement in the whole transaction was that up to seven months before the shipment itself, "Koroma reportedly told Taylor that he was sending him a delegation led by Mike Lamin and that Ibrahim Bah had been recommended by Sam Bockarie to assist the delegation with the procurement of arms.[956] Kargbo gives no testimony as to how Taylor responded. Furthermore, Kargbo remarked that "he was aware of other telephone calls made to other African leaders at various times therafter, including Presidents Mainassara of Niger, Blaise Compairé of Burkina Faso and Muammar Gaddafi of Libya."[957] Although this might raise a possible inference that Bah was acting with Taylor's knowledge, no reasonable trial chamber could accord it

[951] Judgement, para. 5380 ("Samuel Kargbo heard Johnny Paul Koroma state at a meeting of the Supreme Council that he was going to send a second delegation to Liberia led by Mike Lamin of the RUF and Lieutenant-Colonel Fonti Kanu of the AFRC to purchase arms and ammunition for the Junta to be facilitated by one General Ibrahim who had been recommended by Sam Bockarie... The Trial Chamber finds Kargbo's testimony in this regard to be of little probative value in establishing a link between this second delegation and the arms shipment as it not only is circumstantial but is contradicted by another Prosecution witness TF1-371, who insisted that Mike Lamin was never on the delegation that went to Liberia to solicit for arms or ammunition.").
[952] Judgement, para. 5390.
[953] Judgement, para. 5390.
[954] TT, TF1-597, 2 June 2008, p. 10710 ("Q. Mr Kargbo, we are dealing with the second delegation. When the second delegation, who had gone you say to get arms and ammunition, came back, what did they tell you? A. Well, when they came back they met us in Magburaka at that time and they came on board a plane with the arms. Q. How long after they had gone to Liberia did they return? A. Within a week. Q. So, they came back before the arms and ammunition came to Magburaka? A. Some of them came on board the aeroplane"); cf. TT, TF1-371, 28 January 2008, pp. 2314-15
[955] Judgement, para. 5380.
[956] Judgement, para. 5360.
[957] Judgement, para. 5360.

significant, much less decisive weight, particularly given that up to seven months elapsed between the conversation and the shipment itself.

434. Mongor's testimony is no more corroborative of Mr. Taylor's involvement. He gave hearsay testimony that Taylor promised in May 1997 that he would "'send something'", but without any further specificity that this was connected to the Magburaka delivery or even to Bah.[958] Mongor testified that Bah had been sent by Taylor to encourage the RUF and AFRC factions of the Junta government to work together.[959] While Mongor testified that the Junta government was happy because Bah "would be able to help them get ammunition", he offers no indication that Taylor knew that Bah was acting as their arms broker.[960] The Chamber was also obliged to reject significant elements of Mongor's testimony that conflict with that of TF1-371, including that the Magburaka delivery had passed through Liberia from Libya – a claim rejected by the Chamber as based on a "a lack of credible evidence"[961] – and the claim that the shipment was small[962].

435. No reasonable trial chamber could have found that Mongor and Kargbo's testimony was anything but contradictory of the main elements of TF1-371's testimony. No significant details overlap or coincide; on the contrary, their testimonies conflict in respect of all significant details, leading the Chamber to reject most of Mongor and Kargbo's testimony. The Chamber's claim that Kargbo and Mongor's testimony "consistently indicates that Ibrahim Bah was acting on behalf of the Accused in arranging the arms deal"[963] has no basis in the Chamber's own findings or the evidence.

(2) The Trial Chamber failed to assess the credibility of TF1-371

436. [See Confidential Annex A, para. 3.]

437. [See Confidential Annex A, para. 4.]

(3) The Trial Chamber failed to assess the credibility of the source of hearsay evidence

[958] Judgement, para. 5358.
[959] Judgement, para. 5358; TT, TF1-532, 11 Mar. 2008, pp. 5712-14; Judgement, para. 5390.
[960] TT, TF1-532, 11 Mar. 2008, pp. 5714.
[961] Judgement, paras. 5384-5.
[962] Judgement, paras. 5095, 5384-5.
[963] Judgement, para. 5393.

438. The witnesses who testified that Ibrahim Bah was acting on behalf of Charles Taylor were both giving hearsay evidence based on the same source: Ibrahim Bah.[964] The Chamber undertakes no analysis whatsoever of Bah's credibility or whether he would, under the circumstances, have had any motivation to lie. The circumstances suggest that of course he would have had a motivation to lie, in order to enhance his own credibility and that he was acting with official approval. The Chamber's failure to address this obvious consideration as part of the weight to attach to this hearsay evidence reflects a failure to state reasons, and induced a conclusion that no reasonable trier of fact could have reached. This error on its own or when taken together with other errors invalidates the Trial Chamber's finding that Bah was acting on behalf of Taylor and occasions a miscarriage of justice.

(4) The Trial Chamber failed to assess the hearsay evidence with due caution

439. The evidence that Taylor knew that Bah was acting as an arms broker for the AFRC/RUF relies on one source: Ibrahim Bah. Bah had an obvious interest in telling his interlocutors that this was the case – to bolster his own credibility. Not only is it possible that Bah would have wanted to give this impression, it is likely. The Judgement ignores this issue entirely, merely assuming that what Bah told his interlocutors must have been true. The Chamber's unquestioning reliance on evidence

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[964] Judgement, para. 5390 ("A number of Prosecution witnesses implicated the Accused in the supply of the Magburaka arms shipment, at the request of Johnny Paul Koroma. Witness TF1-371 stated that while in Monrovia, his delegation had spoken to officials of the Liberian Government who assured them that President Taylor was already in contact with Johnny Paul Koroma. Upon his return from Monrovia, TF1-371 went to brief Johnny Paul Koroma who confirmed that President Taylor had already communicated with him and promised support in securing recognition by ECOWAS. Subsequently, TF1-371 was at a meeting with Bockarie and Ibrahim Bah at the Cape Sierra Hotel. After Bockarie expressed concern at the constant military attacks on the AFRC by the Nigerian ECOMOG troops and the AFRC Junta's lack of arms and ammunition, Bah responded that Charles Taylor had specifically sent him to negotiate terms with Johnny Paul Koroma that would assist the AFRC secure arms and ammunition. Isaac Mongor was present at a meeting between Ibrahim Bah and senior RUF officials at Sam Bockarie's residence in Freetown when Bah delivered a message from Charles Taylor urging the RUF "to work together with the AFRC". Mongor attended a subsequent meeting of senior AFRC officials at the residence of Johnny Paul Koroma on Spur Road at which Ibrahim Bah repeated the message from Charles Taylor that the RUF and AFRC should "work hand in hand", a message that was "well received" by both the RUF and AFRC. The main topic discussed at this second meeting was the need for ammunition and that the meeting was happy because Bah "would be able to help them get ammunition". Later Koroma told Mongor that he had been in contact with Taylor and that Taylor had said that he was going to "send something" for the Junta Government."); p. 1875, para. 5390 ("Subsequently, TF1-371 was at a meeting with Bockarie and Ibrahim Bah at the Cape Sierra Hotel. After Bockarie expressed concern at the constant military attacks on the AFRC by the Nigerian ECOMOG troops and the AFRC Junta's lack of arms and ammunition, Bah responded that Charles Taylor had specifically sent him to negotiate terms with Johnny Paul Koroma that would assist the AFRC secure arms and ammunition").

that it was obliged by law to assess with caution would not have been committed by a reasonable trial chamber.

440. No reasonable chamber could have rejected the possibility that Bah brokered the Magburaka delivery without Taylor's knowledge. Nothing in the circumstances of the Magburaka shipment implies that it was likely, let alone proven, that Taylor learned of Bah's role. The shipment, as the Chamber found, did not pass through Liberia; Koroma was in direct touch with other African leaders, including the most-likely sources of the Magburaka shipment; and, as the Chamber also found, Bah had the capacity – and did on occasion – act independently of Taylor.[965] Bah, as Kargbo testified, had already been introduced to the Junta government independently of any introduction by Taylor.[966] Mongor similarly suggested that Ibrahim Bah had previously helped the RUF obtain arms and ammunition and was sought out by Koroma for that reason.[967] Bah, according to TF1-371, was living in Burkina Faso a the time the Magburaka shipment was arranged, and was traveling back and forth to Abidjan for face-to-face meetings with Sankoh.[968] TF1-371 even testified that Bah represented himself as being "an advisor to Mr. Sankoh,"[969] suggesting that there was no need for Mr. Taylor to act as an intermediary either between Sankoh and Bah, or between Bah and the Burkinabé authorities. Indeed, TF1-168 testified that Bah and Sankoh travelled together on at least one occasion to Burkina Faso.[970] The Chamber ignored this evidence, which further diminishes the likelihood that Mr. Taylor *had* to be involved in arranging this transaction.

441. The Chamber's evaluation of the evidence is manifestly flawed. No reasonable trier of fact could have ignored the reasonable possibility that Bah acted without Taylor's knowledge or support. The error invalidates the finding that Taylor

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[965] Judgement, para. 2753 ("The Trial Chamber finds beyond reasonable doubt that Ibrahim Bah was an independent businessman who worked, at various times and for particular purposes, for both the RUF and the Accused. He also served as a liaison between the RUF and the Accused but had no permanent affiliation with either the RUF or the Accused.").

[966] Judgement, para. 5390 ("Samuel Kargbo overheard a telephone conversation between Johnny Paul Koroma and Charles Taylor during which Koroma reportedly told Taylor that he was sending him a delegation led by Mike Lamin and that Ibrahim Bah had been recommended by Sam Bockarie to assist the delegation with the procurement of the arms and ammunition. Subsequently, Kargbo attended a Supreme Council meeting at which Koroma stated that he was sending a delegation to Liberia led by Mike Lamin of the RUF, Lieutenant-Colonel Fonti Kanu of the AFRC and General Ibrahim Bah to purchase arms and ammunition for the Junta").

[967] TT, TF1-532, 4 Apr. 2008, pp. 6649-61; Judgement, para. 5359.

[968] TT, TF1-371, 25 Jan. 2008, p. 2291.

[969] TT, TF1-371, 25 Jan. 2008, p. 2291.

[970] TT, TF1-168, 22 Jan. 2009, p. 23302.

facilitated the Magburaka shipment and, therefore, invalidates the finding that he aided and abetted crimes committed using that materiel.

(c) The Evidence Does Not Establish Beyond a Reasonable Doubt That the Materiel in the Magburaka Shipment Was Used to Commit Crimes

(1) The size of the Magburaka Shipment

442. A preliminary issue concerning the potential effect of the military supplies contained in the Magburaka delivery is its size. The Chamber on the basis of its discussion of the evidence said that the shipment was "large",[971] but then amplified, without any additional evidence, its size to "very large" in the findings section.[972] The effect of this erroneous transcript is hard to gauge but reflects a not uncommon tendency of the Chamber to disregard, sidestep or alter its own factual findings when reaching ultimate conclusions.[973]

443. Two witnesses, Mongor and Issa Sesay, testified that the quantity was "small".[974] The Trial Chamber preferred the evidence of TF1-371 who, by his own account, was not present at the shipment.[975] The Chamber's reason for preferring TF1-371's account is never made clear. Mongor and TF1-371 were both deemed generally credible by the Chamber. Mongor was present when the shipment arrived and therefore observed it first-hand;[976] TF1-371 was not. Mongor testified in detail about the content of the shipment;[977] TF1-371 was vague about its content and size, admitting that he did not know its exact size.[978] Mongor was able to specifically testify that the shipment did not contain AK-47 ammunition; TF1-371 implausibly claimed that he knew that it did contain AK-47 ammunition. TF1-371's source about the size of the shipment was Issa Sesay,[979] who appeared before the Chamber and said the shipment was small.[980] The Trial Chamber did not even give reasons as to why it preferred the testimony of TF1-371 over the generally-credible eyewitness testimony

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[971] Judgement, para. 5399.
[972] Judgement, para. 5409.
[973] See: Judgement, paras. 5551-2, where the Chamber assumed the materiel must have lasted into 1998 and been used in crimes committed after the ECOMOG Intervention, despite witness testimony that much of the materiel was abandoned in Freetown: Judgement, para. 5547.
[974] Judgement, para. 5398.
[975] Judgement, para. 5397; TT, TF1-371, 28 Jan. 2008, p. 2315.
[976] TT, TF1-371, 28 Jan. 2008, pp. 2316-7.
[977] TT, TF1-532, 4 Apr. 2008, pp. 6644-5.
[978] Judgement, para. 5357.
[979] TF1-371's knowledge of the shipment came from a report he was given by Issa Sesay, but there is no evidence that the report recorded the quantity of materiel delivered: TT, TF1-371, 28 Jan. 2008, p. 2314.
[980] Judgement, para. 5359; para. 5362; para. 5375.

of Mongor. No reasonable trial chamber, without giving a substantial explanation, could have preferred TF1-371's to Mongor's, which was also corroborated by Issa Sesay. This error renders the Chamber's finding invalid and occasions a miscarriage of justice.

444. The finding as to the size and nature of the shipment generally affected the Chamber's reasoning as to the likelihood that the materiel was used in the commission of crimes.[981] The finding that the shipment included AK-47 ammunition had a direct effect on the Chamber reasoning that the shipment contributed to crimes committed in Tongo and elsewhere.[982]

(2) Tongo Fields

445. The crime allegedly facilitated by the Magburaka shipment in Tongo Fields was the use of children under 15 years of age to guard the mining operation.[983] The Chamber states only that AK-47's "were distributed" amongst these under-age soldiers,[984] not that any of these weapons were used to force children into service. The Chamber does not explain how the distribution of weapons to children who have already been pressed into service as armed guards "contributes substantially to the realization"[985] of, or "substantially contributed to,"[986] that crime. Indeed, there is no finding at all that these children subsequently, or previously for that matter, participated directly in hostilities. Guarding an economic facility does not satisfy customary international law definition of participating in hostilities.[987]

(3) Crimes During and After the Intervention, Including in Freetown, in "Operation Pay Yourself", and Kono

446. The Chamber found that materiel provided in the Magburaka Shipment was also used to commit crimes in the context of the ECOMOG Intervention of February 1998, Operation Pay Yourself and the offensives in Kono District in February/March 1998.[988] It did so on the basis that "[a]s there is no evidence that the Junta obtained further materiel after the Magburaka shipment in late 1997 or that the RUF/AFRC

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[981] Judgement, paras. 5551-2.
[982] Judgement, para. 5546; para. 5549.
[983] Judgement, para. 5546; para. 5559; para. 5835 (xxvii).
[984] Judgement, para. 5546 ("TF1-371 testified that the AK-47's obtained upon the arrival of the Magburaka shipment were distributed amongst the armed guards stationed at the mining operations at Tongo fields, some of whom were as young as 13 years old").
[985] *Renzaho* AJ, para. 52.
[986] *Brđanin* AJ, para. 273.
[987] Commentary API, Art. 51(3), para. 1942.
[988] Judgement, paras. 5559, 5835 (xxvii).

were able to capture a significant amount of supplies in the retreat from Freetown, it is likely that the only supplies that the retreating troops had access to were from the Magburaka shipment."[989] The Chamber then proceeded to find in a separate "findings" section "beyond a reasonable doubt that weapons from the Magburaka shipment were used ... in both "'Operation Pay Yourself' and subsequent offensives on Kono."[990]

447. The Chamber committed at least three errors in reaching this finding. First, it reversed the burden of proof by circumstantial evidence. A circumstantial proposition is proven – and there can be no doubt that the evidence that the Magburaka shipment was used in crimes in purely circumstantial[991] – only where it is "the only reasonable inference based on the totality of the evidence."[992] The Chamber here inferred that proposition based on *the absence of evidence to the contrary*. In other words, the proposition does not need to be the only reasonable inference; it need only be a reasonable inference that has not been contradicted. The reasoning reflects an error of law to which the Chamber is owed no deference.

448. Second, the shifting of the burden of proof was not a harmless error in light of its finding that "the AFRC/RUF also obtained supplies from the existing stockpiles of the Kabbah Government when they took power in May 1997, by capturing them from ECOMOG and UN peacekeepers, and through trade with ULIMO, AFL and ECOMOG commanders."[993] Shifting the burden onto the Defence to prove the relative significance of these various sources was even more prejudicial. It was rather for the Prosecution to prove that these other sources were so insubstantial as to exclude any reasonable possibility that those supplies, rather than those in the Magburaka shipment, were used in crimes. The Chamber made no findings showing that this had been proven; instead, it impermissibly resolved ambiguity and doubt in favour of the Prosecution.

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[989] Judgement, para. 5551.
[990] Judgement, para. 5559.
[991] *Delalić* AJ, para. 458 (a circumstantial case consists of "evidence of a number of different circumstances which, taken in combination, point to the guilt of the accused person because they would usually exist in combination only because the accused did what is alleged against him.") As there is no direct evidence that the ammunition or other supplies from the Magburaka shipment was used in the commission of crimes, the Chamber relied on a "combination" of circumstances to infer that proposition.
[992] *Nahimana* AJ, para. 896; *Seromba* AJ, para. 221.
[993] Judgement, para. 6913.

449. Third, the Chamber ignored its own finding that it was merely "likely" that the Magburaka shipment was used in subsequent crimes. "Likely" does not suffice to establish proof beyond reasonable doubt, yet the Chamber proceeded to this legal conclusion without any reference to its own prior finding. The legal finding is not coherent with the factual findings and is therefore an error of law.

450. No reasonable chamber, correctly applying the burden of proof, the standard of circumstantial evidence, or its own factual findings, could have concluded beyond a reasonable doubt that the Magburaka shipment was used in Operation Pay Yourself or in crimes in Kono in early 1998. The litany of legal and factual errors led to a wrong conclusion that occasions a miscarriage of justice.

(d) The Evidence Does Not Establish That Taylor Knew About Or Participated In The Small Quantity of Supplies Provided By Tamba in 1997

451. The Chamber relied on four categories of evidence to find that Daniel Tamba in late 1997 drove "two land-cruiser pick-ups" worth of materiel[994] over the border into Sierra Leone with Taylor's knowledge or support. First, there was TF1-375, a witness whom the Chamber found to be generally unreliable,[995] who testified that this is what he was told by Tamba. Tamba had an obvious incentive to give this impression to bolster his own credibility with his interlocutors, but the Chamber fails to address Tamba's possible motivations for misleading TF1-375.[996] In any event, the Chamber expressly indicated that it would not rely on TF1-375's evidence without corroboration.

452. Second, Jaward testified that the day after the supplies arrived, he saw Bockarie give Tamba a parcel of diamonds with the words, "'this is what I now have for the old man.'"[997] But Jaward also testified that Foday Sankoh was also commonly referred to as "old man"[998] Further, the Chamber noted that Jaward had pre-existing "speculative" belief (i.e. an unsubstantiated belief) that Tamba was acting as an intermediary between Bockarie and Taylor.[999] Jaward's evidence is therefore of little or no value in proving that Taylor knew about this truckload of materiel.

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[994] Judgement, para. 4810.
[995] Judgement, paras. 308-12; 4832.
[996] See Ground 2.
[997] Judgement, para. 4841.
[998] Judgement, para. 4808.
[999] Judgements, paras. 4808, 4841.

453. The third basis for the Chamber's finding is Mongor's testmony that Tamba brought ammunition with Taylor's knowledge before the AFRC coup in May 1997.[1000] The claim is uncorroborated and implausible.[1001] But even assuming it to be true, it has little probative value that Taylor knew, or was involved in, the shipment many months later. Indeed, the Chamber acknowledged that Tamba may have been acting on his account in brokering arms deals with the RUF in 1995 and 1996.[1002] The Chamber recognized that soldiers would often engage in small arms transactions for their own personal gain, which was possible here.

454. Fourth, Fornie testified that he overheard requests for arms and ammunition being sent from Bockarie's radio station to Taylor's radio station, but without any indication as to the response to these requests, nor even confirming a belief that Taylor sent arms to Bockarie in 1997.[1003] TF1-371 similarly expressed a view that Bockarie had sought materiel assistance from Taylor in 1997, but not that there had been an affirmative response, much less that any materiel had been sent through Tamba or any other intermediary.[1004]

455. No reasonable trier of fact could have concluded on the basis of this evidence, that Taylor knew about this small amount of materiel being supplied by Tamba some time in 1997.

(e) The Evidence Does Not Establish Beyond a Reasonable Doubt That Any of the Tamba Supplies Were Used in the Commission of Crimes

456. The Chamber was unable to find that supplies provided by Tamba were "large."[1005] Indeed, according to TF1-375, upon whom the Chamber relied, all of the materiel fit into "two land-cruiser pick-ups."[1006] The Chamber acknowledged that there was "no direct evidence" as to how the materiel was used, but found that it "can nonetheless reasonably infer that it was used by the AFRC and RUF forces

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[1000] Judgement, para. 4842.
[1001] Taylor was not yet President of Liberia at the time, and therefore had no access to AFL stockpiles.
[1002] Judgement, para. 4838 ("Even if Tamba was engaged in purchasing materiel from ULIMO and Guinea during earlier periods, it is of little value in determining the provenance of shipments brought during the Junta period, when the supply routes to Monrovia had been re-opened.").
[1003] TT, TF1-274, 2 Dec. 2008, p. 21429.
[1004] Judgement, para. 4843 ("TF1-371 testified that Bockarie told him that he had sought materiel assistance from the Accused in 1997 when he was at Kenema.").
[1005] Judgement, para. 4965.
[1006] Judgement, para. 4810.

under Bockarie's command in the course of their activities in the Kenema District, which included the commission of crimes in that area."[1007]

457. The finding is unvarnished speculation. All of the supplies in this relatively small shipment may have been used in lawful combat. The Prosecution did not prove that crimes were committed in all combat actions, nor did it show that any of these supplies were actually sent to the field. Meanwhile, as the Chamber acknowledged, Bockarie was obtaining supplies from other sources including trading with Guineans, ECOMOG and others.[1008] Although the evidence did not suggest that the amounts from any one source were substantial, nor is there any indication that they were any less substantial that the relatively small size of Tamba's delivery.

458. No evidential foundation existed to infer that the Tamba delivery was used in the commission of crimes, much less that any of these supplies had a substantial effect on the commission of crimes.

(iii) No reasonable chamber could have found that Taylor substantially contributed to crimes committed in 1998 and early 1999

(a) Overview

459. The Chamber found that Taylor substantially contributed to crimes committed while trying to hold Kono;[1009] crimes committed in operation Fitti-Fatta;[1010] crimes committed during "operations in the north", mainly by AFRC-affiliated forces in Mongor Bengedu and Kabala, and in Koinadugu and Bombali districts;[1011] and crimes committed in the offensive on, and retreat from, Freetown.[1012]

460. Taylor was found to have been involved in three categories of arms shipments that contributed to these crimes: (i) supplies and arms sent to the RUF with Taylor's knowledge by way of intermediaries such as Tamba, Sampson Weah and Joseph Marzah; (ii) supplies provided directly by Taylor to Bockarie on visits to Liberia; and (iii) the "Burkina Faso shipment", that was allegedly facilitated by Taylor.[1013]

461. The Chamber asserts that by the time of the crimes being committed in connection with the Freetown invasion, the materiel allegedly provided by Taylor

[1007] Judgement, para. 5558.
[1008] Judgement, paras. 5815-23.
[1009] Judgement, paras. 5561-93.
[1010] Judgement, paras. 5594-632.
[1011] Judgement, paras. 5633-67.
[1012] Judgement, paras. 5668-721.
[1013] Judgement, para. 5561.

"formed an amalgamate of fungible resources" that, presumably, substantially assisted the commission of crime.[1014] The Chamber even included, in respect of the Freetown attack, materiel captured from the enemy as assistance attributable to materiel allegedly provided by the accused. This aspect of the Chamber's reasoning is addressed separately in Ground 22. The Chamber does not appear to adopt this "fungible resources" concept in respect of crimes committed before the Freetown attack, where it purports to trace the supply of materiel used in specific operations to specific shipments allegedly provided with Taylor's knowledge. The timing of specific shipments may therefore be of relevance in respect of the first three crime events, but are not of equal relevance given the Chamber's reasoning in respect of Freetown.

462. The next four sections address each of the four alleged sets of crimes, as defined by the Chamber. No reasonable trier of fact could have found that the military materiel in question was supplied with Taylor's knowledge or support. Even assuming that such findings could be sustained, no reasonable trial chamber could have found that that materiel contributed substantially to crimes.

463. The Chamber's findings regarding Taylor's alleged facilitation of materiel to the RUF are infected by the same types of error described in the previous section. The Chamber's findings regarding whether this materiel substantially contributed to the crimes specified are not only the result of errors of fact, but are also undermined by its own acknowledgement that it could not determine beyond a reasonable doubt which supplies were used in which attacks. The Chamber's attempt to rely on materiel captured from the enemy is addressed in Ground 22, which further undermines the Chamber's findings concerning the effect of these alleged shipments on the crimes. No reasonable trial chamber could have made these findings, which in conjunction with a variety of errors of law, invalidate the Chamber's reasoning. All convictions based on the Chamber's analysis of crimes committed in the period February 1998 to 1999 are flawed and should be reversed.

(b) Kono

(1) No Reasonable Chamber Could Have Found That Taylor Facilitated Supply of Military Materiel to the Kono Operation, Either By Supplying Bockarie, or By Facilitating Intermediaries

[1014] Judgement, para. 5716.

464. The Chamber did not find Taylor responsible for any crimes that may have been committed during the initial RUF takeover of Koidu Town in March 1998,[1015] but did find that supplies he allegedly provided or facilitated were used by the RUF to hold onto Kono district before operation Fitti-Fatta in June 1998, and in the commission of crimes.[1016] These crimes therefore precede the one shipment from 1998 that the Chamber was able to categorize as "large":[1017] the Burkino Faso shipment, that occurred "around November/December 1998."[1018] The Chamber also found, however, that the supplies allegedly obtained by Bockarie from Taylor during "early to mid-1998 were sizeable, although not large in comparison to the Magburaka, Burkina Faso or the March 1999 shipment."[1019]

465. No reasonable trier of fact could have found that Taylor facilitiated or directly supplied any, or any significant quantity, of materiel in 1998 whether by way of intermediaries or through Bockarie's trips to Liberia. Taylor never denied that Bockarie may have made trips to Liberia and that he may have been able to obtain weapons on the black market or through corruption, but steadfastly denied that he had any knowledge that he was engaging in such activities, or that he supported them.

466. Almost all of the evidence concerning Taylor's knowledge of, or involvement in, Bockarie obtaining supplies in Liberia is based on hearsay from a single source: Bockarie himself. Mallah, Kanneh, TF1-371, Kamara, TF1-585, Fornie and Kargbo all received their information that Taylor was the source of the materiel directly from Bockarie.[1020] The Chamber simply accepted the evidence as true, because many

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[1015] Judgement, para. 5581 ("As a preliminary issue, the Trial Chamber is satisfied ... that both the Koidu Geiya attack and the Sewafe attack tookplace prior to the Fitti-Fatta mission in mid-1998, but after the RUF successfully captured Koidu Town in March 1998.... [a]ccording to Bobson Sesay, the materiel allegedly provided by the Accused was not used to attack Koidu Geiya itself but was used for subsequent operations to hold onto Kono"; the Chamber proceeds to accept this evidence).

[1016] Judgement, paras. 5582, 5592 (referring to crimes committed "after the attack on Koidu Geiya and the receipt of this shipment of ammunition"), 5593.

[1017] Judgement, para. 4965 ("there is insufficient evidence to find beyond a reasonable doubt that, except for the Burkina Faso shipment of November/December 1998, the amounts of materiel provided by the Accused in 1998 and 1999 through, inter alia, Daniel Tamba, Sampson Weah and Joseph Marzah were large."

[1018] Judgement, para. 5835 (xxvi).

[1019] Judgement, paras. 5029-30.

[1020] Judgement, para. 5021 ("Mallah was told by Bockarie that the purpose of his trips to Liberia was to secure supplies from the Accused. Kanneh testified that Bockarie told him "Pa Taylor" was sending ammunition to Foya for the RUF... TF1-371 stated on one occasion when Bockarie returned from Liberia with materiel he spoke to his commanders about meeting the Accused and being instructed by the Accused to maintain Kono "to pay for those materials"... Perry Kamara testified that prior to going to Monrovia, Bockarie sent a message relaying his instructions from the Accused for the RUF to hold onto Kono in early 1998 in order to provide the Accused with diamonds in exchange for arms and ammunition."); para. 4982 ("TF1-585 stated that she was told on another occasion by Bockarie that he

witnesses heard Bockarie say the same thing.[1021] As explained in Ground 1, it is an error of law to rest a conviction decisively on an uncross-examined statement. The Chamber seems oblivious, as it was on other occasions, that it should accord no greater weight to hearsay testimony, even hearsay testimony, than it could to a sworn out-of-court statement.

467. The Chamber also failed to analyze, or even mention, Bockarie's potential motives to lie. Bockarie was at this very time locked in a power struggle with Koroma to determine who would head the RUF/AFRC confederation. He had every interest in projecting the image of being backed by a respected and ostensibly powerful neighbour. No reasonable trial chamber could have failed to assess these factors and to treat the reliability of the source of the hearsay with appropriate caution. Strangely, the Chamber at one point tries to justify its reliance on this hearsay testimony, explaining: "This is explicable by the fact that many of the witnesses who testified were not personally present at meeting between the Accused and Bockarie and therefore could not have observed their interaction."[1022] The implication appears to be that the Chamber should be permitted to rely more liberally on hearsay evidence because of the absence of direct evidence. The opposite should be true: the absence of direct evidence is precisely when hearsay evidence should be approached with special caution.

468. The Chamber's own reasons illustrate the danger of hearsay testimony. At one point, the Chamber excuses a striking implausibility in TF1-371's testimony on the basis that he "was simply reporting what he was told by Bockarie."[1023] Reasoning of this sort could quickly give hearsay testimony an allure of reliability that is both unjustified and dangerous.

469. None of the other witnesses provide any information upon which the Chamber could have relied to make its findings beyond a reasonable doubt. Saidu received his

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had gone to Taylor's farm in Gbarnga, where he arranged for material to be transferred to White Flower. From there it was transferred to Yeaten's house and then escorted overland to Buedu."); para. 4974 ("Fornie stated that during the course of the return trip, Bockarie remarked that Taylor had told him that while Taylor did not have much ammunition, he was ready to support the RUF "to the best of his ability"."); para. 4996 ("Kargbo testified that he knew the ammunition came from Liberia because Bockarie had said that "Charles Taylor had sent the vehicles to collect us", and because of the uniforms Jungle and the other SSS men were wearing").

[1021] Judgement, para. 5021.

[1022] Judgement, para. 5012.

[1023] Judgement, para. 5016.

information from one of Bockarie's bodyguards called Shabado,[1024] but it is unknown how Shabado received his information, as there is no indication he ever personally met and spoke with Taylor. As his hearsay evidence is unsourced, it is of low or no reliability.[1025] Jaward's hearsay evidence is also unsourced,[1026] and is likewise unreliable. TF1-371's testimony that Bockarie would return in the company of members of the Liberian SSS is curiously uncorroborated, even though there should have been other witnesses;[1027] in any event, even if this evidence is accepted as true, it but does not exclude the reasonably possibility that they were persuaded or paid to keep Bockarie's activities in obtaining weapons from Mr. Taylor secret. And neither of the two remaining witnesses, Kabbah and Pyne, mentioned Taylor.[1028] Their evidence cannot, therefore, be probative of the allegation that Taylor was involved in supplying Bockarie at all, whether in 1998 or 1999 at all. Indeed, one of the striking aspects of the testimony as a whole is that the Chamber, at the end of the day, was unable to make any definite findings about the date any one shipment, or even that different witnesses were speaking of the same trips.

470. The second manner in which the Chamber found that Taylor supplied the RUF/AFRC from February 1998 through December 1999 by was through support for *inter alia*, Daniel Tamba (a.k.a. Jungle), Sampson Weah and Joseph (a.k.a. Zigzag) Marzah. The Chamber did not find these shipments to be large,[1029] referring to "the evidence of the majority of witnesses" that the arms and ammunition brought "were few",[1030] and that the materiel was "not enough" to enable the RUF/AFRC to defend strategic positions.[1031]

471. In finding that Taylor was aware of and was, in effect, the ultimate source of the shipments delivered by Tamba, Marzah and Weah, the Chamber recognised that the evidence was largely hearsay,[1032] and therefore required corroboration by direct evidence. However, while it believed such hearsay was supported by "other

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[1024] Judgement, para. 4983.
[1025] *Gotovina* TJ Vol. I, para. 51; *Popović* TJ, para. 1532; *Milutonović* TJ Vol. II, paras. 265 and 1175; *Haradinaj* TJ, paras. 196-7 and 317; *Krajišnik* TJ, para. 1190; *Hadžihasanović* TJ, para. 272; *Strugar* TJ, para. 322; *Kordić & Čerkez* AJ, para. 190.
[1026] Judgement, para. 5021 ("While Jaward did not specifically state that Bockarie said these supplies were sourced from Taylor, Jaward told the Trial Chamber that 'whenever Sam Bockarie went to Monrovia we would expect those supplies from Charles Taylor'").
[1027] Judgement, para. 5022.
[1028] Judgement, para. 4984; paras. 4993-4.
[1029] Judgement, para. 4965.
[1030] Judgement, para. 4961.
[1031] Judgement, para. 4960.
[1032] Judgement, para. 4948.

evidence", the supporting evidence it placed "particular weight" on – that of TF1-516, who heard radio communications from the Executive Mansion for the delivery of materiel[1033] – is also hearsay, and therefore could not be supporting direct evidence. Equally, the corroborating documentary evidence – Exhibit P-066 and P-067 – is hearsay, but in written form.[1034] In making such fundamental mistakes as to the nature of the evidence, the Chamber misled itself that the speculative hearsay that Taylor was aware of the shipments delivered by Tamba *et al.* was corroborated by direct evidence, when it was not. The Chamber's language, that it placed "particular weight" on what it mistakenly took to be the direct evidence of TF1-516, suggests that it may not have reached the same conclusion had it correctly evaluated the nature of the evidence in question. The Chamber's error thus invalidates its finding that Taylor was aware of these shipments.

(2) No Reasonable Trial Chamber Could Have Found That Any Materiel Supplied By Taylor Contributed Substantially to the Commission of Crimes in Kono in 1998

472. The Chamber relies on two erroneous findings to conclude that the materiel allegedly supplied by Taylor substantially contributed to the commission of crimes in Kono: (i) that the quantum of materiel was large, upon which "substantial contribution" could be inferred; and (ii) the evidence of Bobson Sesay about boxes of ammunition marked "AFL" being sent to the field.

473. The only evidence the Chamber cited which supported the allegation that the shipments were large was from Koker, TF1-567 and TF1-516, whom the Chamber said testified that the materiel delivered by Tamba and Marzah amounted to ten-tyred military trucks full of ammunition.[1035] This is a misstatement of their evidence. TF1-516 testified that Bockarie travelled in a ten-tyred truck to Monrovia and returned with ammunition, but he did not stated the truck was full of ammunition; and he did not link the truck to the visits of Tamba and Marzah, but to Bockarie, whose trips the Chamber considered in another context.[1036] TF1-567 testified that on one occasion he saw a ten-tyred truck in Buedu, but he neither stated this truck was full of ammunition, nor explicitly that it was driven by Tamba and Marzah.[1037] Thus the only

[1033] Judgement, para. 4948. The Chamber also cited Fornie's evidence, which was equally hearsay.
[1034] Judgement, para. 4949.
[1035] Judgement, para. 4959.
[1036] Judgement, para. 4873.
[1037] TT, TF1-567, 2 July 2008, p. 12906.

evidence that shipments comprising significant materiel were delivered by Tamba and Marzah is from Koker, but he did not know the names of the Liberians who brought them and witnessed only one of the shipments himself.[1038] The Chamber also cited Exhibit P-067, which refers to Taylor supplying Bockarie with materiel, but has no mention of Tamba and Marzah in this context. Thus there is no credible evidence that Tamba and Marzah brought significant materiel to the RUF/AFRC in 1998.

474. Therefore, given the vast preponderance of evidence that Tamba and Marzah brought small or insignificant amounts of materiel, which did not assist the RUF/AFRC,[1039] and given the errors made by the Chamber in respect of the little evidence it deemed suggested they brought large amounts of materiel, no reasonable chamber could have found that the shipments delivered by Tamba and Marzah in 1998 amounted to substantial assistance.

475. The direct evidence that any of this ammunition was taken to the field is based solely on the evidence of Alimany Bobson Sesay,[1040] who testified that he overheard a radio communication from Bockarie stating that Taylor had arranged for him [Bockarie] to obtain materiel, and that Bockarie instructed the RUF/AFRC commanders to collect the ammunition for use in Kono.[1041] Alimany Sesay claims that he later saw what he presumed to be this ammunition in boxes marked "Armed Forces of Liberia".[1042]

476. No reasonable chamber could have convicted on such evidence alone. The marking of the boxes is in no way probative that Taylor knew of, or participated in, the shipment. The Defence conceded throughout trial that some supplies may have filtered into Sierra Leone, including by way of corrupt Liberian officials; and indeed the Chamber found that such a private trade existed.[1043] The presence of a box marked "AFL" is, therefore, of no probative value in assessing Taylor's participation. The evidence of Taylor's involvement depends on Alimany Sesay's uncorroborated hearsay evidence. As a matter of law or fact, the Chamber could not have relied on this evidence to directly incriminate Taylor.[1044] The Chamber offers no analysis

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[1038] TT, TF1-114, 15 Jan. 2008, pp. 1286-7, 1293-4.
[1039] Judgement, para. 4960.
[1040] Judgement, paras. 5581-91.
[1041] Judgement, para. 5567.
[1042] Judgement, para. 5567.
[1043] Judgement, para. 5817 ("the Trial Chamber accepts that private trade with AFL officers on the Sierra Leonean-Liberian border was an additional source of supply for the RUF.")
[1044] See Section I of the Defence Appeal Brief.

whatsoever of Bockarie's reliability or whether, at the moment he made the incriminating statement, he would have had any reason to deceive Sesay. Had it done so, it would have had to consider that Bockarie had just before usurped Koroma's position and was, in effect, involved in an internal power-struggle with what remained of the RUF/AFRC alliance. He obviously had a motive to give the impression that Taylor supported him. The absence of any such analysis reflects the Chamber's failure to exercise due caution in analysing evidence that it relied upon to make a highly incriminating finding. No reasonable trier of fact would have been so cavalier, and no court as a matter of law could have relied decisively on an uncorroborated hearsay statement that, by its very nature, the Defence had no opportunity to test or cross-examine.

477. The Chamber claimed that Sesay's evidence was corroborated by evidence of other witnesses who testified generally that materiel made its way to this area from Liberia.[1045] These allegations again are not probative that any of these shipments originated with Taylor's knowledge or participation.

(c) Fitti Fatta

(1) No Reasonable Trial Chamber Could Have Found That Any Materiel Supplied By Taylor Contributed Substantially to the Commission of Crimes in Fitti-Fatta

478. The discussion of the Chamber's errors in respect of Taylor's alleged supply of arms directly to Bockarie or through intermediaries in respect of Kono is equally applicable in respect of Fitti-Fatta, a battle that occurred shortly afterwards. Those submissions will not be repeated.

479. The alleged support did not contribute substantially to any crimes. Indeed, the Chamber made no findings that crimes were committed at Fitta-Fatta. The RUF obtained no territory as a result of this battle and was in fact badly defeated. Even assuming that any materiel supplied by Taylor was used in this operation, the Chamber made no findings committed in the course, or as a result, of this alleged assistance. This negates the actus reus of aiding and abetting.

480. Even assuming that any such crimes were committed, no reasonable chamber could have found that any assistance allegedly provided by Taylor substantially assisted crimes committed in Operation Fitti Fatta. The Chamber found that the

[1045] Judgement, paras. 5587-9.

RUF/AFRC obtained ammunition for the attack on Kono from different sources, and Taylor was one of those sources.[1046] However, the Chamber found it could not determine the quantity of ammunition it deemed that Taylor supplied.[1047] Indeed it noted that Mongor testified Taylor supplied only a "small quantity" of ammunition. By contrast, TF1-375, whom the Chamber recognised could not be believed without corroboration, testified that Taylor supplied a large amount of ammunition, but because this is uncorroborated, the Chamber does not seem to have relied on it.[1048]

481. Because there was insufficient evidence on the amount of assistance Taylor was alleged to have provided, a fundamental aspect of the allegation as a whole, it was not possible for the Chamber to conclude that any role played by Taylor in Operation Fitti Fatta amounted to substantial assistance. A finding of aiding and abetting was not available to the Chamber and accordingly its conclusions on this point amount to a miscarriage of justice.

(d) Operations in the North

(1) No Reasonable Trial Chamber Could Have Found That Any Materiel Supplied By Taylor Contributed Substantially to the Commission of Crimes By the AFRC in the North

482. The discussion of the Chamber's errors in respect of Taylor's alleged supply of arms directly to Bockarie or through intermediaries in respect of Kono is equally applicable in respect of crimes in the North. Those submissions will not be repeated.

483. The Chamber found that ammunition provided by Taylor for Fitti Fatta was used by SAJ Musa and Denis Mingo in attacks on Mongor Bengedu and Kabala, which included the commission of crimes; and by another AFRC group headed by Alex Tamba Brima (a.k.a. Gullit) in attacks on Koinadugu and Bombali Districts, which included the commission of crimes.[1049]

484. In finding that the Brima group used ammunition supplied by Taylor to commit crimes, the Chamber relied exclusively on Alimany Bobson Sesay, who testified that the group brought the ammunition given to them for use in Kono District in early 1998 (as for the evidence that ammunition was supplied by Taylor, see above)

[1046] Judgement, para. 5628.
[1047] Judgement, paras. 5630-1.
[1048] Judgement, para. 5630.
[1049] Judgement, paras. 5666-7.

with them on their way to Eddie Town,[1050] and the Chamber inferred that ammunition was used in committing crimes.[1051]

485. No reasonable chamber could have made such a finding. The Chamber reached its conclusion on the basis that it was "not implausible" that the ammunition lasted from early 1998 to October 1998, despite the fact that in total the ammunition was no more than one truck load,[1052] together with the lack of evidence that Brima's group received ammunition from other sources. There are three fundamental errors in the Chamber's reasoning.

486. First, "not implausible" does not satisfy proof beyond a reasonable doubt. Second, the Chamber reversed the burden of proof by relying on the Defence's failure to show that Brima's group received its ammunition from alternative sources, even though there was abundant contextual evidence (and findings by the Chamber) that those sources existed in general. Third, Bobson Sesay was not in a position to know the sources of ammunition obtained by Brima's group. Bobson Sesay was part of the group led by Hassan Papa Bangura (a.k.a. Bomb Blast), which made its way from Kono District in the second quarter of 1998 and met up with Brima's group at Tombodu.[1053] This Bangura/Sesay group brought ammunition allegedly supplied by Bockarie, but Bobson Sesay never identifies the source of Brima's. The evidence does not exclude that Brima's ammunition came from elsewhere. No reasonable chamber could have excluded the reasonable possibility that the ammunition used in the commission of crimes came from Bockarie or Taylor. The Chamber's finding occasions a clear miscarriage of justice.

487. The Chamber's other finding with regards to operations in the North, is that the ammunition supplied by Taylor for Fitti Fatta was brought by Mingo as he moved north and used to commit crimes in northern Sierra Leone.[1054] The Defence has argued above that Chamber was not entitled to conclude that the ammunition used in Fitti Fatta constituted substantial assistance by Taylor, and thus, as a consequence, the Chamber was also not entitled to find that Taylor aided and abetted crimes committed in the North with the same ammunition.

[1050] Judgement, paras. 5654-5.
[1051] Judgement, para. 5659.
[1052] Judgement, para. 5655.
[1053] Judgement, para. 5637; TT, TF1-334, 18 Apr. 2008, p. 8038-9.
[1054] Judgement, para. 5666.

488. However, even assuming that the ammunition provided for Fitti Fatta did constitute substantial assistance by Taylor, no reasonable chamber could conclude that Taylor aided and abetted crimes committed in the North. The Chamber based its finding on the evidence of TF1-375 and Perry Kamara. The Chamber did not find that TF1-375 was a generally credible witness,[1055] and required corroboration, but here believed that it was "plausible" that TF1-375 could tell the difference between the ammunition used in Sierra Leone from that used in Liberia.[1056] No reasonable chamber could have believed this: TF1-375 provided no evidence as to how the types of ammunition were different, and it is unclear how they could have been different, given that ammunition does not differ from country to country but from weapon to weapon. The Chamber was not entitled to believe such obvious nonsense, and this forms the basis for a clear miscarriage of justice.

489. The Chamber believed TF1-375's testimony was supported by that of Kamara, but Kamara testified only that Bockarie instructed Mingo to take the ammunition he was given for the Fitti Fatta operation to SAJ Musa;[1057] there is no evidence he did do so, or that this contained the materiel allegedly supplied by Taylor (indeed it is a reasonable possibility that any Taylor-supplied ammunition was exhausted in Fitti Fatta and so could not have been taken to the North), and the Prosecution never sought from Kamara whether this was the case. The Chamber is not, therefore, entitled to infer from Kamara's evidence that any Taylor-supplied ammunition was taken by Mingo to SAJ Musa.[1058] Kamara's evidence thus does not corroborate TF1-375's account.

490. As TF1-375's account remains uncorroborated, and as TF1-375 was lacking in general credibility, the Chamber was not entitled to rely on him. As its finding relies solely on his evidence, the Chamber has committed an error of fact and law which invalidates its finding and occasions a miscarriage of justice

(e) Freetown

[1055] Judgement, paras. 308-12.
[1056] Judgement, para. 5661.
[1057] Judgement, para. 5660.
[1058] *Delalić* AJ para. 452 ("Where a Prosecution witness whose evidence is vital is able to clarify any ambiguity in that evidence, and where the Prosecution does not seek to have the witness do so, the inference is available that it did not do so because the evidence would not have assisted the Prosecution case. That is not to say that such an inference ought always to be drawn against the Prosecution, but its mere availability tends to render unsafe any resolution of the ambiguity in favour of the Prosecution").

(1) No Reasonable Chamber Could Have Found Beyond a Reasonable Doubt that Taylor Facilitated the Supply of Military Materiel to the RUF's December 1998-January 1999 Offensive by Facilitating the Burkina Faso Shipment or Supplying the Ammunition Transported by Fornie

491. The Chamber found that around November/December 1998, Charles Taylor was "instrumental" in procuring a large quantity of arms and ammunition for the RUF from Burkina Faso.[1059] The Chamber relied heavily on eight witnesses who gave hearsay testimony based on a single hearsay source – Sam Bockarie – who had told them that he had travelled to Burkina Faso, purchased arms and ammunition, and then transported them overland from Liberia from a cargo plane that had arrived at Roberts International Airport.[1060]

492. The Chamber's treatment of the hearsay is manifestly inadequate. The Chamber did not acknowledge or address that Bockarie was the sole hearsay source for all eight witnesses' testimony.[1061] TF1-371, Mongor, Saidu, Mallah, Kanneh and Keita remained in Sierra Leone throughout the entire episode and were only told the details by Bockarie on his return;[1062] Fornie was present in Liberia,[1063] but only learned of Taylor's alleged involvement through Bockarie.[1064]

[1059] Judgement, para. 5527.

[1060] TF1-371: Judgement, paras. 5416, 5419. TF1-532: Judgement, paras. 5432-5. TF1-577: Judgement, para. 5441. TF1-567: Judgement, para. 5442. TF1-045: Judgement, para. 5444. TF1-338: Judgement, para. 5448. TF1-574: Judgement, paras. 5450-2. TF1-276: Judgement, para. 5462. TF1-274: Judgement, para. 5425-9. TT, TF1-274, 3 Dec. 2008, pp. 21542-3; 10 Dec. 2008, pp. 22078-9 ("Bockarie told the witness after their arrival in Monrovia that the Papay/CIC Taylor had said that the ammunition had been brought to Burkina Faso where Bockarie was to go and receive it"); 3 Dec. 2008, pp. 21551-2 ("Bockarie told the witness that the trucks had been loaded at Roberts International Airport").

[1061] Judgement, para. 5513 ("The Trial Chamber notes that a significant part of the Prosecution's evidence regarding the events in Liberia and Burkina Faso is hearsay. In particular, TF1-371, Mongor, Saidu, and Kanneh did not participate in the RUF mission to Liberia and Burkina Faso. Their account is based on what they observed while in Sierra Leone before the departure and after the return of the RUF delegation, including Bockarie's statement during the debriefing in Buedu in early December 1998. In these circumstances, the fact that their accounts do not coincide exactly on every particular point of the mission in Liberia and Burkina Faso does not affect their credibility. Nonetheless, the fact that most of the evidence of the witnesses is second hand has been fully considered when assessing the weight of their evidence").

[1062] TF1-371: Judgement, paras. 5416, 5419. TF1-532: Judgement, paras. 5432-5. TF1-577: Judgement, para. 5441. TF1-567: Judgement, para. 5442. TF1-045: Judgement, para. 5444. TF1-338: Judgement, para. 5448. TF1-571: Judgement, paras. 5450-52. TF1-276: Judgement, para. 5462.

[1063] Judgement, para. 5429.

[1064] TF1-274: Judgement, para. 5425-7.

493. The Chamber treats the number of hearsay witnesses as significantly corroborative of the underlying claim that Taylor was involved in the transaction[1065] and that they "complement each other on each critical element of the allegation."[1066] While they may lend credibility to the fact that Bockarie may have boasted that Taylor sponsored or brokered the transaction, no multitude of witnesses can change the fact that there was just a single source for their information: Bockarie himself. The testimony of those eight witnesses cannot, therefore, be accorded more weight than would be accorded to the lone uncorroborated testimony of Bockarie if he were to appear as a witness in court – minus a discount for the Chamber's inability to observe him directly, and the defence's opportunity to cross-examine him. Treating the testimony of eight witnesses as a substantial enhancement of reliability when they all have a common source is an error of law that evidently had a significant impact on the Chamber's reasoning.

494. Indeed, the Chamber not only places undue weight on the spurious corroboration of the hearsay witnesses, but also completely fails to consider Bockarie's reliability. No reasonable trier of fact could have failed to at least consider the overwhelming motivation of a man in Bockarie's position to lie about Taylor's involvement to reinforce his own position as a supposedly privileged interlocutor with the President of Liberia. The Chamber undertook neither of these evaluations which, together, reflect a failure to approach this hearsay testimony – which in the event is directly incriminating of the appellant – with appropriate caution.

495. Two additional witnesses did offer evidence that Taylor was involved in the Burkina Faso shipment, at least to the extent of facilitating its passage from the airport to the Liberian border. Marzah testified that he was told by Taylor about the plan to send Bockarie to Burkina Faso to obtain materiel, and, later in Liberia, Marzah said he saw a cargo plane deliver ammunition at Roberts International Airport,

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[1065] Judgement, para. 5514 ("In the Trial Chamber's view however, Prosecution witnesses' testimonies, including those who were allegedly present in Liberia when the shipment was received, effectively complement each other on each critical element of the allegation"); para. 5515 ("TF1-371, Mongor, Marzah and Saidu all testified that the Accused received diamonds in exchange for his help in obtaining these materials."); para. 5519 ("Sesay's initial testimony, four years closer to the events in question, corroborates the evidence of the Prosecution witnesses including TF1-371, TF1-388, Fornie and Kanneh, who testified that the materiel was purchased in Burkina Faso."); para. 5521 ("Under these circumstances, and in light of the overwhelming evidence of Prosecution witnesses and documentary exhibits that arms were shipped from Burkina Faso to Monrovia and particularly noting his initial testimony corroborating this evidence, the Trial Chamber does not find Sesay's testimony that the arms were procured elsewhere to be credible").

[1066] Judgement, para. 5514.

ammunition which he delivered to the RUF.[1067] Sherif testified that he was told by Taylor to receive a shipment of materiel at the airport and, after it arrived, was told by a superior to accompany the shipment from the airport to White Flower.[1068]

496. Neither of these witnesses could have been accepted as reliable by any reasonable trier of fact. The Chamber noted elsewhere that Marzah consistently gave false testimony and was unreliable.[1069] Even in respect of this transaction, the Chamber determined that Marzah had wrongly claimed in his testimony that Mike Lamin was on the delegation that accompanied Bockarie to Burkina Faso and transited with him through Liberia.[1070] The Chamber does not expressly consider whether this was a lie, or merely a lapse of memory. This failure is, in itself, a significant failure of the Chamber to give reasons, considering the importance of the testimony in respect of this specific incident and especially in light of findings Marzah had given false testimony in respect of other events. With respect to the Chamber, these were strong indications that Marzah was lying, and that he would have no compunction to lie to incriminate Taylor if he felt he could secure some benefit as a result.

497. The final witness who requires consideration is Sherif. The Chamber, despite categorizing him as a generally reliable witness, did discard his testimony elsewhere in the Judgement in respect of certain key events, such as the first trip taken by Bockarie to Monrovia.[1071]

498. Even assuming that Sherif's testimony could have been treated as reliable, it is not probative that Taylor played any role, much less an essential role, in facilitating the arms transaction. Insisting that the arms arriving at the airport be taken to a depot for distribution would prove no more than that someone alerted Taylor to the arrival of such a shipment at the airport, containing materiel which he may have believed was for the exclusive use of Liberian forces.[1072] Sherif conspicuously failed to mention that Taylor told him that he had anything to do with facilitating the shipment on behalf of the RUF.

[1067] Judgement, paras. 5437-38.
[1068] Judgement, para. 5447.
[1069] Judgement, paras. 263-8.
[1070] The Chamber based this finding on the testimony of TF1-371, who testified that Lamin was not present, as is confirmed by two photographs of the delegation in Burkina Faso. Exh. P-046A; P-046B; TT, TF1-371, 28 Jan. 2008, p. 2402-4.
[1071] Judgement, para. 3852; para. 3855; para. 6543.
[1072] TF1-561 testified that Liberia received shipments from Burkina Faso for its own use: Judgement, para. 4740; TT, TF1-561, 14 May 2008, pp. 9882-5.

499. The documentary evidence does not show that Taylor was involved in the transaction. Exhibit P-063 shows only that the RUF delegation made a "courtesy call" on him. The only possible reference to arms and ammunition is that Bockarie signed a "rich contract" in Burkina Faso, but this is not connected with the "courtesy call" on Taylor. Neither of these two references suggests Taylor was instrumental in procuring materiel, and indeed the Chamber only relied on the exhibit to determine that Burkina Faso was the source of the materiel.[1073]

500. The evidence does not show, and no reasonably trier of fact could have found beyond reasonable doubt, that Taylor was instrumental in procuring the Burkina Faso Shipment. The Chamber's finding thus occasions a miscarriage of justice.

501. A second, much smaller delivery of arms was allegedly provided by Taylor through Dauda Aruna during the Freetown invasion in January 1999. Fornie and others allegedly transported materiel provided by the Charles Taylor from Liberia to Sierra Leone.[1074]

502. Fornie testified that, during the Freetown Invasion, he travelled to Monrovia. There he met with Yeaten, who took Fornie to White Flower and provided him with ammunition to take back to Sierra Leone.[1075] Because the materiel came from White Flower and was facilitated by Benjamin Yeaten, the Trial Chamber concluded that Yeaten was acting on behalf of Charles Taylor, and because of this that Taylor knew about this assistance.[1076]

503. No reasonable trial chamber could have reached such a conclusion. The evidence that Taylor was aware of this transaction is purely circumstantial; therefore, in order for the Chamber's inference to meet the correct standard, of beyond a reasonable doubt, it must be the only reasonable conclusion available.[1077] Here, it is clearly not the only reasonable conclusion. Another reasonable inference from the evidence is that Yeaten was acting without authorisation. While the Chamber did not find that Yeaten traded materiel independently with the RUF on a general basis,[1078] it

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[1073] Judgement, paras. 5519-21.
[1074] Judgement, para. 5130.
[1075] Judgement, para. 5113.
[1076] Judgement, para. 5126 ("While Fornie did not directly testify as to the ammunition originating from the Accused, the Trial Chamber considers that his evidence that it came from White Flower and was facilitated by Benjamin Yeaten, the Accused's subordinate, to be sufficient to establish that the Accused either sanctioned or was aware of the supply to Fornie").
[1077] *Delalić* AJ, para. 458.
[1078] Judgement, para. 2629.

did note that Yeaten could take action without authorisation,[1079] accepted corruption in Yeaten's conduct,[1080] and found that Liberian officers did trade materiel with the RUF in a private capacity, independently of Taylor.[1081] It cannot be excluded that in this transaction, Yeaten was acting in a private capacity; especially, in this context, as there was no mention of Taylor. This possibility should have been considered by the Chamber, and, because it was a reasonable possibility that Yeaten was acting independently, its failure to do so constitutes an error which occasions a miscarriage of justice.

(2) The Evidence Does Not Establish Beyond a Reasonable Doubt That Any of the Materiel Supplied to the RUF/AFRC in the Burkina Faso Shipment and/or the Shipment Escorted by Fornie During the Freetown Invasion Was Used in the Commission of Crimes

504. The section addresses three potential links between the supplies provided by Taylor and crimes: (i) crimes in the initial operations in Kono and Kenema; (ii) crimes committed in Freetown and the Western Area using materiel brought by Sesay; and (iii) crimes committed in Freetown and the Western Area using materiel brought by Rambo Red Goat.

505. The Chamber made no findings that crimes were committed in Kono and Kenema during the offensive commencing in December 1998. The Chamber does at one point state that "the arms and ammunition from the Burkina Faso shipment were ... used in attacks in Kono and Kenema in December 1998 ... and in the commission of crimes in the Kono and Makeni districts."[1082] But this finding is, in turn, based on the section of the Judgement entitled "Factual and Legal Findings on Alleged Crimes."[1083] A review of that section of the Judgement, as discussed in Ground 15, shows that there were no findings of crimes committed during this offensive, although there are findings that crimes may have been committed earlier in year – i.e. before the arrival of the Burkina Faso shipment.[1084] The Chamber implicitly recognizes this at paragraph 5718, claiming that Kono and Kenema were not essential to its findings:

[1079] Judgement, para. 2623.
[1080] Judgement, para. 2628.
[1081] Judgement, para. 5817.
[1082] Judgement, para. 5719.
[1083] Judgement, para. 5717.
[1084] Judgement, para. 1424 ("approximately December 1998"); para. 1540 ("approximately August through December 1998"); para. 1694 ("approximately December 1998 onwards").

"even if it were the case that no crimes were committed in these districts [Kono (including Kenema) and Bombali (including Makeni)] ... crimes, including rape, were committed in Freetown and the Western Area."[1085] Finally, the Chamber's "Arms and Ammunition" findings declare that the Burkina Faso shipment was used in crimes in Freetown and the Western Area, but conspicuously avoids such a finding in respect of Kono District and Makeni.[1086] The only proper reading of the Judgement, therefore, is that the Chamber, notwithstanding the one errant reference in paragraph 5719, did not find that crimes were committed in Kono and Makeni. It follows that Taylor could not have been convicted of aiding and abetting crimes that were not found by the Chamber.

506. The Chamber's reasoning about the alleged materiel brought by Issa Sesay to the environs of Freetown in the third week of January 1999, and allegedly given to Gullit's group in Macdonald, has already been discussed in Grounds 21 and 22.[1087] The Chamber was unable to determine whether that materiel came from the Burkina Faso or Fornie supplies, or had been captured from ECOMOG.[1088] Even assuming that this was not an error, the Chamber further erred by merely assuming, without any evidence, that Issa Sesay distributed ammunition to Gullit's group. The Chamber admitted that it had no such evidence, merely inferring that such distribution was "likely".[1089] This falls blatantly short of the required standard of proof. The Chamber therefore erred in finding beyond a reasonable doubt that materiel from the Burkina Faso shipment was distributed by Sesay to Gullit's forces and used in, let alone substantially contributed to, any crimes.

507. The Chamber's finding that materiel from the Burkina Faso shipment was used in crimes, therefore, boils down to Alimany Bobson Sesay's uncorroborated hearsay testimony that Rambo Red Goat entered Freetown armed with materiel from

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[1085] Judgement, para. 5718.
[1086] Judgement, para. 5835 (xxxiii)-(xxxiv).
[1087] Judgement, para. 5720.
[1088] Judgement, para. 5710; para. 5715-6; para. 5721.
[1089] Judgement, para. 5710. The Chamber similarly found that it was "likely" that Fornie's materiel arrived in Freetown via Issa Sesay. Judgement, para. 5714. Fornie did not testify to this, and the Prosecution failed to clarify the point with him, which should lead to an adverse inference against the finding, even assuming that the "likely" standard was remotely satisfactory for such a finding, which it is not. See *Delalić AJ*, para. 452 ("Where a Prosecution witness whose evidence is vital is able to clarify any ambiguity in that evidence, and where the Prosecution does not seek to have the witness do so, the inference is available that it did not do so because the evidence would not have assisted the Prosecution case. That is not to say that such an inference ought always to be drawn against the Prosecution, but its mere availability tends to render unsafe any resolution of the ambiguity in favour of the Prosecution").

the Burkina Faso shipment.[1090] This, as on so many other occasions, is another example of the Chamber relying on an uncross-examined, and effectively untestable evidence, to make a highly incriminating factual finding. This was both a legal error, and an error of fact that could not have been committed by a reasonable chamber. But even assuming that Bobson Sesay's uncorroborated hearsay testimony was remotely sufficient, the Chamber did not find either that Rambo Red Goat's group itself committed crimes,[1091] or that they distributed their weapons or ammunition to Gullit's forces.[1092] The Chamber's conclusion that Rambo Red Goat's was armed with materiel from the Burkina Faso shipment therefore does not substantiate the different and further claim that this materiel was used in, much less substantially contributed to, the commission of crimes in Freetown or the Western Area.

(iv) No reasonable chamber could have found that Taylor substantially contributed to crimes committed in 1999, 2000 and 2001

(a) Overview

508. The Chamber found that, from 1999 to 2001, Taylor substantially contributed to the commission of crimes by the RUF/AFRC through his participation in (i) the March 1999 Shipment;[1093] (ii) providing Bockarie with a helicopter of materiel as alleged by TF1-567;[1094] (iii) shipments during the period Issa Sesay was leader of the RUF: through Tamba, Marzah, Weah and others;[1095] during Sesay's trip to Liberia in May 2000;[1096] during trips made by Sesay to Liberia in 2000 to 2001;[1097] and during trips made by TF1-567 and Saidu.[1098] These shipments formed part of the overall supply of materiel used by the RUF/AFRC, and on that basis, the Chamber held Taylor liable for substantially contributing to all crimes committed by the RUF/AFRC from 1999 to 2001.[1099]

509. No reasonable chamber could have reached such conclusions. The Chamber made identifiable errors in its treatment of hearsay evidence, circumstantial evidence

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[1090] Judgement, para. 5706-8 ("the Trial Chamber considers credible Bobson Sesay's evidence that Rambo Red Goat told him it came from Bockarie's distribution prior to advancing towards Kono and Makeni, although Red Goat did not disclose whether the ammunition he brought came from Liberia").
[1091] See Ground 6, Section (v).
[1092] Judgement, paras. 5707-8.
[1093] Judgement, para. 5096.
[1094] Judgement, para. 5110.
[1095] Judgement, para. 5163.
[1096] Judgement, para. 5195.
[1097] Judgement, para. 5224.
[1098] Judgement, paras. 5250-1.
[1099] Judgement, paras. 5752-3.

and purported corroboration, just as it did for the other shipments recorded above. Moreover, in convicting Taylor of accessory liability, the Chamber contradicted its own findings. On the one hand, it recognised that following the Freetown Invasion, there was insufficient evidence to find that materiel supplied by Taylor in 1999,[1100] 2000 and 2001,[1101] was used to commit crimes, and accepted that in many cases it could not establish the size of shipments,[1102] or that materiel provided was ever used.[1103] On the other hand, the Chamber found that Taylor was involved in a number of shipments which were delivered to the RUF/AFRC after the Freetown Invasion, which formed "part of the overall supply of materiel" used by the RUF, and which in such a way made Taylor liable as an accessory for the crimes the RUF committed.[1104]

510. On account of such irreconcilable contradictions, the only proper remedy is to reverse the Chamber's conviction for aiding and abetting in respect of these shipments.

511. Section (b) below examines the March 1999 Shipment; section (c) examines the Chamber's finding that Taylor provided Bockarie with a helicopter of ammunition in 1999; section (d) examines all the shipments Taylor was found to have assisted during Issa Sesay's time as RUF leader in 2000 and 2001; and section (e) examines the errors relating to the finding that these shipments substantially contributed to the crimes.

(b) The Evidence Does Not Establish Taylor's Participation in the March 1999 Shipment

512. The Trial Chamber found that on Bockarie's trip to Monrovia around March 1999, he brought back a large shipment of materiel supplied by Taylor.[1105] The Chamber based its finding on the testimonies of TF1-371, TF1-567, TF1-585 and Karmoh Kanneh, which it deemed corroborated each other.[1106]

513. No reasonable chamber could have found that the four witnesses in question corroborated each other. Of these witnesses, only TF1-371 testified specifically to the event in question. His evidence was that, just after the Freetown Invasion, Bockarie

[1100] Judgement, para. 5745.
[1101] Judgement, para. 5751.
[1102] Judgement, paras. 5160-1; paras. 5223-4; para. 5249.
[1103] Judgement, paras. 5160-1; para. 5248.
[1104] Judgement, paras. 5752-3.
[1105] Judgement, para. 5096.
[1106] Judgement, para. 5094.

travelled to Monrovia and returned with a consignment of materiel;[1107] and that this shipment was one of the three major shipments obtained by the RUF/AFRC.[1108] By contrast, none of the other witnesses were specific enough to justify the Chamber's conclusion that they were referring to this same event. TF1-567's evidence was simply a general statement that Tamba, Marzah and others brought ammunition from Liberia to the RUF, which the Chamber recognised.[1109] However, it wrongly used this evidence to support TF1-371's testimony, by claiming that it supported "the arrival of a shipment of arms and ammunition around this time".[1110] TF1-567's evidence cannot be used to support the transportation of the March 1999 Shipment as described by TF1-371, because TF1-567's evidence refers to transportation of materiel by Tamba and Marzah (which the Chamber addressed elsewhere); he does not mention Bockarie transporting a large shipment at this time, and so if anything TF1-567's testimony undermines TF1-371's account.

514. Likewise, Kanneh was not specific. He was unclear about when the shipment occurred, leaving the Chamber to deduce he was referring to the March 1999 Shipment because it occurred when LURD invaded Lofa.[1111] However, this is not specific enough to tie it to this date, as LURD made several attacks on Lofa;[1112] and, moreover, it is unlikely Kanneh was referring to the March 1999 Shipment, which was said by TF1-371 to be one of the three major shipments received by the RUF/AFRC, because he testified that the quantity of ammunition it delivered was "few".[1113] The final witness, TF1-585, testified that Bockarie travelled to Liberia to see Taylor two weeks after the troops retreated from Freetown in 1999; when Bockarie returned from the trip, a day later Jungle brought ammunition.[1114] It is clear

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[1107] Judgement, para. 5048.
[1108] Judgement, para. 5048.
[1109] Judgement, para. 5091 ("TF1-567's testimony does not actually cite a specific shipment. Rather, the way TF1-567 phrased his evidence — "I used to see them bring ammunition" — suggests he was referring to multiple occasions over the period of time he was stationed in Buedu. He stated that when they delivered this ammunition, Marzah, Jungle, and Mike Lama told him that it was the Accused who sent it. However, the Trial Chamber considers that TF1-567's testimony generally supports the arrival of a shipment of arms and ammunitions sent by the Accused to the RUF around this time").
[1110] Judgement, para. 5091.
[1111] Judgement, para. 5090.
[1112] The Chamber did not make factual findings with respect to when exactly and on how many occasions LURD attacked Lofa, but did state that it was "undisputed" there was a "fluctuating battle" in Lofa between LURD and the AFL between 1999 and 2001: Judgement, para. 6722. TF1-516, whom the Chamber deemed credible, testified that in 1999 Voinjama changed hands four times: Judgementpara. 6673. Therefore, it would be impossible to state with any certainty that Kanneh was referring to March 1999 simply because he described a LURD attack on Lofa.
[1113] Judgement, para. 5049.
[1114] Judgement, para. 5050.

from this that TF1-585's testimony does not refer to the same event as described by TF1-371 or by the Chamber. TF1-371 and the Chamber specify that it was Bockarie who returned with the consignment, not Jungle, whereas TF1-585 is specific about it being Jungle who brought the materiel. This cannot be the March 1999 Shipment, brought by Bockarie from Monrovia to Buedu.

515. Given the serious discrepancies between the four accounts, no reasonable Chamber could have concluded that the testimonies of these four witnesses referred, beyond reasonable doubt, to the same event. The Chamber erred in fact in concluding that the testimonies of TF1-371, TF1-567, TF1-585 and Karmoh Kanneh corroborated each other in relation to the March 1999 Shipment.

516. Consequently, only TF1-371 referred to this shipment beyond reasonable doubt, and so any conviction must be based on his uncorroborated hearsay evidence. Yet, his evidence, as the Chamber noted, did not state that the shipment was sent by Taylor.[1115] The Chamber inferred from TF1-371's evidence that Taylor sent it. No reasonable Chamber could safely convict on an inference based on uncorroborated hearsay evidence. On this basis, the Chamber's finding is an error of law and fact, invalidating its finding and occasioning a miscarriage of justice.

517. In addition or alternatively, the Trial Chamber erred in finding that the quantity of materiel was large. In doing so, the Chamber based its finding exclusively on the evidence of TF1-371.[1116] However, as the Trial Chamber recognised, TF1-371 had not mentioned the shipment in previous statements to the Prosecution and testified that he had initially forgotten about it.[1117] By contrast, the Trial Chamber believed that Karmoh Kanneh testified about the same shipment, but rejected his description of the quantity of materiel delivered as "few", on the basis that Kanneh

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[1115] Judgement, para. 5093.

[1116] Judgement, para. 5095 ("In relation to the quantity of the shipment, TF1-371 testified that the shipment was "large" and "major" and was physically transported to Buedu by "pick-ups and trucks". The Trial Chamber notes that while Karmoh Kanneh described the materiel that Bockarie as "few", he initially could not recall the quantity of ammunition they received. In these circumstances, the Trial Chamber accepts TF1-371's testimony that the shipment was large").

[1117] Judgement, para. 5089 ("While TF1-371 described it as one of three "major shipments" received by the RUF, along with the Magburaka shipment in October 1997 and Burkina Faso shipment in November/December 1998, the Trial Chamber notes that his testimony concerning the March 1999 shipment was not as detailed as that relating to the other shipments. TF1-371 failed to mention the alleged March 1999 shipment in an earlier interview in February 2006 and could not explain his failure to do so except for stating that it was "human nature" to forget events that had not occurred "for years". In another prior interview on November 2005 the witness had testified to there being three major shipments, including one in April 1998 and the Magburaka Shipment but did not mention the alleged March 1999 shipment explicitly. The witness also acknowledged that he had forgotten the March 1999 shipment in these interviews").

could not initially recall the quantity.[1118] While the Chamber was of course entitled to reject Kanneh's evidence and accept that of TF1-371, it was not free to do so for a deficiency that equally applied to TF1-371, without significant justification. In the absence of such a justification, a reasonable Chamber faced with the same facts would have been unable to have concluded that the shipment was either large or small. The Trial Chamber has thus erred in fact in finding the shipment was large.

518. Consequently, because there was insufficient evidence on fundamental aspects of the shipment, namely its size, it was not possible for the Chamber to conclude that any role played by Taylor relating to the shipment amounted to substantial assistance. A finding of aiding and abetting was not available to the Chamber and accordingly its conclusions on this point amount to a miscarriage of justice.

(c) The Evidence Does Not Establish Taylor's Participation in Providing Bockarie with a Helicopter of Materiel At An Undefined Time after the Freetown Invasion, and Between August and October 1999

519. The Trial Chamber found that Bockarie made a trip to Monrovia as part of the Lomé delegation and returned to Sierra Leone in or around late September to October 1999 with a helicopter of materiel supplied by Charles Taylor.[1119]

520. This finding was based impermissibly on the uncorroborated hearsay evidence of TF1-567.[1120] TF1-567 testified that Yeaten, in the witness's presence, explained to Bockarie that the materiel loaded in the helicopter Bockarie had boarded had been given to him by Taylor.[1121] He is the only witness who testified about this specific allegation, and thus the Chamber was not entitled to convict based solely on his uncorroborated hearsay.[1122]

521. The Chamber wrongly decided that TF1-567's allegation was "supported by the evidence that Bockarie made trips to Monrovia during 1999 from which he

[1118] Judgement, para. 5095.
[1119] Judgement, para. 5110.
[1120] Judgement, para. 5108 ("The Trial Chamber finds that TF1-567's account is reliable, supported by the evidence that Sam Bockarie made trips to Monrovia during 1999 from which he returned with ammunition. For this reason, the Trial Chamber accepts TF1-567's evidence that Bockarie did make a trip to Monrovia at an undefined time after the Freetown invasion from which he returned with a supply of ammunition").
[1121] Judgement, para. 5099 ("The next day Bockarie, TF1-567 and Benjamin Yeaten went to Spriggs Field, where the witness boarded a helicopter with Bockarie which was loaded with up to 15 "sardine" tins of AK rounds and an "RPG bomb with the TNT". Yeaten explained to Bockarie that this materiel was given to him "by my dad, Charles Taylor" to take to Buedu for the purpose of "keeping security" while Sankoh was in Freetown").
[1122] See e.g. *Gotovinia* TJ Vol. I, para. 43 ("The Trial Chamber used as a standard that it would not enter a conviction where the evidence supporting that conviction was based solely on hearsay evidence").

returned with ammunition".[1123] This is a general assertion that mentions nothing probative regarding Taylor's accessory liability as to the allegation at hand, and thus cannot be used as corroboration to convict.

522. The Trial Chamber also failed to assess the credibility of the source of hearsay evidence, namely Benjamin Yeaten. In TF1-567's evidence, Yeaten told Bockarie that Taylor had given Yeaten the materiel in question.[1124] Although the Trial Chamber concluded that TF1-567's account was credible, it did not assess whether Yeaten's purported comments were likely to have been true. As Taylor's subordinate, Yeaten was hardly likely to tell Bockarie that Taylor did not sanction his actions, and had every reason to suggest that Taylor supported what he was doing. Equally, given the Chamber acknowledged that Yeaten could take action without authorisation,[1125] was corrupt,[1126] and that Liberian officers did trade materiel with the RUF in a private capacity, independently of Taylor,[1127] the Chamber was not justified in accepting Yeaten's purported statement without examining its truth or lack thereof. The absence of any such analysis reflects the Chamber's failure to exercise due caution in analysing evidence that it relied upon to make a highly incriminating finding. No reasonable trier of fact would have done so, and no court as a matter of law could have relied decisively on an uncorroborated hearsay statement that, by its very nature, the Defence had no opportunity to test or cross-examine.

523. For the above reasons, the Trial Chamber's finding that Bockarie made a trip to Monrovia as part of the Lomé delegation and returned to Sierra Leone in or around late September to October 1999 with a helicopter of materiel supplied by Charles Taylor,[1128] is invalid and represents a miscarriage of justice.

(d) The Evidence Does Not Establish Taylor's Participation in Providing the RUF with Materiel While Issa Sesay Was Leader, 2000 to 2001

524. The Chamber found that Taylor provided the RUF with materiel in four different ways whilst Issa Sesay was leader: through Tamba, Marzah, Weah and

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[1123] Judgement, para. 5108.
[1124] Judgement, para. 5099 ("The next day Bockarie, TF1-567 and Benjamin Yeaten went to Spriggs Field, where the witness boarded a helicopter with Bockarie which was loaded with up to 15 "sardine" tins of AK rounds and an "RPG bomb with the TNT". Yeaten explained to Bockarie that this materiel was given to him "by my dad, Charles Taylor" to take to Buedu for the purpose of "keeping security" while Sankoh was in Freetown").
[1125] Judgement, para. 2623.
[1126] Judgement, para. 2628.
[1127] Judgement, para. 5817.
[1128] Judgement, para. 5110.

others;[1129] during Sesay's trip to Liberia in May 2000;[1130] during trips made by Sesay to Liberia in 2000 to 2001;[1131] and during trips made by TF1-567 and Saidu.[1132]

(1) Supply Through Tamba, Marzah and Weah

525. No reasonable chamber could have concluded that Taylor participated in the shipments transported by Tamba, Marzah, Weah and others. The Chamber relied on Marzah's evidence, but only in so far as it was supported by TF1-516. TF1-516 made no claim that Taylor participated in the shipments: he gave evidence that he enabled communications between Sesay and Yeaten.[1133] That Sesay requested and was provided with materiel by Yeaten thus relies on TF1-516's uncorroborated hearsay evidence, and the finding that Taylor participated in this process must be inferred from this evidence. Such an inference, from uncorroborated hearsay evidence, would hardly make for a safe conviction even if it could be justified by appropriate analysis, but the Chamber undertook no examination of whether such an inference was in fact justified; it merely concluded without analysis that Taylor supplied this materiel through Yeaten,[1134] which consitutes an error to give a reasoned judgement. Independently of this, the Chamber found that Taylor did supply the RUF through Roland Duoh, relying on the evidence of TF1-567 and Sherif.[1135] However, this evidence cannot support the finding that Taylor supplied materiel through Yeaten, Tamba, Marzah or Weah, relating as it does to a different intermediary.

(2) Supply Through Issa Sesay in May 2000

526. No reasonable chamber could have found that Taylor provided Sesay with materiel on a trip to Liberia in May 2000. In doing so, the Chamber relied on the evidence of TF1-338, which it believed was corroborated by the evidence of TF1-567, Keita and Kamara. It noted the inconsistencies in the witnesses' testimonies,[1136] yet maintained they were sufficiently similar to corroborated each other.[1137] However, they do not corroborate each other; they each relate to a different time.

527. This can be seen if the evidence is laid out in chronological order, as follows. First in time is TF1-338, who testified that Sesay made two trips to Monrovia in May

[1129] Judgement, para. 5163.
[1130] Judgement, para. 5195.
[1131] Judgement, para. 5224.
[1132] Judgement, paras. 5250-1.
[1133] Judgement, para. 5154.
[1134] Judgement, para. 5159.
[1135] Judgement, para. 5156.
[1136] Judgement, para. 5189.
[1137] Judgement, para. 5191.

2000, and received materiel after the first trip he made.[1138] It was on the second trip that he discussed the release of the hostages.[1139] By contrast, Keita testified that Sesay returned to Makeni with ammunition following a meeting to discuss the release of the hostages (i.e. the second trip in TF1-338's account) but before the UN hostages were released.[1140] For his part, TF1-567 testified that Sesay was given ammunition in Monrovia whilst he was there to discuss the release of the peacekeepers (again, the second trip in TF1-338's account). Last in time is Kamara, who testified that Sesay received ammunition which had been sent in the same helicopter which came to pick up the UN hostages in Foya, i.e. as the hostages were being released, and were in Liberia (and so on a separate and later trip).[1141]

528. It is clear from the above that the four witnesses cannot be testifying about the same shipment: the materiel TF1-338 testified about was supplied to Sesay on an earlier trip, and in Kamara's testimony the materiel was provided after the peacekeepers were released. Only in Keita's and TF1-567's testimonies was materiel provided after the meeting to discuss the release of the peacekeepers but before they were actually released. However, as the Chamber noted, Keita and TF1-567 do not corroborate each other because Keita never mentioned a helicopter,[1142] and even if the Chamber was entitled to conclude that TF1-567 and Keita testified about the same event, it was not entitled to conclude that event was the same as the one mentioned by TF1-338, which is clearly earlier in time.

529. Therefore, no reasonable chamber could have found that TF1-338 was corroborated by TF1-567, Keita and Kamara.. While the Chamber was free to accept TF1-338's evidence and reject those of TF1-567, Keita and Kamara, or to accept all the witnesses' accounts as relating to separate acts of assistance, the Chamber did not do so, finding that the evidence only supported one single act of assistance, namely the episode as described by TF1-338. However, as TF1-338's evidence is uncorroborated, the Chamber's finding on the assistance provided was impermissible,[1143] and thus invalid.

(3) No Practical Or Substantial Assistance

[1138] Judgement, para. 5167.
[1139] TT, TF1-338, 2 Sept. 2008, p. 15142.
[1140] Judgement, para. 5169. Sesay returned to Makeni with the ammunition and then discussed releasing the peacekeepers.
[1141] Judgement, para. 5189.
[1142] Judgement, para. 5189.
[1143] See Section 1 of the Defence Appeal Brief.

530. No reasonable chamber could have concluded that (i) the shipments transported by Tamba, Marzah, Weah and others, (ii) the materiel provided to Sesay during trips he made to Liberia in 2000 to 2001, and (iii) the materiel transported by TF1-567 constituted substantial assistance. For all these shipments, the Chamber could not determine the quantity of the materiel involved.[1144] On account of the Chamber's inability to determine the size of the shipment, the Chamber was not entitled to conclude that the shipments represented substantial assistance, and thus that Taylor had liability for aiding and abetting in respect of them. The Chamber's findings on these occasions are invalid and represent a miscarriage of justice.

531. No reasonable chamber could have found that (i) the shipments transported by Tamba and others, and (ii) the materiel transported by Saidu, constituted assistance. In respect of these shipments, the Chamber was unable to determine whether the materiel was ever used in Sierra Leone.[1145] Indeed, the Chamber noted that Saidu testified that the rifles he transported were never used.[1146] The Chamber was therefore not entitled to find these shipments constituted assistance of any kind, and thus that Taylor had liability for aiding and abetting in respect of them. The Chamber's findings on these occasions are invalid and represent a miscarriage of justice.

(e) The Evidence Does Not Establish Beyond a Reasonable Doubt That Any of the Materiel Supplied to the RUF/AFRC through Tamba, Marzah and Weah, in the March 1999 Shipment, in Bockarie's Helicopter of Materiel, in Fornie's Shipment During the Freetown Invasion and/or Provided to Issa Sesay Was Used in the Commission of Crimes

532. The Chamber found that there was insufficient evidence to find conclusively that materiel supplied by Taylor in 1999,[1147] and 2000 to 2001,[1148] was used to commit crimes. However, the Chamber concluded that the materiel formed "part of the overall supply of materiel" used by the RUF, which included the commission of crimes.[1149]

533. The Chamber's conclusion that the materiel supplied by Taylor formed "part of the overall supply of materiel", and that it was not necessary to distinguish what crimes the Taylor-supplied materiel assisted is an error of law which has been

[1144] Judgement, paras. 5160-1; paras. 5223-4; para. 5249.
[1145] Judgement, paras. 5160-1.
[1146] Judgement, para. 5248.
[1147] Judgement, para. 5745.
[1148] Judgement, para. 5751.
[1149] Judgement, paras. 5752-3.

addressed under Grounds 21 and 22. Equally, the Chamber was wrong to conclude that materiel which it accepted was never used,[1150] or which it could not show was ever used,[1151] was "used" by the RUF. The evidence is that it was not used; it was not open for the Chamber to conclude that it was.

534. The Chamber was not entitled to find that materiel which it accepted was never used,[1152] or which it could not show was ever used,[1153] or which it could not determine constituted substantial assistance,[1154] assisted the commission of crimes. In doing so the Chamber committed an error of both law and fact, invalidating its finding and occasioning a miscarriage of justice.

d. ERRORS RELATING TO THE MATERIAL ELEMENT: MILITARY PERSONNEL

i. GROUND OF APPEAL 24: The Trial Chamber erred in fact and in law in finding that Charles Taylor provided substantial assistance to crimes in the form of persons whom he did not control.

(i) Overview

535. The Chamber erred in law and fact by relying on Alice Pyne's unsourced and uncorroborated second-hand hearsay evidence as the sole basis for finding that Mr. Taylor sent 20 former NPFL fighters to Sierra Leone.[1155] It committed a further error by rejecting Pyne's alternate testimony that Senegalese and the 20 fighters belonged to the STF, without any independent corroboration of her and Alimany Bobson Sesay's opinions.

536. Even assuming that Pyne's evidence was a sufficient basis on which to find that Mr. Taylor knew about, and approved of, the adhesion of these 20 fighters to the RUF, no reasonable trial chamber could have concluded that these individuals would engage in criminal conduct, instead of restricting themselves to lawful combat. Mr. Taylor had no control over the deployment or activities of these soldiers, and to impute their actions to him in that context is an error of law and fact.

537. Even assuming that neither of the foregoing errors were committed, no reasonable trial chamber could have found, and the Chamber did not find, that these 20 fighters substantially contributed to the commission of crimes. The evidence could

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[1150] Judgement, para. 5248.
[1151] Judgement, paras. 5160-1.
[1152] Judgement, para. 5248.
[1153] Judgement, paras. 5160-1.
[1154] Judgement, paras. 5160-1; paras. 5223-4; para. 5249; and see the arguments in respect of the March 1999 Shipment above.
[1155] Judgement, para. 4384.

not, and did not, sustain a finding that the presence of these 20 fighters had any effect, much less a substantial effect, on the crimes of other persons, particularly in light of the errors enumerated in Ground 23 concerning the alleged source of their arms.

538. Any and all of these errors require that these findings be quashed, along with Mr. Taylor's convictions on Counts 1 to 11 for aiding and abetting crimes committed in in Bombali District and during the Freetown Invasion.

(ii) The Chamber erred in fact and law in finding that Charles Taylor sent 20 former NPFL fighters to Sierra Leone

(a) The Chamber erred in fact and law by accepting Alice Pyne's unsourced and uncorroborated second-hand hearsay evidence as the sole basis for an adverse finding of fact

539. Alice Pyne testified that Senegalese told her that "Charles Taylor had sent him and others to Sam Bockarie and Sam Bockarie sent them to Superman".[1156] The Chamber's finding rests on this evidence alone, as no other witness or documentary evidence corroborated this claim.

540. No reasonable trial chamber could have found the fact proven on the basis of this evidence. Pyne gives no details that would assist the Chamber in assessing its reliability. Most obviously, Senegalese does not explain whether the basis for this claim is something that he was told by Mr. Taylor, or whether Senegalese merely believed this based on what he was told by someone purporting to act on Mr. Taylor's behalf. Senegalese's reliability is cast into further doubt by the absence of any evidence of any prior relationship with Mr. Taylor or anyone else in the Liberian government.[1157] Indeed, Senegalese's identity is in doubt, as there were apparently multiple individuals potentially known by this name.[1158] The nature of this evidence is so vague that it is essentially untestable. For the reasons set out in Ground 1, reliance on this evidence to infer a directly incriminating fact was an error of law; further, no reasonable trial chamber, exercising due caution and being aware of the principles set

[1156] TT, Alice Pyne, 19 June 2008, p. 12258:29-12259:1.

[1157] As the Chamber noted, witnesses variously identified Senegalese as associated with Charles Taylor's Special Forces (TF1-375, Varmuyan Sherif, Jabaty Jaward); the SLA before the ECOMOG intervention (TF1-516); the RUF during the Junta (Samuel Kargbo); ULIMO or NPFL in 1997 (TF1-367); ULIMO before that group split (Komba Sumana, Augustine Mallah, Issa Sesay): Judgement, para. 4380.

[1158] While the Chamber found that witnesses consistently identified Senegalese as Liberian (Judgement, para. 4380), the evidence suggests that "Senegalese" was a nickname given to a person who was tall (see, for example, TT, DCT-008, 31 August 2010, pp. 47647:3 - 47648:1.)

out in Ground 2, could have accepted this evidence as a basis for the incriminating finding.

541. The purported reliance on TF1-375 as providing corroboration was erroneous.[1159] First, TF1-375 does not mention any connection between these men and Mr. Taylor, much less that he had sent them. Second, the evidence does not establish that the Liberians accompanying Senegalese, who met Pyne in Yomandu, are the same Liberians as those who arrived in Koinadugu with Senegalese and identified themselves as "former NPFL" to TF1-375.[1160] According to Pyne, she entered Koinadugu with some of Superman's bodyguards, Bai Bureh, Senegalese, General Bropleh and all the fighters accompanying them.[1161] The evidence does not establish which, of any number of Liberian fighters with this group, identified themselves to TF1-375 as "former NPFL". Pyne's testimony that the fighters told her that they belonged to the STF[1162] makes it unlikely that these same fighters, a couple of days later, identified themselves as former NPFL.

542. The only corroboration provided by TF1-375, as the Chamber had to acknowledge, was the arrival of a 'group of Liberian men [...] in Koinadugu after the Fitti-Fatta attack with Senegalese'.[1163] This does not corroborate Mr. Taylor's knowledge or support for the adherence of these men to the RUF.

(b) The Chamber erred in fact and law in accepting Pyne and Bobson Sesay's opinions to reject Pyne's alternate testimony

543. Pyne herself conveyed alternative hearsay evidence as to the affiliation of the fighers, testifying that fighters themselves told her that they belonged to the STF,[1164] and that Bai Bureh told her that Senegalese also belonged to the STF.[1165] The Chamber explained that this alternative hearsay information did not raise a reasonable doubt about Senegalese's account "because the STF members she knew spoke Krio

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[1159] Judgement, para. 4379.
[1160] TF1-375 testified that Senegalese arrived in Koinadugu with about 60 men, the majority of whom were Liberians, and who "they said they were" former NPFL fighters: TT, TF1-375, 24 June 2008, pp. 12566-12567, 12572. Further, the Chamber's summary of TF1-375 mischaracterises his evidence: it is not clear from the transcript whether TF1-375 was told that by any Liberian fighters that they were "former NPFL" or whether he was reporting on a general rumour.
[1161] TT, Alice Pyne, 19 June 2008, pp. 12249, 12251, 12254-5.
[1162] TT, Alice Pyne, 20 June 2008, pp. 12382-5.
[1163] Judgement, para. 4379.
[1164] TT. Alice Pyne, 20 June 2008, pp. 12382-5.
[1165] TT, Alice Pyne, 19 June 2008, pp. 12250, 12253-4; 20 June 2008, p. 12384.

fluently, while Senegalese only spoke Liberian English and Bobson Sesay's explanation that the STF was used as a generic term for the Liberian group."[1166]

544. No reasonable trial chamber could have failed to entertain a reasonable doubt given this alternative hearsay information. First, the alternative information was conveyed to Pyne by several independent sources: the 20 fighters, and Bai Bureh. This evidence, despite its hearsay nature, is therefore prima facie entitled to more weight that Senegalese's uncorroborated story. Second, the Chamber could not have chosen to disbelieve this hearsay information based purely on linguistic usage. The Chamber heard no evidence that all STF spoke fluent Krio, or that Senegalese did not speak Krio.[1167] The Chamber's inference is based purely on conjecture, not evidence. Third, the Chamber disregarded other evidence that Senegalese and his men actually were part of the STF, and that the terms "Liberian" and "STF" were frequently conflated.[1168]

545. The low probative value of Pyne's hearsay in respect of either account could not but have raised a reasonable doubt for a reasonable trier of fact. Pyne's conjecture – and the Chamber's conjecture – based on linguistic usage was certainly not an adequate basis to extinguish reasonable doubt. The Chamber's finding based on this manifestly inadequate evidence caused a miscarriage of justice and should be set aside.

(iii) The Trial Chamber erred in fact and law in finding that Charles Taylor could assist the commission of crimes by sending persons over whom he had no control or influence

546. The *actus reus* of aiding and abetting can, according to previous caselaw, be satisfied by a commander permitting the use of resources under his control, including personnel, to facilitate the perpetration of a crime.[1169] Blagojević performed the *actus reus* of aiding and abetting by having "permitted members of the Brutanac Brigade Military Police to participate in the separations of Bosnian Muslim men from the women, children and elderly as well as in guarding the Bosnian Muslim men detained

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[1166] Judgement, para. 4380.

[1167] In cross-examination, Alice Pyne clarified that "I did not hear [Senegalese] speak any other dialect apart from Liberian English", and in relation to the 20 fighters, "I did not hear them speak proper Krio." (TT, Alice Pyne, 20 June 2008, pp. 12382, 12384) (emphases added). Surely the witness not having heard Senegalese or the men speaking Krio is not conclusive evidence that they did not.

[1168] See Defence Final Brief, para. 1495.

[1169] *Blagojević* AJ, para. 127, *Krstić* AJ, paras. 137, 144.

in Bratunac town from 12 to 14 July 1995"[1170]; Krstić "knew that those murders were occurring and... permitted the Main Staff to use personnel and resources under his command to facilitate them"[1171]; Borovčanin "left the 1st Company of the Jahorina Recruits in Potočari to assist in the forcible transfer" and "continued to permit them to practically assist on 13 July."[1172] In each of these cases, liability was predicated on direct knowledge of the unlawful task to be carried out by the personnel, combined with the power to command those personnel to engage in the task.

547. In the present case, the Chamber erred in law by finding that Mr. Taylor could be liable for the actions of Senegalese or the 20 men, when it did not find that Mr. Taylor had any contact or influence, let alone exercised effective control, over Senegalese and the 20 fighters in question. In the absence of such a finding to ground Mr. Taylor's liability, the only reasonable conclusion is that these men were free agents acting of their own volition.

548. Further, the Chamber erred in law in finding Mr. Taylor liable, without finding that Senegalese or the 20 fighters were sent to facilitate the commission of crimes. That finding was not open on the evidence, as the eventual deployment of Senegalese and the 20 fighters was far from evident when they arrived in Sierra Leone some five months earlier.

549. In the first place, on the basis of Pyne's testimony that Senegalese and the 20 fighters were sent "to Sam Bockarie",[1173] the Chamber held that "Senegalese was sent by the Accused to be part of reinforcements supplied to Bockarie."[1174] The finding that they were sent as reinforcements is not only unsupported by the evidence, but itself fails to support the assertion that they were sent to facilitate the commission of crimes.

550. Further, witnesses testified that Bockarie sent Senegalese to either kill SAJ Musa,[1175] kill Superman,[1176] retrieve ammunition,[1177] or on a mission to Kono.[1178] With only Bobson Sesay supporting this assertion, the Chamber found itself unable to

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[1170] *Blagojević* AJ, para. 131.
[1171] *Krstić* AJ, para. 144.
[1172] *Popović* TJ, para. 1498.
[1173] TT, Alice Pyne, 19 June 2008, p. 12258-9.
[1174] Judgement, para. 4384.
[1175] TT, Alice Pyne, 19 June 2008, pp. 12248-53; Foday Lansana, 22 Feb. 2008, p. 4530.
[1176] TT, Isaac Mongor, 11 Mar. 2008, pp. 5767-8.
[1177] TT, TF1-375, 24 June 2008, pp. 12563-12567; Issa Sesay, 9 July 2010, p. 44167 and 18 Aug. 2010, pp. 46632-3.
[1178] TT, TF1-516, 10 Apr. 2008, p. 7185.

determine that Senegalese was sent by Bockarie to "as reinforcement to Koinadugu."[1179] The Chamber found that Mr. Taylor did not exercise effective control over Bockarie,[1180] so Bockarie's directions to those forces could not ground Mr. Taylor's responsibility. Further, the evidence indicates that in all likelihood, these men were not following Mr. Taylor's or Bockarie's instructions, but deciding their own fate. Finally, even if it is accepted that Bockarie sending these men at all could possibly be connected to Mr. Taylor's (which it is not), there is no indication that they were sent to facilitate the commission of crimes.

551. These errors of law warrant the quashing of Mr. Taylor's convictions for Counts 1 to 11 of the Indictment, for aiding and abetting crimes committed by troops led by O-Five in Bombali District, and RUF/AFRC troops Freetown and the Western Area in 1998 and January 1999.

(iv) The Chamber erred in fact and law in finding that these fighters provided substantial assistance to the commission of any crime

552. The Trial Chamber was unable to find that the 20 AFL fighters personally committed any crimes.[1181] Rather, the Chamber relied on Alimany Bobson Sesay's evidence "to the effect that the Red Lion Battalion was an extremely fierce unit, which boosted the morale of the other RUF soldiers who were glad to fight alongside these soldiers"[1182] to find that sending 20 fighters when "taken cumulatively, and in addition to the arms shipments provided by the Accused... had a substantial effect on the commission of crimes by the RUF and RUF/AFRC."[1183] This is an error.

553. First, Bobson Sesay's evidence, as well as the Chamber's findings, pertain to events after the Red Lion Battalion joined Gullit's troops in Colonel Eddie Town and headed towards Freetown. The Chamber did not make a finding that the 20 AFL members substantially contributed to the commission of crimes by O-Five's group during the earlier attacks on Karina and Kamalo in the Bombali District.[1184] Mr. Taylor's conviction for crimes committed in Karina and Kamalo[1185] is therefore

[1179] Judgement, para. 4385.
[1180] Judgement, para. 6981.
[1181] Judgement, para. 4393. Rather, they were found to have participated in attacks where crimes were committed by others: Judgement, paras. 4394, 4395, 4618(i)-(ii).
[1182] Judgement, para. 6923.
[1183] Judgement, para. 6924.
[1184] Judgement, paras. 4388, 4394.
[1185] Judgement, para. 1565.

unsustainable both because of the Chamber's own finding and because of the absence of evidence pertaining to the effect of the 20 AFL fighters on the crimes alleged.

554. Second, Bobson Sesay's testimony does not support the proposition that the Red Lion Battalion (as a whole) substantially contributed to the commission of crimes by RUF or RUF/AFRC forces. The witness stated that the Red Lion Battalion was fierce and dangerous to the ECOMOG and civilians, because most of them had no "relations" in Freetown and so did not care.[1186] He described the effect of the Red Lion Battalion as being to make other troops "happy... because they were really hard fighters."[1187] Boosting the morale of fighters during the course of a military operation does not imply a substantial contribution to the commission of crimes. To the contrary, Bobson Sesay himself distinguished between the Red Lion Battalion and "us who had family members in Freetown" and thought "Okay, let me be careful what I do."[1188]

555. Moreover, Bobson Sesay testified[1189] about the Red Lion Battalion as a whole, found to be comprised of 200 fighters.[1190] Without any indication that he was testifying about these specific 20 AFL fighters specifically "boosting morale", rather than any other members of the 200 strong Red Lion Battalion, the Chamber is not in a position to accept that these 20 AFL fighters substantially contributed to the commission of crimes by the 1,000 fighters[1191] who entered Freetown.

556. Finally, the Chamber found that sending the 20 fighters could not constitute a significant contribution alone, but only when taken together with arms shipments.[1192] However, the Chamber did not, and could not,[1193] find that any arms from the Burkina Faso shipment ended up in the hands of any of O-Five's or Gullit's troops who committed the crimes in question. With no link between the arms and the crimes, or a reasoned opinion as to how one could support the other, the Chamber has no basis for finding that these two alleged instances of aiding and abetting *could* be taken together at all.

[1186] TT, Alimany Bobson Sesay, 23 Apr. 2008, p. 8321.
[1187] TT, Alimany Bobson Sesay, 23 Apr. 2008, p. 8320.
[1188] TT, Alimany Bobson Sesay, 23 Apr. 2008, p. 8321.
[1189] TT, Alimany Bobson Sesay, 23 Apr. 2008, pp. 8319-21.
[1190] Judgement, para. 4395.
[1191] Judgement, para. 4395.
[1192] Judgement, para. 6924.
[1193] The Burkina Faso shipment was found to have arrived in November or December 1999 (Judgement, para. 5527), and therefore following these troops advance on Freetown.

557. The Chamber erred in fact and law in finding that sending these 20 fighters substantially contributed to the commission of crimes, and therefore that Mr. Taylor aided and abetted the commission of crimes in Bombali District, Freetown and the Western Area. These errors, taken together or individually, warrant the quashing of Mr. Taylor's convictions for Counts 1 to 11 for aiding and abetting the crimes in question.

(v) Conclusion

558. The Trial Chamber erred in its findings that Mr. Taylor sent Senegalese or 20 former NPFL fighters to Sierra Leone, that he could be liable in the absence of any communication, let alone influence or effective control over these men, and that they substantially contributed to the commission of crimes. Each of these errors taken alone, and any combination of them, extinguish an indispensible link between Mr. Taylor and the crimes in question.

559. Consequently, the precise relief sought is reversal of the convictions on Counts 1 to 11 for aiding and abetting crimes committed (i) by the 200 fighters with O-Five in Bombali District and (ii) the 1,000 RUF/AFRC fighters in Waterloo, Fisher Lane, Hastings, Freetown and the Western Area in December 1998/January 1999.

ii. GROUND OF APPEAL 25: The Trial Chamber erred in fact in finding that safe haven was provided to the RUF in Liberia, and that deserters or other aliens found in Liberia were returned to Sierra Leone, and in law that either of these alleged actions assisted the commission of crimes.

(i) The Chamber erred in fact and law in finding that the return of former SLAs constituted practical assistance with substantial effect on the commission of the crimes

560. The Chamber considered that the return to Sierra Leone of at least four former SLA fighters who had retreated to Liberia constituted practical assistance to the commission of crimes.[1194] The Chamber could not find that this assistance in isolation had a substantial effect on the commission of crimes,[1195] but nevertheless reasoned that "taken cumulatively, and in addition to the arms and ammunition provided by the Accused, the military personnel provided by the Accused constituted practical

[1194] Judgement, para. 6920.
[1195] Judgement, paras. 6922-4.

assistance which had a substantial effect on the commission of crimes by the RUF and RUF/AFRC."[1196]

561. In reaching this conclusion, the Chamber erred in law and fact. The return of these SLAs should not have been considered as part of the cumulative calculus of assistance, as the Chamber itself found that the men did not commit any crimes.

562. Although the Chamber found that these four SLAs participated in the attack on Kono in December 1998,[1197] as previously discussed,[1198] the Chamber was unable to find that *any* crimes were committed during the attack on Kono in December 1998.[1199] Further, it was "unable to consider the impact this group of men had on the commission of crimes since the testimony of Bobson Sesay is vague with regard to the number of men sent by the Accused, and no evidence was introduced to show that the men sent by the Accused committed crimes."[1200]

563. Absent any evidence that practical assistance was provided by the SLAs, no aiding and abetting liability could have arisen in respect of their return. The precise relief sought, therefore, is the quashing of the Chamber's findings, insofar as they consider that Mr. Taylor sending back these SLAs constituted substantial practical assistance to the commission of crimes.

(ii) The Chamber erred in fact and law in finding that the provision of safe-havens and return of deserters constituted practical assistance with substantial effect on the commission of crimes

564. The Chamber found that providing safe-haven for RUF fighters during their retreat from Zogoda,[1201] and the capture and return of deserters to Sierra Leone,[1202] "supported, sustained and enhanced the functioning of the RUF and its capacity to undertake military operations in the course of which crimes were committed."[1203]

565. The Chamber's analysis reflects a legal misconception of aiding and abetting, misapplies the *actus reus* element of aiding and abetting, and therefore constitutes an error of law that invalidates its findings. The *actus reus* of aiding and abetting

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[1196] Judgement, para. 6924.
[1197] Judgement, para. 6920. The Defence notes that the Chamber did not find that repatriated Sierra Leonean refugees participated in attacks in Sierra Leone (Judgement, para. 6920).
found that repatriated Sierra Leonean refugees.
[1198] Ground 11, section (iii) and Ground 23, section (iii)(e)(2) are incorporated here.
[1199] Those submissions are incorporated here.
[1200] Judgement, para. 4565.
[1201] Judgement, Operational Support: Alleged Provision of Safe Havens.
[1202] Judgement, Provision of Military Personnel: Alleged Cooperation in Return of Deserters to Sierra Leone.
[1203] Judgement, paras. 6935-6.

requires that any alleged assistance be shown to have substantial effect upon the crimes committed.[1204] Facilitating the continued existence of an organization, with no further indication of the connection with or impact on any crimes, cannot meet this threshold. One is not guilty, as discussed in Ground 21, for keeping a criminal alive, housing them, feeding them, educating them, or doing anything else facilitating their continued existence. What is required is assistance that substantially contributes to their criminal act and there is no such evidence here. The findings in respect of "safe-haven" and "deserters" are particularly clear in this regard. The Chamber could make no findings that either of these forms of support had any direct or substantial impact on the commission of crimes, as opposed to the pursuit of lawful combat – or even that it had an impact on the manner in which operations were pursued. The most that could be said is that these actions preserved the "existence" of the RUF/AFRC. There is no evidence that this had "a substantial effect upon the perpetration of the crime."[1205]

566. First, the Chamber also reached factual conclusions that could have been reached by no reasonable trial chamber. No reasonable trier of fact could have found beyond a reasonable doubt that safe haven was provided after, instead of before, the beginning of the Indictment period, which commences with the signing of the Abidjan Peace Accord on 30 November 1996.[1206] The Chamber held that the SLA and Kamajors attacked Zogoda and forced the RUF from their stronghold in November 1996.[1207] TF1-371 and TF1-362, on whom the Chamber relied to find that Mr. Taylor provided safe-haven to RUF combatants retreating after the fall of Zogoda, testified, respectively, that Zogoda was attacked (i) while peace talks were ongoing and to put pressure on the RUF in the negotiations,[1208] and (ii) after Foday Sankoh left for Abidjan.[1209] Further, witnesses TF1-338, Dauda Aruna Fornie, Jabaty Jaward, Mohamed Kabbah, Perry Kamara, Alice Pyne, Augustine Mallah, Charles Ngebeh, Martin George and Issa Sesay (whose testimony the Chamber failed to consider in this regard) consistently stated that Zogoda fell before the signing of the Abidjan

[1204] See Ground of Appeal 16.
[1205] *CDF* TJ, para. 229; See Ground of Appeal 16 regarding the applicable legal standards for aiding and abetting.
[1206] Judgement, para. 40
[1207] Judgement, para. 40.
[1208] TT, TF1-371, 25 Jan. 2008, pp. 2268-9, 2276 (CS).
[1209] TT, TF1-362, 27 Feb. 2008, pp. 4855-8 (CS); 3 Mar. 2008, pp. 5080-9, 5096 (CS).

Peace Accord, and in violation of a ceasefire in place to allow for the negotiations.[1210] The Chamber did not find, and there is no basis for finding, that these combatants arrived in Liberia following the signing of the Abidjan Peace Accord and therefore during the indictment period. This error warrants the quashing of this finding.

567. Second, the Chamber failed to find that either providing safe-haven to retreating RUF combatants or returning deserters Fonti Kanu and Dauda Aruna Fornie to Sierra Leone had any concrete effect on the commission of crimes. On the contrary, the Chamber found that "once the RUF combatants crossed into Liberia they were disarmed by ULIMO, and subsequently serviced by the International Committee for the Red Cross."[1211] Further, there is no finding that, following their disarmament and contact with the Red Cross, these same RUF members ever crossed back into Liberia and, if they did, that they committed crimes. Similarly, the return of deserters Fonti Kanu and Dauda Aruna Fornie is not found to have had any impact on the commission of crimes.[1212] No accessorial liability could be attributed in the absence of such findings.

568. Third, no reasonable trier of fact would have concluded beyond a reasonable doubt that Mr. Taylor provided safe-haven or expelled illegal aliens with the requisite intent to assist the commission of crimes.[1213] Significantly, the providing of safe-haven resulted in disarming the RUF combatants and assuring them access to the Red Cross. Further, states have a broad discretion in exercising their right to expel aliens under customary international law,[1214] and it was for the Chamber to conclude that this was exercised arbitrarily in the instance of Fonti Kanu and Dauda Aruna Fornie.

[1210] TT, Charles Ngebeh, 23 Mar. 2010, pp. 37841-3 (The RUF was finally pushed out of Zogoda on 12 November 1996. Sankoh was in Abidjan asking Tejan Kabbah to respect the ceasefire.); TF1-338, 1 Sept. 2008, p. 15113 (Zogoda fell two weeks after Sankoh left for Abidjan, while peace talks were ongoing.); Dauda Aruna Fornie, 11 Dec. 2008, p. 22152 (The SLPP government acted in bad faith in invading Zogoda during the Abidjan peace talks); Jabaty Jaward, 16 July 2008, p. 13812 (The RUF were driven out of Zogoda by government troops and Kamajors during the time Sankoh was negotiating a peace accord in Abidjan); Mohamed Kabbah, 17 Sept. 2008, pp. 16411-2 (The Kamajor attack on Zogoda, while Sankoh was engaged in talks before the signing of the peace accord in Abidjan, destroyed the prospect for peace at that time); Perry Kamara, 5 Feb. 2008, p. 3084 (The Kamajors attacked Zogoda while Sankoh was negotiating peace in Abidjan); Alice Pyne, 17 June 2008, p. 12126 (Zogoda was attacked before the signing of the Abidjan Peace Accord); Issa Sesay, 2 Aug. 2010, p. 45180 (The SLA and Kamajors attacked Zogoda during the Abidjan peace talks, in violation of the ceasefire); Augustine Mallah, 12 Nov. 2008, p. 20109 (Zogoda fell in 1996 when Sankoh was in the Ivory coast negotiating the Yamoussoukro Peace Accord); Martin Geroge, 23 Apr. 2010, p. 39750 (Sankoh was in Abidjan for peace talks when Zogoda was overrun).

[1211] Judgement, para. 4171.

[1212] See Judgement, paras. 4616-7, 4618 (xi).

[1213] See discussion on applicable *mens rea* for aiding and abetting in Ground 16.

[1214] Sir Jennings, Robert QC and Sir Watts, Arthur KCMG QC, Oppenheim's International Law, Vol. 1, Oxford University Press (Oxford, 9th Ed.), p. 940, para. 413.

Finally, the Chamber fails to find that Mr. Taylor knew or had any reason to know that, on two occasions, illegal aliens were expelled by Liberian police authorities.

569. The incorrect appreciation and application of the law and the facts by the Chamber invalidates its findings and occasions a miscarriage of justice. The precise relief sought is therefore the reversal of the Chamber's findings that providing safe-haven to RUF combatants after the fall of Zogoda and expelling deserters Fonti Kanu and Aruna Dauda Fornie constituted operational support that substantially assisted the commission of crimes.

e. ERRORS RELATING TO THE MENTAL ELEMENT: ADVICE

i. GROUND OF APPEAL 26: The Trial Chamber erred in fact in finding that Charles Taylor gave military or operational advice to the RUF or AFRC, and erred in law and in fact in finding that any such alleged advice constituted assistance to crimes.

(i) Overview

570. The Trial Chamber found that Taylor offered the following military or operational advice to the RUF or AFRC: (i) advising Johnny Paul Koroma to capture Kono in late February/early March 1998;[1215] (ii) advising Bockarie to be sure to maintain control of Kono for the purpose of trading diamonds with him for arms and ammunition;[1216] (iii) advising Bockarie to recapture Kono so that the diamonds there would be used to purchase arms and ammunition, which resulted in the Fitti-Fatta attack in mid-June 1998;[1217] (iv) advising Bockarie in relation to the progress of the operations in Kono and Freetown in the implementation of their plan;[1218] (v) advising Bockarie to send prisoners released from Pademba Road Prison to RUF controlled areas;[1219] (vi) advising Bockarie to open a training base in Bunumbu, Kailahun District;[1220] and (vii) advising Boackarie in 1998 to construct or re-prepare the airfield in Buedu.[1221]

571. Even assuming this advice to have been given, which could not have been found beyond a reasonable doubt based on the evidence, none of it, viewed cumulatively or separately, substantially contributed to the commission of any crimes.

[1215] Judgement, para. 3611 (ii).
[1216] Judgement, para. 3611 (iii).
[1217] Judgement, para. 3611 (v).
[1218] Judgement, para. 3611 (xiv).
[1219] Judgement, para. 3611 (xvii).
[1220] Judgement, para. 4248 (xxxiii).
[1221] Judgement, para. 4248 (xxxvi).

The advice, in most cases, concerned matters that would have been utterly obvious to Koroma and Bockarie, or to anyone with a passing acquaintance with Sierra Leonean geography.

(ii) Advice Relating to Capturing or Holding Kono

(a) Taylor's Advice to Capture Kono

572. The Chamber found that Taylor advised Koroma to capture Kono following the Junta's eviction from Freetown in February 1998;[1222] Bockarie to maintain control of Kono in March 1998;[1223] and Bockarie to recapture Kono resulting in the Fitti Fatta offensive in June 1998.[1224]

573. The Chamber recognised that the allegation that Taylor advised Koroma to capture Kono came exclusively from the Kargbo's evidence, but accepted Kargbo's account, despite the fact that it found his general account was "often imprecise" and at times inconsistent with other witnesses.[1225] No reasonable chamber could have found this uncorroborated and "often imprecise" evidence proved the allegation beyond a reasonable doubt. Moreover, Kargbo's evidence was also hearsay. The Chamber was not entitled to rely upon uncorroborated hearsay as determinative evidence.[1226] The Chamber's improper evaluation of the evidence has occasioned a miscarriage of justice.

574. The Chamber based its finding that Taylor advised Bockarie to maintain control of Kono on the evidence of Kamara,[1227] and TF1-371.[1228] Both witnesses testified that they heard Bockarie say that Taylor told him to hold Kono, though their evidence relates to different times.[1229] No reasonable chamber could have relied on such evidence. Firstly, both witnesses' evidence is second hand hearsay, relayed through Bockarie, and thus is not only unreliable as hearsay evidence, but also cannot corroborate the underlying allegation (that Taylor told Bockarie to hold Kono) because the evidence has Bockarie as its common source. The most the hearsay evidence can prove is that Bockarie made assertions that Taylor had told him to hold Kono, but this amounts to no more than Bockarie's uncorroborated testimony, which

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[1222] Judgement, para. 3611 (ii); para. 2863.
[1223] Judgement, para. 3611 (iii); para. 2864.
[1224] Judgement, para. 3611 (v); para. 2951.
[1225] Judgement, para. 2855.
[1226] See Section I of the Defence Appeal Brief.
[1227] Judgement, para. 2856.
[1228] Judgement, para. 2861.
[1229] Judgement, para. 2856; TT, TF1-360, 5 Feb. 2008, pp. 3102, 3142; TT, TF1-371, 28 Jan. 2008, pp. 2384-5.

the Defence cannot cross-examine, and thus is of limited if any weight. It certainly cannot be relied upon by a reasonable chamber to prove an allegation beyond reasonable doubt.

575. The Chamber, as on many other occasions throughout the Judgement, undertook no assessment of Bockarie's reliability as the source of the hearsay evidence, and so failed to consider his motives for lying or exaggerating his links with Taylor. Had it done so, it would have recognised that Bockarie, having just usurped Koroma's position as de facto leader of the RUF/AFRC, had every incentive to lie or exaggerate the support Taylor gave him to project himself over his rivals. No reasonable chamber could have failed to undertake such a crucial evaluation of the evidence. The Chamber's failure (i) to recognise that the hearsay evidence of Kamara and TF1-371 cannot corroborate each other on the truth of the underlying allegation; and (ii) to undertake an assessment of Bockarie's credibility as the source of the hearsay evidence, has led it to make errors which invalidate its finding and occasion a miscarriage of justice.

576. No reasonable chamber could have found that Taylor advised Bockarie to attack Kono in the offensive known as Fitti Fatta. In making its finding, the Chamber relied upon three key witnesses: Saidu, Kabbah and Kanneh.[1230] The Chamber recognised it could not rely on the evidence of the meeting provided by Kamara, because his memory of the meeting was influenced by subsequent events,[1231] or TF1-585, whose evidence was of "little probative value".[1232] Equally, the Chamber acknowledged that Kanneh's recollection of the meeting involved events which referred to later in 1998, and only relied upon him to the extent that his evidence of planning of Fitti Fatta was corroborated by Saidu and Kabbah.[1233] And the Chamber recognised that Kabbah's knowledge of military matters was limited.[1234]

577. As such the Chamber based its finding primarily on Saidu's testimony. In doing so, it recognised that Saidu's testimony was inconsistent with statements previously given to the Sesay defence team in 2005 and 2007, but excused these inconsistencies, believing Saidu's explanation that these previous statements related to a meeting Saidu heard over the radio, a meeting to discuss Issa Sesay's punishment

[1230] Judgement, para. 2938.
[1231] Judgement, para. 2934.
[1232] Judgement, para. 2930.
[1233] Judgement, para. 2941.
[1234] Judgement, para. 2942.

for the loss of diamonds, which was different from the meeting he was testifying about, the meeting to discuss the planning of Fitti Fatta.[1235] However, the Chamber found elsewhere that Sesay's loss of the diamonds and the planning of Fitti Fatta were discussed at the same meeting,[1236] a number of credible witnesses, including Saidu himself, testified as such,[1237] and that Saidu, in a previous statement to the Prosecution, put to him in court, said that Sesay's punishment was decided at the same meeting.[1238] By contrast, no witness referred to another separate meeting to discuss Sesay's loss of the diamonds or his punishment for that loss. Equally, when asked to clarify by Justice Sebutinde, Saidu struggled to answer, testifying first that the issue was discussed at that meeting, and soon after that it was not, and then blaming the Prosecution for recording his statement inaccurately.[1239] Given such evasiveness on Saidu's part, together with the lack of evidence for a separate meeting to discuss Sesay's punishment, no reasonable chamber could have accepted Saidu's excuse, and consequently no reasonable chamber could have accepted his evidence of the meeting.

578. Even if it was entitled to accept all the witnesses' evidence as credible, the Chamber failed to recognise that the allegation (Taylor advised the RUF/AFRC to attack Kono) came from Bockarie and Tamba. It, therefore, failed to conduct any evaluation of Bockarie's or Tamba's credibility. Had it done so, it would have recognised both had an incentive to lie or exaggerate Taylor's support for the RUF/AFRC's offensive, given their need to project themselves as privileged interlocutors with the neighbouring president, an image they needed to maintain their status with the rest of the RUF/AFRC. No reasonable chamber could have failed to address this point.

579. As such the Chamber's evaluation of the evidence of the meeting at which Fitti Fatta was planned, and which was supposedly the result of Taylor's advice to

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[1235] Judgement, para. 2943.
[1236] Judgement, para. 2938.
[1237] Judgement, para. 2929; para. 2938.
[1238] TT, TF1-577, 6 June 2008, pp. 11175-6.
[1239] TT, TF1-577, 6 June 2008, pp. 11177-8 ("JUDGE SEBUTINDE: You are saying that it is not true, it didn't happen in the meeting, or that you weren't in the meeting? I don't understand. What are you saying? THE WITNESS: After the meeting - during this meeting – to say that after this meeting - at that meeting we discussed sending Issa Sesay at the front line. That's what I'm talking about. It was not at that meeting. The front line which Issa went to when Sam Bockarie sent him there, that was an issue between Sam Bockarie and Issa. But here I am seeing the Prosecution - I am seeing that the Prosecution has written it there so that's what I'm saying, that it might be a mistake on the part of the Prosecution").

recapture Kono, was improper and fundamentally flawed. The Chamber's finding that Taylor did give such advice has occasioned a miscarriage of justice.

(b) Advice Relating to the RUF's December 1998 – January 1999 Offensive

580. The Chamber found (i) Taylor gave advice to Bockarie and received updates in relation to the progress of the operations in Kono and Freetown in the implementation of their plan;[1240] and (ii) Taylor directed Bockarie to send prisoners released from Pademba Road Prison to RUF controlled areas.[1241] Although the Chamber made a general finding that Taylor gave advice to Bockarie in relation to the operations in Kono and Freetown, it found that only one such instruction could be proved beyond a reasonable doubt: that Taylor advised Bockarie to release prisoners from Pademba Road.[1242]

581. No reasonable chamber could have found that Taylor directed Bockarie to send prisoners released from Pademba Road Prison to Buedu. The Chamber based its finding on Fornie and TF1-516.[1243] Fornie testified that he overheard Bockarie speak to Yeaten over the satellite phone, and that Bockarie then told Kabbah that Taylor had instructed him, through Yeaten, to release the prisoners.[1244] His evidence that the instruction came ultimately from Taylor is thus third hand hearsay, and is unsupported by Kabbah who did not mention any such instruction, despite being the person to whom Bockarie purportedly spoke.[1245] TF1-516 testified that after the prisoners were released, he overheard Yeaten called Bockarie over the radio to congratulate him; he also testified that the release of the prisoners occurred after Bockarie had called Yeaten.[1246] TF1-516's evidence is second hand hearsay, and has no mention of Taylor being behind the instruction. The finding that Taylor advised Bockarie to release the prisoners, therefore, rests on Fornie's third hand hearsay, unsupported by a key witness to the event, corroborated only circumstantially by TF1-516's second hand hearsay. No reasonable chamber could find that such evidence proves the allegation beyond a reasonable doubt. The Chamber's finding represents a miscarriage of justice.

(c) Advice Relating to Bunumbu Training Camp

[1240] Judgement, para. 3611 (xiv).
[1241] Judgement, para. 3611 (xvii); para. 3591.
[1242] Judgement, para. 3605.
[1243] Judgement, para. 3591.
[1244] Judgement, para. 3588; TT, TF1-274, 3 Dec. 2008, pp. 21581-7.
[1245] Judgement, para. 3589.
[1246] Judgement, para. 3588; TT, TF1-516, 8 Apr. 2008, pp. 6938-9, 6977-8.

582. No reasonable chamber could have found that Taylor advised Bockarie to open Bunumbu Camp. The Chamber recognised that TF1-362 is the only witness who testified about Taylor's involvement in the creation of Bunumbu camp and that her evidence was hearsay.[1247] TF1-362's evidence was that Bockarie told her that Taylor had instructed him to open a training camp at Bunumbu.[1248] Later, after the camp was set up, Issa Sesay told her that Taylor had asked Bockarie to train SLA soldiers who returned to Sierra Leone from Liberia. TF1-362 testified that Monica Person trained these soldiers and that Sesay told Pearson that Taylor thanked her for doing so.[1249] Thus, TF1-362's evidence that Taylor advised the setting up of Bunumbu is second hand hearsay, and her evidence that Taylor advised the training of the SLAs is third hand hearsay. The Chamber was not entitled to accept such uncorroborated hearsay evidence as proof of the allegation beyond a reasonable doubt.[1250] The Chamber's approach to the evidence constitutes a clear error of law, which invalidates its finding that Taylor advised Bockarie to open the camp.

583. The Chamber found that TF1-516's evidence that Yeaten ordered Bockarie to open the base "is not very detailed" and "erroneously places the event in 1999".[1251] It decided that TF1-516's account corroborated TF1-362's account rather than undermined it, on the basis that Yeaten was Director of the SSS and worked for Taylor, and so carried out his orders. No reasonable chamber could have relied on this evidence as corroboration. TF1-516's evidence is vague, and there is no obvious basis for his knowledge of Yeaten's conversation with Bockarie, given that Yeaten and Bockarie were said to have had this discussion at a private meeting at which the witness was not present. Further, it is not clear the event described by TF1-516 is the same event as described by TF1-362, given the different individuals, places and timeframes involved (the Chamber's belief that TF1-516 "erroneously places the event in 1999" is speculation, and it provided no justification as to why it thought this was the case). On account of such major problems, the Chamber was not entitled to rely on TF1-516's evidence to corroborate TF1-362's testimony.

(d) Advice Relating to Buedu Airfield

[1247] Judgement, para. 4106.
[1248] Judgement, para. 4097; TT, TF1-362, 27 Feb. 2008, pp. 4866-8.
[1249] Judgement, para. 4099; TT, TF1-362, 27 Feb. 2008, pp. 4895-7.
[1250] See Section I of the Defence Appeal Brief.
[1251] Judgement, para. 4107.

584. No reasonable chamber could have found that Taylor advised Bockarie to construct an airfield at Buedu. In its analysis, the Chamber relied on the evidence of Saidu, Kamara and TF1-585.[1252] No reasonable chamber could have relied on such evidence. TF1-585's evidence, which she learned from Bockarie's wife, was that Bockarie was at Taylor's farm to discuss the construct of an airfield.[1253] The Chamber failed to examine how reliable such hearsay is, or from where Bockarie's wife would have received her information. Even if it was directly from Bockarie (and there is no reason to believe it was), the evidence TF1-585 provided is second hand hearsay, which should not have been relied upon by the Chamber without extreme caution, which the Chamber conspicuously failed to exercise. However, even taken at its height, TF1-585's evidence only suggests that Bockarie was at a meeting at Taylor's farm to discuss the building of an airfield. There is no evidence that Taylor was present at this meeting, what was decided, or whether Taylor agreed with whatever was decided. It is certainly not evidence that Taylor advised Bockarie to construct the airfield, and cannot corroborate any account that Taylor provided such advice.

585. Saidu testified that in a meeting in April 1998 to talk over Issa Sesay's loss of diamonds, Daniel Tamba conveyed Taylor's advice that the RUF and AFRC should work together and that while the meeting discussed the construction of an airfield, Tamba said that the RUF should construct it as soon as possible for the emergency landing of aircraft.[1254] Once, again, even taken at its height, the evidence shows only that Tamba encouraged the RUF/AFRC to construct the airfield (and he did not initiate this: the evidence is clear the RUF/AFRC members present were already discussing its construction). It does not show that Taylor advised or supported the airfield's construction. Furthermore, the meeting at which this was supposedly discussed, the April 1998 meeting to talk over Issa Sesay's loss of the diamonds, is a well-recorded meeting of the RUF/AFRC, about which several other witnesses testify. Only Kabbah testified that at this meeting there was a discussion concerning the construction of an airfield,[1255] but he stated that it was Bockarie who discussed the airfield's construction so that the RUF/AFRC could receive arms and ammunition from Libya; there is no mention here that Bockarie's proposal was supported by

[1252] Judgement, para. 4149.
[1253] Judgement, para. 4136; TT, TF1-585, 8 Sept. 2008, p. 15662.
[1254] Judgement, para. 4135; TT, TF1-577, 5 June 2008, pp. 11056-7. Saidu's testimony on this meeting should have been treated with caution, given the points raised in section (b) above.
[1255] The Chamber concluded that Kabbah's testimony on this point was referring to the same meeting as that testified about by Saidu: Judgement, para. 2938.

Tamba, still less was supported by Taylor.[1256] Significantly, TF1-585 and Kamara were also at this same meeting,[1257] yet despite the fact these two witnesses supposedly corroborate the allegation that Taylor advised Bockarie to construct an airfield, neither mentioned any discussion concerning the construction of an airfield. Therefore, no reasonable Chamber could rely on Saidu's evidence that at this meeting there was such a discussion; and even if it could, it could only interpret this as evidence that Tamba supported the construction of the airfield. No reasonable chamber could conclude from this evidence that Taylor advised its construction.

586. The final witness, and in fact the only witness who actually testified that it was Taylor who advised Bockarie to construct the airfield is Perry Kamara. He testified that following the ECOMOG Intervention, Taylor sent Bockarie a message telling him to reconstruct the airfield.[1258] Kamara's evidence is hearsay, as he heard this report only from Bockarie, and as uncorroborated hearsay, the Chamber was not entitled to base its finding upon it.[1259] Moreover, Bockarie's message, as reported by Kamara, was that the RUF should use forced labour to construct the airfield, yet the Chamber rejected the allegation that Taylor told Bockarie to used forced labour.[1260] Having found that one part of Bockarie's message was unreliable, no reasonable chamber could then rely on the other part of the same message without some significant justification, which the Chamber failed to provide. Therefore, no reasonable chamber could have relied upon Kamara's evidence, and the Chamber was wrong to rely upon it.

587. Nevertheless, the Chamber concluded that the evidence of the three witnesses proved that Taylor perceived a need for an airfield to receive arms and ammunition from Liberia.[1261] Even at its height, regardless of all the errors committed by the Chamber, the evidence does not show this. As explained above, the evidence of TF1-585 and Saidu evinces nothing of Taylor's motives or needs because neither referred to Taylor in the context of the construction of the airfield. Kamara, meanwhile, heard that Taylor advised Bockarie to construct an airfield, but mentioned nothing about this being in connection with the delivery of arms and ammunition. The Chamber's conclusion is totally unjustified.

[1256] Judgement, para. 4138; TT, TF1-568, 12 Sept. 2008, pp. 16147-8.
[1257] The Chamber found that Kamara and TF1-585 were at this meeting: Judgement, para. 2930.
[1258] Judgement, para. 4132; TT, TF1-360, 5 Feb. 2008, p. 3105.
[1259] See Section I of the Defence Appeal Brief.
[1260] Judgement, para. 4150.
[1261] Judgement, para. 4149.

(iii) No Reasonable Trial Chamber Could Have Concluded That Any of This Advice Contributed At All, Much Less Substantially, to the Crimes In Question

588. The Chamber could not have concluded that Taylor's advice substantially contributed to any of the alleged crimes. Even assuming, for example, that Taylor advised Bockarie to construct an airfield, there is no evidence or indication that Taylor suggested that the RUF/AFRC should use forced labour to do this, much less that they would do so. The airfield was ultimately never used,[1262] played no role in assisting the RUF/AFRC war effort, and so cannot constitute practical assistance in respect of other crimes.

589. All the other items of advice would have been abundantly obvious to Koroma or Bockarie. There is no evidence showing that the advice in question altered the behaviour of Koroma or Bockarie, that it induced them to commit more crimes than would otherwise have been the case, or even that it prolonged or diminished the existence of these fighting forces. None of this advice could reasonably have been found to substantially contribute to any crimes.

(iv) Conclusion

590. No reasonable trial chamber could have concluded that Taylor gave the advice as found by the Chamber. Those factual findings should be quashed, and any contribution of those findings to the ultimate legal conclusions should be set aside.

591. Even if the Chamber was entitled to find that Taylor gave advice the advice, no reasonable chamber could have found that it had any effect on the commission of crimes, substantial or otherwise, or that Taylor knew this to be the case when he gave the advice. As the Chamber found, Taylor's advice was at times not followed,[1263] suggesting the RUF/AFRC merely followed his advice when it fitted in with its intended course of action. No evidence has been brought to show that any advice Taylor gave affected the RUF/AFRC's behaviour in any way, much less that it had a substantial effect on its conduct of the war in Sierra Leone and the commission of crimes. Because there is no evidence of such a nature, no reasonable chamber could have concluded that the advice given constituted practical assistance or had a substantial effect on the commission of crimes. For that reason also, Taylor's convictions in respect of accessory liability for all instances of providing advice should be quashed.

[1262] Judgement, para. 4144.
[1263] Judgement, para. 6973.

f. ERRORS RELATING TO THE MATERIAL ELEMENT: "OPERATIONAL SUPPORT"

i. GROUND OF APPEAL 27: The Trial Chamber erred in law and in fact in finding that alleged provision of communication devices, radio training and "warning messages" constituted assistance to crimes.

(i) Overview

592. The Chamber found that (i) providing Sam Bockarie and Issa Sesay with satellite phones, (ii) allowing RUF members occasional access to radio equipment in Liberia, and (iii) "448 messages" sent from Liberia, "supported, sustained and enhanced the functioning the RUF and its capacity to undertake military operations in the course of which crimes were committed."[1264] The Chamber found that these forms of operational support "improved coordination and facilitated the trade for and vital flow of arms and ammunition to the RUF/AFRC" and thereby constituted practical assistance for the commission of crimes.[1265]

593. The Chamber's analysis misapplies the *actus reus* element of aiding and abetting, and therefore constitutes an error of law that invalidates its findings. The *actus reus* of aiding and abetting requires that any alleged assistance be shown to have a substantial effect upon the crimes committed.[1266] Facilitating the improved communication of members of the RUF with Mr. Taylor and amongst each other, with no further indication of the connection with or impact on any crimes, does not meet this threshold. The alleged assistance made it no more likely that crimes would be committed in the course of the armed conflict. To the contrary, the Chamber's own findings show that it was unable to (i) connect the provision of, and access to, communications equipment, or the issue of warning messages to any crime, or (ii) find that such assistance was substantial, especially when compared to the RUF/AFRC's existing communications and monitoring capabilities. There is no evidence that the alleged assistance provided had "a substantial effect upon the perpetration of the crime."[1267]

(ii) Satellite phones

594. Sam Bockarie and Issa Sesay possessed several satellite phone obtained from different individuals, and the Chamber was unable to determine whether any of them

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[1264] Judgement, para. 6936.
[1265] Judgement, para. 6936.
[1266] See Ground of Appeal 16.
[1267] *CDF* TJ, 2 Aug. 2007, para. 229; See Ground of Appeal 16 regarding the applicable legal standards for aiding and abetting.

were used in relation to military activities, let alone that the phones provided by Mr. Taylor were so used. Bockarie had at least two satellite phones, and the Chamber was "unable to ascertain from the evidence whether any of the calls made by Bockarie to the Accused and others in relation to RUF/AFRC activities were made on the satellite phone that the Accused gave Bockarie."[1268] The Chamber nevertheless vaguely found that since one of those phones was given to Bockarie by Mr. Taylor, this "enhanced his communications infrastructure."[1269] The Chamber was similarly unable to determine whether Sesay used a satellite phone provided by Mr. Taylor, resorting to the finding that the phone contributed to Sesay's "communications capability."[1270]

595. The Chamber purported to link the use of satellite phones to crimes in one instance, where it noted communication between Mr. Taylor and Bockarie "in furtherance" of the Freetown Invasion.[1271] This finding was erroneous in both fact and law. The Defence submits, firstly, the Chamber erred in fact and law in accepting that these calls occurred.[1272] Second, even if accepted, the dearth of testimony going to the contents of these conversations means that it is impossible to conclude that the satellite phones used to conduct them constituted practical assistance that made a substantial contribution to the commission of any crime. For instance, the Chamber presumed that communications in the lead up to Freetown were to inform Mr. Taylor as to the "continuing evolution" of the alleged plan.[1273] In other words, unable to find that Mr. Taylor said anything of assistance to the operation, the Chamber only found that he received updates. Importantly, as above, the Chamber is unable to find that, in the course of the Freetown Invasion, Bockarie or Sesay were using the satellite phones provided to them by Mr. Taylor or the satellite phones they already had.

596. The Chamber's findings were therefore erroneous for two main reasons. First, it mischaracterised the provision of satellite phones to Sam Bockarie and Issa Sesay as assistance to criminal acts, whereas, on the contrary, no findings were made (or could have been made on the evidence) that these phones ever assisted in the commission of a crime under the Statute. Second, the Chamber erred in law and logic in finding that the provision of these two satellite phones constituted substantial

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[1268] Judgement, para. 3726.
[1269] Judgement, para. 3726.
[1270] Judgement, para. 3727.
[1271] Judgement, para. 6928, referring to findings in Operational Support: Communications, Satellite Phones, especially paras. 3723-4.
[1272] Submissions made in Grounds of Appeal 7 and 12 in this regard are incorporated here.
[1273] This presumption was erroneous: see Ground of Appeal 12(iii)(b).

assistance in the sense of leading to an "enhanced" communications capacity, when it found that both Bockarie and Sesay already had a satellite phone each, on top of a number of alternate means of communication available to them. These errors warrant the quashing of this finding.[1274]

(iii) Use of Liberian communications equipment by the RUF/AFRC

597. The Chamber found that (i) various occasions of RUF members using Liberian radio communication equipment in Monrovia[1275] and (ii) Base 1 (the radio station at Benjamin Yeaten's home) being used for communications with Bockarie and Sesay,[1276] constituted the *actus reus* for aiding and abetting.[1277] Each relevant finding is considered in turn.

598. Sankoh's communication while detained: Witnesses testified about a number of different messages passed through the NPFL communication network. Upon a close examination of the Chamber's deliberations, it is clear that the Chamber only accepted one instance of Sankoh using the NPFL communication network: his instruction to Bockarie to follow the Accused's orders.[1278] As the Chamber did not find Mr. Taylor liable for ordering, it is difficult to see how Sankoh's messages could have constituted practical assistance to the commission of crimes.[1279]

599. Communications between Memunatu Deen and Sam Bockarie in 1997: The Chamber found that Mr. Taylor provided practical assistance in the form of allowing two RUF radio operators to communicate to each other using an NPFL radio about an arms shipment that the Prosecution alleged Mr. Taylor sent to Bockarie. The Chamber found, however, that the evidence was insufficient to conclude that Mr. Taylor sent this shipment to Bockarie.[1280] Any alleged communication relating to this shipment, even if it did occur, could not have had any effect, much less a substantial effect, on any crime.

600. Communications relating to Eddie Kanneh in Liberia in 1998: The Chamber found that radio communications were sent between Bockarie and Base 1 or Base 020 in Monrovia, and later from Issa Sesay, to report the movements of Eddie Kanneh

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[1274] Judgement, paras. 6928, 6931.
[1275] Operational Support: Communications, Use of Liberian Communications by the RUF.
[1276] Operational Support: Communications, Use of Liberian Communications by the RUF.
[1277] Judgement, paras. 6929, 6931.
[1278] Judgement, para. 3831. In this regard, the Chamber is unconvinced that Sankoh used NPFL communications equipment to promote Bockarie, given Isaac Mongor's conflicting testimony (Judgement, paras. 3832).
[1279] Further, please refer to Ground 26 for mr. Taylor's aliability for 'advice'.
[1280] Judgement, para. 3842, referring to 4854.

between Liberia and Sierra Leone in the course of an alleged diamond transaction[1281] The Chamber makes no findings as to how these movements, or any information arising therefrom, contributed in any degree to any crime, much less had a substantial impact on any crime.[1282]

601. Communications between Dauda Aruna Fornie and Sierra Leone in 1998: The Chamber's found that "on one of Sam Bockarie's first trips to Monrovia after the Intervention, radio operator Dauda Aruna Fornie... kept Bockarie appraised of events in Sierra Leone by using Base 1, a radio station at Benjamin Yeaten's home in Monrovia."[1283] Even if these factual findings are accepted, in the absence of any evidence or findings as to what information Bockarie was appraised of, or what he did with any such information, and how this was related to the commission of crimes by the RUF, this finding does not reflect practical assistance in any degree.

602. Communications during Mosquito Spray incident: The Chamber found that "the RUF sent a radio operator to Liberia who worked directly with Benjamin Yeaten, in order to coordinate communications between Yeaten and the RUF."[1284] This could not have constituted practical assistance to the commission of crimes charged in the Indictment by Mr. Taylor because (i) the radio operator was sent *by the RUF*, not by the Accused, and (ii) this RUF radio is found to have coordinated joint operations of the RUF and Liberian troops *outside Sierra Leone*, and therefore outside the territorial jurisdiction of the Special Court.[1285]

603. None of these finding could constitute the *actus reus* of aiding and abetting. Not one of the above instances constitutes practical assistance to the commission of any crime, let alone substantial assistance.

(iv) "448" Warnings

604. The Chamber finds, generally speaking, that communications support, in the form of "448 messages" (warning the RUF when ECOMOG jets left Monrovia to attack AFRC/RUF forces in Sierra Leone) were sent by subordinates of Mr. Taylor in Liberia and constituted practical assistance to the commission of crimes.[1286]

[1281] Judgement, para. 3848.
[1282] The Arguments made in Ground of Appeal 32 and 33 are incorporated here.
[1283] Judgement, para. 3856; the Defence submissions made in Ground 12 in this regard, are incoproated here as if set out in full.
[1284] Judgement, para. 3884.
[1285] Judgement, para. 3880, 3882; Judgement, Relationship of the Accused with the RUF: Operations Outside Sierra Leone.
[1286] Judgement, paras. 3914, 6930, 6931.

605. The sending of "448 messages", potentially assisting a combatant to avoid being killed (facilitating their continued existence), does not contribute to their criminal conduct. There is no evidence that the sending of any warning message could logically be linked to the commission of a crime. That liability for sending a 448 warning could not be linked to specific crimes, or even operations generally, becomes patently obvious when we consider that the Chamber did not determine a time-frame for when ECOMOG jets were based in Robertsfield International in Monrovia (and were thereby potentially monitored by radio operators in Liberia), rather than Lungi Airport in Sierra Leone.[1287]

606. On a related note, the Chamber accepts that 448 messages also originated in Sierra Leone.[1288] It accepts the evidence of Isaac Mongor that "most" operators were from the SLA, and TF1-516's evidence that "most" messages were sent in Morse code.[1289] In this regard, whilst the Chamber disregards Issa Sesay's testimony that only former SLAs were trained in Morse code, it ignores Mongor's testimony that SLAs had trained with ECOMOG and thereby knew the same code.[1290] Even if the sending of warning messages could be considered to constituted assistance to the commission of crimes, in the absence of findings as to (i) the time-frame when 448 messaged were sent from Liberia and (ii) the proportion of warnings coming from Liberia at any given time, the Chamber was not in a position to determine that any effect 448 messaged had was "substantial."

(v) Conclusion

607. The Chamber therefore erred in law and fact in finding that the *actus reus* of aiding and abetting was performed. The precise relief sought is the quashing of these findings.[1291] This error, viewed cumulatively with all the other errors identified in this Part, invalidates the conclusion that Mr. Taylor aided and abetted the commission of crimes through the provision of operational support and the consequent convictions on Counts 1 to 11 of the Indictment.

[1287] Prosecution witness Perry Kamara testified that in 1998 ECOMOG fighter jets were flying from Lungi airport to attack RUF positions in Kailahun, Koinadugu and Koidu, and 448 messages were sent from SLA radio operators in Sierra Leone (TT, Perry Kamara, 6 Feb. 2008, pp. 3223-4). Several other witnesses have mentioned ECOMOG's use of Lungi airport: see, amongst others, TT, Isaac Mongor, 11 Mar. 2008, p. 5733; Abu Keita, 23 Jan. 2008, p. 2024.

[1288] Judgement, para. 3909.

[1289] Judgement, para. 3910.

[1290] Judgement, para. 3910; TT, Isaac Mongor, 11 Mar. 2008, pp. 5772-5.

[1291] Judgement, paras. 6930, 6931.

ii. GROUND OF APPEAL 28: The Trial Chamber erred in law and fact in finding that Charles Taylor assisted crimes by providing a guesthouse in Monrovia for use by the RUF.

608. The Trial Chamber erred in law and in fact in finding that the provision of a guesthouse assisted any or all crimes committed during the Indictment period.[1292]

609. The existence of the Guesthouse from October 1998 to early 2001 has never been at issue in this case.[1293] The only relevant issue was whether Mr. Taylor knew that that Guesthouse was being used for any criminal purpose, or indeed for any purpose at all, other than facilitating the peace process. No reasonable trier of fact could have found otherwise.

610. The Chamber concluded that during its existence, the Guesthouse was used by the RUF in furtherance of the peace process and for diplomatic purposes.[1294] The Chamber found, however, that it was also used to facilitate the transfer of arms and ammunition to the RUF in exchange for diamonds.[1295] These transactions were found to play "a vital role" in the military operations of the RUF during which crimes were committed.[1296] Significantly, the Chamber agreed with the Defence that there was little evidence regarding how the Guesthouse was used by the RUf, prior to the signing of the Lomé Peace Accords, and the evidence adduced by the Prosecution regarding its use pertains to events occurring after January 1999.[1297] As such, only the period after January 1999 and the closure of the Guesthouse in early 2001 is relevant for purposes of the Chamber's findings.

611. As has been discussed above in Ground 23, no reasonable trial chamber properly directing itself to the evidence and the applicable standard of proof could have found that Mr. Taylor knew about or was involved in these transactions. Further, as discussed in Grounds 32 and 33 below, the Chamber found that the evidence does "not establish that every delivery of diamonds to the Accused was matched by a delivery of arms and/or ammunition to the RUF"[1298] and could not infer that Mr. Taylor was in receipt of diamonds in supposed payment for this materiel. It follows that the Chamber's findings concerning the Guesthouse are also wrong.

[1292] Judgement, paras. 4239, 4241-3, 4246-7, 4248 (xl), 4249, 4261-2, 4261, 6933.
[1293] Judgement, paras. 4194, 4239.
[1294] Judgement, paras. 4261, 4247.
[1295] Judgement, paras. 4261, 4247.
[1296] Judgement, paras. 4261, 4247.
[1297] Judgement, para. 4239.
[1298] Judgement, para. 5936; see Ground of Appeal 32 and 33.

612. In any event, there was no evidence suggesting that Mr. Taylor was ever at the Guesthouse during its existence, or was aware of any exchange of diamonds for materiel facilitated through the Guesthouse. Applicable jurisprudence requires that the act provide some form of practical assistance and must have a "substantial effect on the commission of the crime."[1299] There is no evidence establishing that the Guesthouse provided practical assistance, or even that it had a substantial effect on the commission of charged crimes. Indeed, the Chamber failed to identify and specify which precise crimes were aided and abetted in consequence of the Guesthouse, aside from a nebulous catchall of "military operations" by the RUF.[1300]

613. In concluding that the Guesthouse was a form of assistance that played a vital role in the military operations of the RUF,[1301] the Chamber viewed the Guesthouse as forming part of the cumulative assistance by the Accused that contributed to the commission of crimes.[1302]As such, the Guesthouse was lumped together with "financial support" and other alleged forms of assistance that were subsumed under the "military operations" of the RUF,[1303]all without any pronouncement of the specific crimes that were aided and abetted by virtue of the Guesthouse, and despite the fact that some of the disparate forms of assistance were found to have been insignificant to the operations of the AFRC/RUF.[1304]

614. Significantly, and in its deliberations and findings regarding the Guesthouse, the Chamber noted the importance of the transfer of funds made at the Guesthouse[1305] when it had previously determined the funds to be insignificant to the operations of the AFRC/RUF.[1306] For example, the Chamber cited the payment of $USD 15,000 to Johnny Paul Koroma[1307] at the Guesthouse in furtherance of its finding that the Guesthouse was used for illegal purposes. However, such determination was inconsistent with the Chamber's previous findings that the money was for clothing and personal items, not to mention the Chamber's finding that the Prosecution had

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[1299] *Blagojević* TJ, para. 726; *CDF* AJ, para. 72; *Furundžija* TJ, paras. 209, 234.
[1300] Judgement, para. 4247.
[1301] Judgement, para. 4247.
[1302] Judgement, paras. 6925, 6929.
[1303] Judgement, para. 4247.
[1304] Judgement, para. 4026. See also, Ground 31 of the Defence Appeal Brief.
[1305] Judgement, paras. 4243, 4247.
[1306] Judgement, para. 4026. See also, Ground 31 of the Defence Appeal Brief.
[1307] Judgement, paras. 4200, 4243; TT, TF1-567, 4 July 2008, pp. 12978-9.

failed to prove beyond a reasonable doubt that the money was sent by the Accused to Koroma at the RUF Guesthouse.[1308]

615. Likewise, and when considering money given to Issa Sesay at the Guesthouse, the Chamber again engaged in the practice of assigning inculpatory weight to events that it previously found to have not been criminal in nature. The example at issue involves two occasions of money given to Issa Sesay at the Guesthouse: $USD 15,000 purportedly not to disarm[1309] and $USD 300,000 that was split in half, with the Accused supposedly holding on to $USD 150,000 for safekeeping.[1310] In both instances, the individual events were part of an overall finding regarding financial support, which was found not to have had a direct impact on the operations of the AFRC/RUF.[1311] Nevertheless, the Chamber proceeded to rely on "financial support" to sustain the conclusion of assistance by virtue of the Guesthouse. These inconsistent findings by the Chamber and the irreconcilable and illogical weight attached to the same evidence amounts to errors of fact and law, occasioning a miscarriage of justice.

616. The findings of the Chamber with regard to the provision of the Guesthouse implicate serious errors in law and in fact that have resulted in a miscarriage of justice by contributing to the Chamber's erroneous determination that Charles Taylor had "substantially assisted" the commission of crimes.[1312] These errors, viewed cumulatively with all the other errors identified in this Part, invalidate that conclusion, and occasion a miscarriage of justice.

iii. GROUND OF APPEAL 29: The Trial Chamber erred in law and in fact in finding that Charles Taylor assisted crimes by providing "herbalists".

617. The finding that Taylor sent "herbalists" to bless fighters in the Fitti-Fatta operation depends on two witnesses: Alice Pyne, who testified that she was told this by an unidentified "elderly Gbandi woman" in the field;[1313] and Perry Kamara, who testified he was told this by Sam Bockarie during a commander's meeting in

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[1308] Judgement, paras. 3982-3.
[1309] Judgement, paras. 4243.
[1310] Judgement, paras. 4219. In its findings regarding Financial Support, the Chamber found that there was no exchange of funds later on with regard to this amount, Judgement, para. 4022.
[1311] Judgement, para. 4026.
[1312] Judgement, para. 4248 (xl), 4249, 4261-2, 6910-5.
[1313] Judgement, para. 4072 ("Pyne also testified that an elderly Gbandi woman had told her that the herbalists' boss was a Loma tribesman and they had been sent to Bockarie by Taylor to help protect the RUF fighters, particularly those who would go to recapture Koidu Town from ECOMOG"); para. 4086.

Buedu.[1314] Pyne's testimony is of no probative value. Her alleged source of information was not identified beyond the vaguest of descriptions. The Defence had no avenue to verify much less challenge information arising from an unidentified source. It makes no sense that the Chamber could give any weight at all to an anonymous source identified by a witness on the stand, whereas no statement could even be admitted into evidence from "an elderly Gbandi woman." No reasonable trier of fact could have attributed any weight at all to Pyne's testimony without more information about the identity of the woman, how old she was, her potential motivations for making the statement, her state of mind at the time, the circumstances, and the many other variables that would give the Defence at least a minimal opportunity to test the evidence. The Chamber, in the circumstances, could not in law nor as a reasonable trier of fact accorded any weight to Pyne's testimony based on this anonymous source.

618. Further, Pyne and Kamara's testimony are not corroborative. Kamara makes no mention of an "elderly Gbandi woman", referring instead to a male herbalist to whom he was introduced during a commanders' meeting in Buedu. The Chamber nevertheless wrongly asserted that Kamara "corroborated" Pyne's account[1315] – as if perhaps to say that no matter how divergent two testimonies might be, corroboration could validly arise as long as they both implicate Taylor's guilt. That standard would of course mean that all Prosecution evidence is corroborative, no matter how divergent the details.

619. The Chamber does not approach Kamara's hearsay evidence with anything resembling caution. On the contrary, the Chamber justifies the hearsay nature of the evidence, explaining that none of the Prosecution witnesses would "conceivably have been present when the Accused would allegedly have made the requisite arrangements."[1316] This is an improper and irrelevant consideration. Evidential standards cannot be lowered based on the deficient nature of the witnesses brought by the Prosecution. Such an approach reflects nothing more than a bias towards the

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[1314] Judgement, paras. 4074, 4086. Witness TF1-375, Samuel Kargbo, Komba Sumana, and Alimamy Bobson Sesay were only able to verify the "herbalists" were Liberian, not that they had been sent by Taylor. Judgement, paras. 4075-9. Indeed, two of those witnesses suggested they had been sent by others. TT, Komba Sumana, 6 Oct. 2008, pp. 17981-3; Alimamy Bobson Sesay, 21 Apr. 2008, pp. 8075-6.

[1315] Judgement, para. 4085.

[1316] Judgement, para. 4085.

credibility of Prosecution evidence. The hearsay nature of the evidence does not justify a more permissive approach; it requires a more cautious approach.

620. Even assuming that a reasonable trial chamber could have found that Taylor sent these herbalists, the net effect of their "treatment" was a devastating defeat for the RUF. Large numbers of fighters were apparently slaughtered in the fighting because of a false sense of invulnerability. Kamara testified that "the reason so many of the fighters died or were wounded during Fitti-Fatta was 'because they met the man Sam Bockarie said Taylor sent.'"[1317] The Chamber apparently accepted this testimony, summarizing that both Sesay and Kamara "testified to the heavy losses that the RUF incurred in the Fitti-Fatta operation and the belief of many fighters that they were invincible."[1318] Notwithstanding that the potential perpetrators were encouraged by these "herbalists", the concrete effect of their involvement in no way assisted the commission of crimes. On the contrary, their intercession led to the RUF's catastrophic defeat. The Chamber therefore erred in law in finding that the *actus reus* of aiding and abetting was performed.

621. Finally, the Chamber made no finding that any crime whatsoever was committed during, or as a consequence of, the Fitti Fatta attack. No finding is made that any territory was seized, or that any civilians came under the power of the RUF, as a result of this attack. No accessorial responsibility could be attributed in the absence of such findings.

622. The Chamber's errors of fact led directly to its conviction of Mr. Taylor for aiding and abetting, and invalidates the legal grounds on which this conviction is based. The finding should be reversed any conviction based on it quashed.

iv. GROUND OF APPEAL 30: The Trial Chamber erred in law and fact in finding that Charles Taylor assisted crimes by providing medical support to RUF fighters.

623. The Chamber found that Mr. Taylor provided "medical care to RUF/AFRC members"[1319] which, in addition to other forms of alleged assistance, "supported sustained and enhanced the functioning of the RUF and its capacity to undertake military operations in the course of which crimes were committed."[1320] No reasonable chamber could have found that Mr. Taylor provided such support, much less that any

[1317] Judgement, para. 4074.
[1318] Judgement, para. 4092.
[1319] Judgement, para. 4248 (xxxi).
[1320] Judgement, para. 6935.

such support that was provided contributed substantially to the commission of any crimes. Even if both of these findings could have been reached by a reasonable trial chamber, providing medical support to wounded fighters, regardless of their past actions or affiliation, is an obligation prescribed by international humanitarian law and is therefore justified according to the doctrine of necessity.

624. The Chamber's finding that Mr. Taylor provided medical assistance to RUF fighters is based on the testimony of TF1-360 and TF1-406, and a concession made by Mr. Taylor that he permitted injured RUF members to receive medical treatment in Liberia "during the very tough period"[1321] on humanitarian grounds.[1322] The Chamber found that the evidence of TF1-360 and TF1-406 was "not very specific,"[1323] and that it was not clear "how continuous or substantial the provision of medical care was throughout the Indictment period."[1324]

625. No reasonable trier of fact would have concluded beyond reasonable doubt that Charles Taylor provided medical assistance or care to the RUF for criminal rather than humanitarian reasons, and with the requisite intent to assist the commission of crimes[1325] falling within the Indictment. Significantly, the "provision of medical assistance"[1326] on the face of the evidence on record was justified in law, and it was error for the Trial Chamber to conclude otherwise.

626. The Chamber's errors in law and fact, viewed cumulatively with all the other errors identified in this Part, invalidates the conclusion regarding medical assistance and occasions a miscarriage of justice, insofar as they mischaracterize certain actions as assistance to crimes and contributed to the Chamber's determination that Charles Taylor "substantially assisted" the commission of crimes.[1327]

627. The Chamber deemed both TF1-360 and TF1-406 to be "generally credible"[1328] witnesses. However, and contrary to the Chamber's finding, their respective testimony is not corroborative of one another, especially since they testified about different time periods and Sherif's testimony and the concession by Mr. Taylor

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[1321] Judgement, para. 4054; TT, Charles Taylor, 16 Sept. 2009, p. 29013.
[1322] Judgement, paras. 4032-6, 4062-3 and 4054.
[1323] Judgement, para. 4063.
[1324] Judgement, para. 4063.
[1325] See discussion on applicable *mens rea* for aiding and abetting in Ground of Appeal 16.
[1326] The Accused's concession in this regard was limited to "permitting RUF fighters to receive treatment in Liberia." Judgement, para. 4054.
[1327] Judgement, paras. 6910-5; paras. 4062-3, 4066; paras. 4068; para. 4248-9 (xxxi); para. 4258.
[1328] See, para. 236 for Perry Kamara (TF1-360) and paras. 2623 and 5324 for Varmuyan Sherif (TF1-406).

pertained to alleged acts of medical assistance outside the geographic scope of the Indictment.

628. TF1-360 testified to an arrangement between Bockarie and the Accused for the medical care of wounded RUF fighters in Monrovia in 1998 and 2000,[1329] whereas TF1-406 testified that RUF fighters who participated in fighting in Lofa County in 1999, outside of Sierra Leone, were taken to a hospital in Monrovia.[1330] Mr. Taylor testified that he permitted injured RUF members to receive medical treatment in Liberia "during the very tough period,"[1331] on humanitarian grounds. The Chamber found that such assistance (cumulatively with other forms of operational support) contributed to the "well-functioning and continued existence of the [RUF/AFRC]."[1332] Consequently, the Chamber found that the operational support from the Accused, of which medical assistance was one component, cumulatively supported, sustained and enhanced the functioning of the RUF and its capacity to undertake military operations in the course of which crimes were committed.[1333] It constituted practical assistance[1334] for the commission of the charged crimes and had a substantial effect on the commission of crimes.[1335]

629. The Chamber erred in its application of the law and facts. Aiding and abetting requires a substantial assistance to the crimes committed;[1336] and there is no such evidence here. Furthermore, the Chamber's finding was based on the "continued existence" of the RUF/AFRC rather than the existence of a nexus with the commission of crimes, or a substantial effect on the commission of crimes, as is required for aiding and abetting liability under international law. "Continued existence" is not a crime and the erroneous application of this standard as equating to all crimes subsequently committed is untenable and illogical. Significantly, no consideration was given to, nor any analysis undertaken to determine, whether the alleged and conceded acts of medical assistance were "specifically directed to assist,

[1329] Judgement, paras. 4032-3; TT, TF1-360, 5 Feb. 2008, pp. 3089, 3161; 6 Feb. 2008, pp. 3181-2, 3200.
[1330] Judgement, paras. 4036; TT, TF1-406, 10 Jan. 2008, pp. 898-900.
[1331] Judgement, para. 4054; TT, Charles Taylor, 16 Sept. 2009, p. 29013.
[1332] Judgment, para. 6935.
[1333] Judgment, para. 6936.
[1334] Judgment, para. 6936.
[1335] Judgement, paras. 6935-7.
[1336] See Ground of Appeal 16.

encourage or lend moral support to the perpetration of a certain crime" and that they had "a substantial effect upon the perpetration of the crime."[1337]

630. The incorrect appreciation and application of law by the Chamber invalidates its findings and occasions a miscarriage of justice that requires reversal of the relevant finding.

631. The same applies to the Chamber's reliance on testimony by Mr. Taylor that he permitted injured RUF members to receive medical treatment in Liberia "during the very tough period,"[1338] on humanitarian grounds. Such reliance was improper in the absence of adequately, or at all considering and addressing his mental element in allowing such medical treatment, and whether such "assistance" had a substantial effect on the perpetration of a crime. Indeed, the Chamber failed to adequately consider and address the stated humanitarian reasons for permitting the medical assistance.[1339] Significantly, the permission granted by Mr. Taylor was lawful and the contrary has not been demonstrated. If giving words of moral support and encouragement to Kamajor fighters who were about to conduct military operations... and providing them with medicine which the Kamajors believed would protect them against the bullets did not constitute aiding and abetting in the CDF case, permitting RUF fighters to receive medical treatment in Liberia -- unconnected with any specific military operation, much less with identified crimes within the Indictment -- cannot constitute aiding and abetting.[1340]

632. Additionally, Common Article 3 of the Geneva Conventions I – IV requires the humane treatment of all persons not taking active part in hostilities and for the treatment of wounded and sick.[1341] This rule of international law is extended to non-international armed conflicts in Additional Protocol II to the Geneva Conventions, which repeat the same language regarding the care and protection of the wounded or sick. Furthermore, the practice of States makes it illegal to deny medical care to the

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[1337] *CDF* TJ, para. 229; See Ground of Appeal 16 regarding the applicable legal standards for aiding and abetting.

[1338] Judgement, para. 4054; TT, Charles Taylor, 16 Sept. 2009, p. 29013.

[1339] Judgement, para. 4054; TT, Charles Taylor, 16 Sept. 2009, p. 29013.

[1340] *CDF* AJ, paras. 110-1.

[1341] Geneva Conventions, art. 3.

> (1) Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction found on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. [...] (2) The wounded and sick shall be collected and cared for.

sick or wounded.[1342] Refusing to provide medical care to dying men might, itself, have been a crime and was necessary to avoid harm to life. The doctrine of necessity permits actions in such circumstances.[1343]

633. For the foregoing reasons, the Chamber erred in finding that medical care provided to RUF fighters aided and abetted crimes.

v. GROUND OF APPEAL 31: The Trial Chamber erred in law and fact in finding that Charles Taylor assisted the commission of crimes by providing sums of money.

634. The Chamber found that Mr. Taylor provided financial support to the RUF/ AFRC in varied amounts on different occasions.[1344] Mr. Taylor conceded that he provided some of these funds, notably the 10 million CFA francs given to the RUF in the Côte d'Ivoire[1345], the money given to Johnny Paul Koroma following the Lomé Accords[1346], and $USD 4,000 to 5,000 given to Sam Bockarie between September 1998 and November 1999 as traditional gifts from an African leader.[1347]

635. With the exception of the funds allegedly given to Sam Bockarie "in the tens of thousands of US Dollars," to buy arms and ammunition from ULIMO, the funds allegedly given by Mr. Taylor to various individuals were for unspecified or personal use.[1348] Thus, the 10 million CFA francs allegedly given to the RUF were found not to have been used for purposes of facilitating arms and diamond deals for the RUF.[1349]

[1342] Henckaerts, Jean-Marie and Doswald-Bec, Louise, *Customary International Humanitarian Law, Volume I: Rules*, Cambridge University Press (2005), p. 401, fn. 36.

[1343] Rome Statute, Art. 31(1)(d) ("1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct: [...] (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) Made by other persons; or (ii) Constituted by other circumstances beyond that person's control").

[1344] Judgement, paras. 4023 and 6932.The specific findings were the provision of the following funds: (i) 10 million CFA francs to the RUF in Côte d'Ivoire (ii) unspecified funds to RUF personnel stranded in Côte d'Ivoire after Foday Sankoh was detained in Nigeria; (iii) unspecified funds to the RUF, in the tens of thousands of dollars, to buy arms and ammunition from ULIMO; (iv) $USD 10,000 to Sam Bockarie after ULIMO and LURD invaded Lofa; (v) $USD 20,000 to Foday Sankoh in Lomé before the negotiations began; (vi) $USD 15,000 to Sam Bockarie following the Lomé Accords; (vii) $USD 5,000 to 10,000 to Johnny Paul Koroma following the Lomé Accords; (viii) $USD 15,000 to Issa Sesay to support the RUF; and (ix) $USD 50,000 to Issa Sesay in 2001. Judgement, paras. 4023 and 4257.

[1345] Judgement, para. 4024.

[1346] Mr. Taylor conceded giving Koroma $USD 5,000 to $USD 10,000 at a meeting after the Lomé Accords. Judgement, para. 3981.

[1347] Judgement, paras. 4024, 3949, 3969, 3971; TT, Charles Taylor, 26 Nov. 2009, pp. 32568-72.

[1348] Judgement, paras. 4257 and 4024..

[1349] Judgement, paras. 4023 (i) and 4257.

The funds given Foday Sankoh before the Lomé Accords was for "personal use," and that given JP Koroma was for his delegation to "buy personal items" in Monrovia.[1350] Other funds allegedly given were for unspecified purposes and the Chamber concluded that the RUF also received financial support for arms and ammunition from sources other than Mr. Taylor.[1351]

636. Significantly, the Chamber concluded that:

> In light of the relatively few and small amounts of funding provided to the RUF or AFRC by the Accused, and considering that most of this funding was for personal or unspecified uses, the Trial Chamber is unable to find that the financial support provided by the Accused, in itself, had a direct impact on the operations of the AFRC/RUF.[1352]

637. Despite this finding, the Chamber found that the funds given to Bockarie for the purchase of arms and ammunition from ULIMO, and the alleged safekeeping of diamonds and money for the RUF/AFRC,[1353] were forms of assistance that "supported, sustained and enhanced the functioning of the RUF and its *capacity* to undertake military operations in the course of which crimes were committed."[1354] The Chamber therefore apparently distinguishes between "capacity" and "operations", finding that the money provided enhanced the former, but did not have a direct impact on the latter. Nevertheless, the Chamber concluded that, viewed in conjunction with other alleged forms of support, notably alleged supply of materiel, the financial support had a "substantial effect on the commission of crimes charged in... the Indictment."[1355]

638. The Chamber's own reasoning is legally incoherent. Aiding and abetting requires assistance to a crime. Assistance to an organization whose members may from time to time commit, or have committed, crimes is not aiding and abetting. What is required in such circumstances is that the aider and abettor has provided assistance to *the crime*, and to the individuals perpetrating that crime. Extending liability to support to the organization, as discussed in Ground 21, bypasses the principles of liability hitherto established in international criminal law. The Chamber at first seems to accept that the financial support pertained, at most, to the RUF's "capacity", rather

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[1350] Judgement, para. 4257.
[1351] Judgement, para. 4257.
[1352] Judgement, para. 4026.
[1353] The issue of safekeeping money or diamonds for the RUF/ AFRC is addressed in relation to Grounds of Appeal 32 and 33.
[1354] Judgement, para. 6932-7 (emphasis added). Although not listing financial support explicitly, the Chamber includes all "aforementioned forms of assistance" in its findings on legal responsibility.
[1355] Judgement, para. 6937.

than its "operations". Assistance to organizational "capacity" is not aiding and abetting.

639. No reasonable trier of fact could have concluded that such financial support had a "substantial effect" on the commission of charged crimes. The Chamber erred in fact and law in reaching the opposite conclusion and, viewed cumulatively with all the other errors identified in this Part, its errors invalidate the conclusion regarding financial support and occasion a miscarriage of justice, insofar as they mischaracterize certain actions as assistance to crimes and contributed to the Chamber's determination that Charles Taylor "substantially assisted" the commission of crimes.[1356]

640. The Chamber erred in its application of the law and facts. Aiding and abetting requires a substantial assistance to the crimes committed,[1357] and the funds allegedly given to Bockarie to buy arms and ammunition from ULIMO, after February 1998,[1358] do not suffice as "substantial assistance," bearing in mind that the RUF received financial support from sources other than the Accused and the purposes for which each installment of provided funds was used has not been demonstrated, much less a showing that all such funds were used for unlawful acts.

641. Furthermore, the Chamber's finding was based on the "continued existence" of the RUF/AFRC rather than the existence of a nexus with the commission of crimes, or a substantial effect on the commission of crimes, as is required for aiding and abetting liability under international law. "Continued existence" is not a crime and the erroneous application of this standard as equating to all crimes subsequently committed is untenable and illogical. Significantly, no consideration was given to, nor any analysis undertaken to determine, whether the alleged and conceded acts of financial support were "specifically directed to assist, encourage or lend moral support to the perpetration of a certain crime" and that they had "a substantial effect upon the perpetration of the crime."[1359]

642. The incorrect appreciation and application of law by the Chamber invalidates its findings and occasions a miscarriage of justice that requires reversal of the relevant finding.

[1356] Judgement, paras. 6910-5; paras. 4062-3, 4066; paras. 4068; para. 4248-9 (xxxi); para. 4258.
[1357] See Ground of Appeal 16.
[1358] Judgement, para. 6932.
[1359] *CDF* TJ, para. 229; See Ground of Appeal 16 regarding the applicable legal standards for aiding and abetting.

643. The Defence emphasizes that Chamber found a lack of direct impact of the financial support on the operations of the AFRC/RUF.[1360] This was an explicit finding and to subsequently extend and have this finding subsumed under the purview of "cumulative impact" on the functioning, existence and support of the RUF/AFRC in its capacity to commit crimes during military operations was an error that is irreconcilable with the explicit finding by the Chamber of no direct impact.[1361]

644. The Chamber also erred in failing to give due consideration to the traditions that dictated Mr. Taylor's actions in providing occasional monetary gifts to the RUF/ AFRC. Mr. Taylor testified that the practice of monetary gifts has a traditional aspect to it[1362]; such tradition, it is submitted, helps form regional customary practice.[1363] Regional or local customary practices are customary international laws which are "applicable only within a defined group of States."[1364] The practice of local customary international law finds its basis in, *inter alia*, two judgements of the International Court of Justice: the *Asylum*[1365] and *Right of Passage over Indian Territory*[1366] cases. The monetary gifts to Foday Sankoh by President Olusegun Obasanjo of Nigeria and President Gnassingbe Eyadema of Togo[1367], may thus be viewed as consistent with a rule of local customary international law regulating the diplomatic practice of states in Africa and, more specifically, West Africa, which the Accused relied upon when providing the said gifts. The Trial Chamber erred in fact by failing to adequately consider Mr. Taylor's testimony regarding local customary practices and obligations which obtained at the time of the giving of the gifts.

645. The Chamber's erroneous approach to the financial support issue served as part of its justification for its conclusion that Mr. Taylor aided and abetted the commission of charged crimes by the RUF/AFRC. For the foregoing reasons, the

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[1360] Judgement, para. 4026.
[1361] Judgement, para. 4026.
[1362] Judgement, para. 3974; TT, Charles Taylor, 26 Nov. 2009, pp. 32568-72.
[1363] See Ground 16 for a discussion of customary international law more generally explained.
[1364] Thirlway, Hugh, "The Sources of International Law" in Evans, Malcolm D. (ed.), *International Law*, Oxford University Press (Oxford 3rd ed., 2010), p. 106.
[1365] *Assylum Case* Judgement, p. 276-7. Although the Court did not find state practice supporting the finding of local custom, it determined that a rule of international law established by and applicable as a local custom could be established by State practice requiring "constant and uniform usage, accepted as law, with regard to the alleged rule."
[1366] *Passage over Indian Territory* Judgement, p. 6 at 39. The Court also recognized the existence of a special custom as being established by only two states and the regulation of their relations.
[1367] Judgement, paras. 3956, 3962; TT, Charles Taylor, 14 Sept. 2009, pp. 28816-7; and 14 July 2009, pp. 24340-1.

Chamber erred in finding that financial support provided to the RUF/ AFRC aided and abetted crimes.

vi. **GROUND OF APPEAL 32: The Trial Chamber erred in fact in finding that Charles Taylor facilitated the sale, transfer or production of Sierra Leoneon of diamonds, and erred in fact and in law in finding that any such alleged facilitation aided and abetted crimes.**

vii. **GROUND OF APPEAL 33: The Trial Chamber erred in law and fact to the extent that it found that Charles Taylor aided and abetted crimes by facilitating the sale of diamonds.**

(i) Introduction

646. This section deals with the issue of diamonds and consolidates Defence submissions relating to Grounds of Appeal 32 and 33.

647. The significance of diamonds to the allegations against Mr. Taylor was varied and confused throughout the trial of the case. The Judgement, in the section dealing specifically with "Diamonds" (Section VIII.G), made a number of findings.[1368] These findings, at best, provide a general contextual understanding of the Sierra Leonean conflict. Importantly, the Chamber exonerated[1369] Mr. Taylor from JCE liability by concluding that diamonds were a commodity that was, at times, traded on a *quid pro quo* basis[1370] and the Accused had no plan or motivation to terrorise the people of

[1368] That Mr. Taylor **(i)** provided diesel fuel and mining equipment to the RUF on one occasion between 1998 and 2002 (paras. 6136, 6139 (viii) and 6148); **(ii)** sent two men to visit and assess a mining site in Kono (paras. 6137, 6139 (ix) and 6148); **(iii)** facilitated a relationship in 2001 between Issa Sesay/RUF and a Belgian diamond dealer ("Alpha Bravo") for purposes of diamond transactions (paras. 6139 (vii), 6147, 6092 and 6103); **(iv)** diamonds given to Issa Sesay around April 1998 and intended for delivery to Ibrahim Bah were lost by Sesay in Monrovia (5978, 5975 and 6139 (iii)); **(v)** Foday Sankoh delivered diamonds to the Accused in February or March 2000 (paras. 6139 (iv), 6144 and 5990); **(vi)** diamonds were delivered to the Accused on Sankoh's behalf before or in 1999 while Sankoh was in detention (paras. 6139 (iv), 6144 and 5989 - 5990); **(vii)** diamonds mined in Kono and Tongo Fields were delivered from the AFRC/RUF to the Accused by Daniel Tamba (a.k.a., Jungle) between May 1997 and February 1998 in exchange for arms and ammunition (paras. 5873 – 5874, and 6139 (i)); **(viii)** diamonds were delivered to the Accused between February 1998 to July 1999, directly by Sam Bockarie and indirectly by Eddie Kanneh and Daniel Tamba, sometimes for safekeeping until Sankoh's return or, in order to obtain arms and ammunition from the Accused (paras. 6139 (ii), 6142, 5930, and 5947 - 5948); **(ix)** between June 2000 and the end of hostilities in 2002, Issa Seay delivered diamonds to the Accused, sometimes in return for supplies and/or arms and ammunition and other times for safekeeping until Sankoh's release from detention (paras. 6139 (v), 6057 and 6145); and **(x)** Eddie Kanneh delivered diamonds to the Accused on Sesay's behalf "on occasion" between June 2000 and the end of hostilities in 2002, sometimes in exchange for supplies and/or arms and ammunition and other times for safekeeping until Sankoh's release from detention (paras. 6145, 6139 (vi), 6050 and 6058). There are no findings of aiding and abetting any charged crimes, in consequence of diamonds, in the Diamonds section of the Judgement. Further, these findings, even if accepted, do not constitute aiding and abetting of any charged crime.

[1369] Judgement, para. 6900.

[1370] Judgement, paras. 6898-6899.

Sierra Leone. The Chamber finding dealt a final blow to the heart of the Prosecution's case theory that the Accused formulated a plan to gain or maintain political power or control over the territory of Sierra Leone (the diamond mining areas, in particular) in order to exploit the natural resources of the country.[1371]

648. In turn, section IX.A.2, of the Judgement which deals with Mr. Taylor's individual criminal responsibility for aiding and abetting, makes scant references to diamonds. Insofar as it does, however, this section will address the Chamber's errors of fact and law.

(ii) Indirect findings on aiding and abetting and diamonds

649. The Chamber mentioned diamonds indirectly in its discussion of the forms of "operational support" that allegedly aided and abetted the commission of crimes. First, in finding that Mr. Taylor provided "communications support", the Chamber mentions that some communications were in relation to diamond transactions.[1372] The Defence has addressed the Chamber's findings on "communications support" in Ground 27.

650. Second, the Chamber considered that Mr. Taylor's provision of a Guesthouse in Monrovia was used, in part, to facilitate the alleged delivery of diamonds to Mr. Taylor.[1373] The Chamber's findings in relation to the Guesthouse have been dealt with in Ground 28.

651. Third, the Chamber held that Mr. Taylor aided and abetted crimes by providing "encouragement and moral support", when he (i) told Bockarie, generally, to "keep control over [Kono] for the purpose of maintaining the trade of diamonds for arms and ammunition" and (ii) advised Bockarie to recapture Kono in mid-June 1998 "in order to mine diamonds which would be used to purchase arms and ammunition, following which the RUF carried out Operation Fitti-Fatta."[1374] These findings are addressed Grounds 20 and 26.

652. In addition, the Defence makes the following observations about diamonds: Whilst it found that Mr. Taylor provided Foday Sankoh with arms and ammunition for an attack on Kono around November 1992,[1375] the Chamber noted that the

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[1371] Pre-Trial Conference Materials, para. 6; TT, Prosecution Opening Statement, 4 June 2007, p. 271; Notification of Amended Case Summary, para. 42; Indictment, paras. 23-5; Amended Case Summary, paras. 42-4.
[1372] Judgement, para. 6929.
[1373] Judgement, para. 6933.
[1374] Judgement, para. 6942.
[1375] Judgement, para. 5507.

acquisition of diamonds was not the primary purpose of the attack on Kono.[1376] The Defence notes the Chamber's finding that a shipment of arms and ammunition in November or December 1998 was paid for with diamonds;[1377] that shipment has been addressed in Ground 23. Finally, the Defence notes, regarding the Magburaka shipment, that Mr. Taylor did not send arms and ammunition and did not receive the 90 carats of diamonds or $US 90,000 given to Ibrahim Bah.[1378]

(iii) Aiding and abetting liability for diamonds

653. The Chamber held that Mr. Taylor "kept diamonds and money in 'safekeeping' for the RUF/AFRC"[1379] and this constituted operational support which "supported, sustained and enhanced the functioning of the RUF and its capacity to undertake military operations in the course of which crimes were committed."[1380] Further, as all forms of operational support "improved coordination and facilitated the trade for and vital flow of arms and ammunition to the RUF/AFRC," they constituted practical assistance for the commission of crimes.[1381] Further, all forms of operational support "taken cumulatively, and having regard to the military support provided by the Accused to the AFRC/RUF... had a substantial effect on the commission of crimes charged in Count 1 to 11 of the Indictment."[1382] The finding of the Chamber that the retention of diamonds for "safekeeping" (usually in anticipation of Sankoh's release from detention) assisted the commission of any crime, let alone had a substantial effect in this regard, is an error of law and logic.

654. As discussed above,[1383] the applicable jurisprudence requires that the act in question provide some form of practical assistance and have a "substantial effect on the commission of the crime."[1384] The Chamber does not, and could not, link the "safekeeping" of diamonds to the commission of any crime. Indeed, the very notion of "safekeeping" entails the storage of a valuable asset for its safety or preservation - as opposed to its utilization. Placing an object in safekeeping is, by definition, making it unavailable for use, including to assist in the commission of a crime. If anything,

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[1376] Judgement, para. 2456. Obviously, this incident also falls outside the indictment period.
[1377] Judgement, paras. 5507, 5524, 5841.
[1378] Judgement, paras. 5388, 5559, 5840.
[1379] Judgement, para. 6932.
[1380] Judgement, para. 6936.
[1381] Judgement, para. 6937.
[1382] Judgement, para. 6937.
[1383] The legal arguments and discussion made in Grounds 27 to 31 are incorporated here insofar as they relate to the Chamber's approach towards aiding and abetting liability.
[1384] *Blagojević* TJ, para. 726; *CDF* AJ, para. 72; *Furundžija* TJ, paras.209, 234.

the safekeeping of diamonds, by removing them from the use of the RUF or RUF/AFRC would prevent their use in the commission of crimes.

655. There is no nexus between the deposit of any diamond for safekeeping and the commission of any crime. In this regard, and even taking into account all instances of diamond deliveries and not solely ones for "safekeeping", the Chamber held that "the evidence does not establish that every delivery of diamonds to the Accused was matched by a delivery of arms and/or ammunition for the RUF."[1385] Further, the relevant witnesses testified that diamonds were given to Mr. Taylor for safekeeping until Foday Sankoh was released from detention,[1386] presumably to be utilized by the RUF in some manner at that time. No witness testified, and no finding was made, that Sankoh or any other member of the RUF received back these diamonds and utilized them in some manner that facilitated an identified crime within the Indictment, or even in any manner whatsoever.[1387] In the absence of such a crucial link, it cannot be said that the "safekeeping" of diamonds had even the remotest connection to the commission of any crime.

656. The incorrect appreciation and application of law by the Chamber invalidates its findings and occasions a miscarriage of justice that warrants reversal of the relevant finding.

D. PART IV: ERRORS RELATING TO IRREGULARITIES IN THE JUDICIAL PROCESS

i. GROUND OF APPEAL 36: The Trial Chamber erred in law and/ or procedure in that deliberations, as contemplated and required by Rule 87, Rule 16*bis* and Rule 26*bis*, were not undertaken by the Trial Chamber in this case, as was declared in open court by Alternate Judge El Hadji Malick Sow on 26 April 2012 after the oral pronouncement of the Judgement.

657. The Chamber delivered an oral summary of the Judgement on 26 April 2012. At the conclusion of the sitting, Alternate Judge, Justice Sow, declared in open court in the presence of the parties:

> "The only moment where a Judge can express his opinion, is during the deliberations or in the courtroom, and pursuant to the Rules, *where there is*

[1385] Judgement, para. 5936.
[1386] Judgement, para. 5881, 5893, 5994.
[1387] TF1-338, Transcript 2 September 2008, pp. 15192-15193; TF1-567, Transcript 8 July 2008, p. 13201; Isaac Mongor, Transcript 31 March 2008, pp. 6193-6194

> *no ^ deliberations*, the only place left for me in the courtroom. I won't get -- because I think we have been sitting for too long but for me I have my dissenting opinion and I disagree with the findings and conclusions of the other Judges, because for me under any mode of liability, under any accepted standard of proof the guilt of the accused from the evidence provided in this trial is not proved beyond reasonable doubt by the Prosecution. *And my only worry is that the whole system is not consistent with all the principles we know and love, and the system is not consistent with all the values of international criminal justice, and I'm afraid the whole system is under grave danger of just losing all credibility, and I'm afraid this whole thing is headed for failure.* Thank you for your attention." ("Justice Sow's Statement" or "Statement.")[1388]

658. Justice Sow's Statement contains direct evidence of grave errors of law and procedure in relation to the proceedings in the Judgement against Mr. Taylor. Two significant errors are identified. The first is that the Trial Chamber failed to deliberate pursuant to the Rules. The second is that the process was conducted in a manner inconsistent with fundamental principles and values of international criminal law. These errors also constitute a breach of the right of the Defendant to a fair and public trial. Individually or collectively, the errors vitiate the proceedings, occasion a miscarriage of justice and invalidate the Judgement. Accordingly they should lead to a reversal of all adverse findings in the Judgement, the quashing of all convictions, and vacatur of the Judgement and Sentencing Judgement.

659. The first error is addressed under this ground. The second error is addressed under Ground 37 in the context of other serious breaches of procedure and the fair trial rights of Mr. Taylor, relating to the making of the Statement and related facts.

660. The existence of Justice Sow's statement cannot be disputed, having already been implicitly confirmed by the Plenary Decision to remove him for judicial misconduct.[1389] A majority of this Appeals Chamber has held that the Plenary Decision "did not pronounce on nor express any views concerning the content of Justice Sow's Statement" and concerned "only... his behaviour in court."[1390] Further, this Camber has held that "Justice Sow's credibility, professional or otherwise, was

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[1388] (Emphasis added.) See Public Annex C, Statement of Justice El Hadji Malick Sow on 26 April 2012.

[1389] "1. The plenary declares that Justice Malick Sow's behaviour in court on the 26th of April, 2012, amounts to misconduct rendering him unfit to sit as an Alternate Judge of the Special Court. 2. The plenary recommends to the appointing authority pursuant to Rule 15 bis (B) to decide upon the further status of Justice Malick Sow. 3. Pursuant to Rule 24(iii), the plenary directs Justice Malick Sow to refrain from further sitting in the proceedings pending a decision from the appointing authority." ("Plenary Decision"). Trial Transcript 16 May 2012, T. 49682- T. 49683. Disqualification Decision & Disqualification Decision, Separate Op.

[1390] Disqualification Decision, para. 29.

not before the Plenary and was not judged by the Plenary."[1391] Thus, these findings make it clear that the Plenary Decision and Justice Sow's behaviour does not affect the way in which this Court will consider the content of the Statement or the credibility of Justice Sow.

661. The requirement that Judges carefully deliberate on the evidence presented to them prior to making a determination on the guilt or innocence of an accused person is a fundamental and inviolable principle of criminal justice. It is one of the cornerstones of a fair trial and underlines the very integrity of judicial proceedings. Any violation of this principle, including Judges' failure to participate in them, constitutes a fundamental breach of applicable procedural requirements and the fair trial rights of the Defendant amounting to a miscarriage of justice.

662. The ordinary meaning of 'deliberations' encompasses "the act of carefully considering issues and options before making a decision or taking some action".[1392] Final deliberations after the conclusion of a trial are mandatory. Rule 87 requires that the "Trial Chamber *shall* deliberate".[1393] The "Trial Chamber" in this provision, refers to all the members of the Trial Chamber. Therefore each member of the Trial Chamber is obligated to be present during all deliberations. An Alternate Judge designated to a particular trial in accordance with Article 12(4) of the Statute[1394] is required to be present at all times during deliberations despite not being entitled to vote on the guilt of the Defendant on each count of the indictment.[1395] In this case, Judge El Hadji Malick Sow was the Alternate Judge of the Trial Chamber, who was present throughout five years of trial and the purported deliberations of the Chamber.[1396] Final trial deliberations can only commence once the Presiding Judge has declared a hearing closed.[1397]

663. The purpose of such deliberations is to consider and reach a decision on whether the Defendant is guilty beyond reasonable doubt on each count of the indictment.[1398] Each voting Judge votes separately on each count.[1399] If the Trial

[1391] Disqualification Decision, para. 28.
[1392] Garner, Bryan A, *Black's Law Dictionary* (West, 9th ed., 2009) , p. 492.
[1393] Rule 87(A) of the Rules.
[1394] Statute.
[1395] Rule 16*bis* (C) of the Rules.
[1396] Justice Sow was designated as an Alternate Judge by Justice Sebutinde pursuant to Article 12(4) of the SCSL Statute. See Order Designating Alternate Judge.
[1397] Rule 87(A) of the Rules.
[1398] Rule 87(A) of the Rules.
[1399] Rule 87(B) of the Rules.

Chamber finds the accused guilty on one or more counts it shall also determine the penalty to be imposed for each of the counts.[1400] A Trial Chamber of the ICTY has described the process, stating that "[d]uring its final deliberations, the Trial Chamber has [...] assessed the weight of the relevant facts, taking into consideration the totality of the trial record and, most particularly, any evidence submitted by the non-moving party to rebut the adjudicated fact."[1401]

664. Justice Sow's Statement suggests that the Chamber failed to properly conduct the process of deliberations under the Rules, that is, to attend all deliberations together, consider the guilt of Mr. Taylor beyond reasonable doubt with reference to the totality of the trial record and to decide upon this issue by voting on each count of the indictment. This failure constitutes an error of both law and procedure that invalidates the Judgement.

665. Deliberations after the close of proceedings are the most solemn and significant aspect of the decision making process of the court whereby the guilt of the accused is discussed in light of the relevant evidence and law, and the fate of the accused is finally decided in terms of both guilt and sentence. The importance of deliberations therefore is not only a requirement of law and procedure but is also a fundamental aspect of fair trial. The Defence has made detailed legal submissions in Ground 37 regarding the applicable standards of a fair and public trial and hereby incorporates those submissions by reference. That a failure of deliberations constitutes a denial of the right to a fair trial as enshrined in the Rules of the Special Court, cannot be gainsaid.[1402] A failure to deliberate also implicates another aspect of fair trial rights concerning the conduct of judges. The right to a fair trial includes the right to an impartial tribunal, of persons of high moral character, impartiality and integrity who have made a solemn declaration to serve honestly, faithfully, impartially and conscientiously.[1403] If these standards are breached then the right to a fair trial has been infringed. A failure to deliberate may well be viewed as breaching this solemn duty.

666. Justice Sow's Statement has substantial probative value. Regardless of the propriety of the manner in which he conveyed the information, his statement

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[1400] Rule 87(C) of the Rules.
[1401] *Popović* TJ, para. 71.
[1402] Article 17(2) of the Statute & Rule 26 *Bis*. Rules. This fundamental right has recently been confirmed by this Appeals Chamber. Disqualification Decision, para. 23, fn.59.
[1403] Disqualification Decision, para. 23 citing Article 13(1) of the Statute and Rule 14(A) of the Rules.

constitutes compelling and voluntarily provided evidence from a professional judge who was legally obliged to attend all and any of the purported deliberations of the Chamber. He was therefore in a unique position of a first-hand observer to whatever did, or in this case, did not occur during that process. This contrasts with previous cases where such claims have been rejected in the absence of direct evidence of a failure to deliberate.[1404]

667. Rule 29 of the Rules provides that "deliberations are to take place in private and remain secret" and Rule 87(A) states that deliberations after the conclusion of the evidence in the case in order to consider the guilt of the accused beyond a reasonable doubt, are to be conducted "in private".[1405] Rule 29 applies to all the deliberations of Chambers,[1406] including all decisions and orders prior to the final decision. Rule 87(A) expressly applies to the final deliberations after the close of the hearing.

668. These provisions are intended to cover the substance of the deliberations in Chambers when assessing the applicable law and facts leading to either a decision during the proceedings or leading to a vote on the guilt of the accused under each count of the indictment, after the close of the hearing.[1407] Both the Prosecutor of the ICTR and the Appeals Chamber of the ICTR have agreed that what is protected by secrecy is the *substance* of deliberations with the Appeals Chamber stating:

> Deliberations for Judgements of the Tribunal are strictly privileged and confined to the staff of each Trial Chamber; staff of different Trial Chambers are thus prohibited from discussing the *substance* of any Judgements with any other person.[1408]

669. The implication is that secrecy relates to the substance, not the very existence, of deliberations.

[1404] See eg. in the case of *Prosecutor v Krajišnik,* the ICTY Appeals Chamber rejected the *Amicus Curiae* submission that the Trial Chamber had failed to properly deliberate on the basis that it had failed to adduce evidence to substantiate its claim. *Amicus Curiae* asserted it was impossible to for the Trial Chamber to properly deliberate the case and deliver a comprehensive Trial Judgement in the way that it had within only 18 days, alleging that deliberations had commenced prior to the closing of the case. However, in the absence of any further evidence substantiating such claim, the Appeals Chamber was not prepared to draw that inference. *Krajišnik* AJ,paras. 133-4.

[1405] Rules 29 & 87(A) of the Rules.

[1406] *AFRC* Leave to Appeal Decision, p. 1.

[1407] With respect to deliberations after the close of proceedings, the final voting on each count is ultimately revealed in the written judgment of the Trial Chamber because Judges are empowered to issue dissenting opinions indicating a disagreement with the majority on counts of the indictment. Rule 88(C) of the Rules.

[1408] *Semanza* AJ, para. 56.

670. Furthermore, and in any case, there are certain circumstances where Judges are permitted to state publically what occurred during the deliberative process, including the conduct of their colleagues, if this is necessary in order to address serious procedural irregularities which in their view undermine the fundamental integrity of the legal process and therefore the fairness of the proceedings. As such, these statements are lawfully made statements in the interests of justice. Furthermore, they fulfil a Judge's solemn declaration to serve honestly, faithfully, impartially and conscientiously.[1409]

671. Judges of the Special Court have publically explained what has occurred during deliberative processes relating to matters falling for decision by the Special Court. Two examples of such expressions have related to a decision of Trial Chamber II in the *Brima* case not to reinstate defence counsel,[1410] and a subsequent decision by the same Trial Chamber to grant leave to appeal that same decision.[1411] In Justice Sebutinde's dissenting opinion to the decision refusing re-appointment of defence counsel, Her Honour referred to and appended an internal memorandum sent by her to the other Judges of Trial Chamber.[1412] In that memorandum she disclosed, in detail, what she viewed as serious procedural problems pertaining to the matter before the Chamber including conversations she had with Justice Doherty, the Presiding Judge of the Trial Chamber, the conduct of the Presiding Judge, and her own conduct. In that memorandum she also expressed her opinion on substantive issues relating to matters before the court to the other Judges of the Chamber. Justice Sebutinde further stated that she was writing the memorandum because "I feel that it would be a betrayal of my solemn declaration and undertaking if I did not make public my position on and the extent of my involvement in the issue."[1413]

672. Justice Doherty publically responded to Justice Sebutinde's dissenting opinion and her annexed memorandum by appending "Comments" to the a subsequent decision by the Trial Chamber to grant leave to appeal the decision.[1414] In these comments, Justice Doherty gave a detailed account of the discussions between herself and the other Judges of the Trial Chamber, including Justice Sebutinde, and the

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[1409] Disqualification Decision, para. 23 citing Article 13(1) of the Statute and Rule 14(A) of the Rules.
[1410] *AFRC* Re-Appointing Decision & *AFRC* Re-Appointment Dissenting Opinion.
[1411] *AFRC* Leave to Appeal Decision.
[1412] *AFRC* Re-Appointment Dissenting Opinion, Annex to Dissenting Opinion of Justice Sebutinde.
[1413] *AFRC* Re-Appointment Dissenting Opinion, Annex to Dissenting Opinion of Justice Sebutinde, para. 2.
[1414] *AFRC* Leave to Appeal Decision.

conduct of the Judges in relation to the matter before the Chamber. In so doing she acknowledged that such disclosure would not ordinarily be permitted but that she felt impelled to do so because these matters were already public and she was entitled to do so in order to correct incorrect or misleading facts. She said:

> I consider some facts stated are incorrect or misleading. .... I consider Rule 29 of the Rules of Procedure and Evidence does not permit any Judge to publish or discuss matters that have been discussed in Chambers however since several matters have been brought into the public arena by the publication of both the Dissenting Opinion and the interoffice memorandum I consider I am entitled to put the following before the Appeal Chamber.[1415]

673. Another more recent example where a Judge stated publically what occurred during a deliberative process in order to address what, in his view, was a serious procedural irregularity occurred in the context of the Disqualification Decision. In his separate opinion to the decision, Justice King declined the relief sought by the Defence motion on the basis that he did not participate in two days of deliberations and the subsequent Plenary Decision which found that Justice Sow had engaged in misconduct for his behaviour in making the Statement.[1416] In so doing he provided his account of the procedure and conduct of Judges with respect to the Plenary Decision and in particular the conduct of Justice Sebutinde. He stated that "at the start of deliberations, [...] Justice Julia Sebutinde of Trial Chamber II read a written 6 page statement on behalf of Trial Chamber II, which purported to be a complaint against Justice Malick Sow",[1417] and that "Justice Malick Sow, against whom the allegations in the statement were made was not given prior notice of it and, consequently, had not been given the opportunity to respond."[1418] Justice King characterised the allegations as "sudden and scurrilous".[1419] As a result of this "procedural irregularity, which patently impinged on Justice Sow's right to be heard...[and] was against basic principles of natural justice",[1420] Justice King made it clear that he did not participate in the deliberations of the Emergency Plenary of the SCSL "either on 7 or 10 May 2012 or in any decision taken by the Plenary on the matter."[1421] Justice King therefore publically described the conduct and process of

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[1415] *AFRC* Leave to Appeal Decision, p.1.
[1416] Disqualification Decision, Separate Op.
[1417] Disqualification Decision, Separate Op., para. 5.
[1418] Disqualification Decision, Separate Op., para. 7.
[1419] Disqualification Decision, Separate Op., para. 8.
[1420] Disqualification Decision, Separate Op., para. 8.
[1421] Disqualification Decision, Separate Op., para. 10.

deliberations in the context of procedural irregularities which in his opinion breached fundamental fair hearing rights.

674. Accordingly, while deliberations as to the substance of matters before Chambers are generally secret, there are exceptional circumstances where Judges may speak out publically and address the conduct of deliberations. They may do so if it is in the interests of justice or fairness or in accordance with a Judge's solemn declaration to serve honestly, faithfully, impartially and conscientiously.

675. In the present case the first few phrases of Justice Sow's Statement are instructive. Justice Sow said "The only moment where a Judge can express his opinion, is during the deliberations or in the courtroom, and pursuant to the Rules, *where there is no ^ deliberations*, the only place left for me in the courtroom." As such his Statement was guided by his conviction that he was speaking out at the only appropriate forum left open to him, which was in the court room. He then proceeded to voice his grave concerns about the process against Mr. Taylor as set out in this ground and Ground 37.

676. Statements made under these circumstances, such as the Statement of Justice Sow, should be considered as compelling evidence of grave procedural irregularities because they are made by Judges who are experts in their field, direct observes as to the events they are speaking of and because their purpose and duty is to protect the fairness and integrity of the judicial process

677. As noted in Mr. Taylor's Notice of Appeal dated 19 July 2012, this ground is subject to a filing under Rule 115 to present additional evidence before the Appeals Chamber.[1422] As such the Defence reserves the right to present further argument on this ground after the resolution of the matters relating to additional evidence.

ii. GROUND OF APPEAL 37: The Trial Chamber erred in law and/ or procedure, in that there were recurring irregularities in the judicial process during the proceedings before the Trial Chamber, contrary to Rule 26*bis* and fundamental principles of due process.

678. On the 26 April 2012, Justice Sow, the Alternate Judge in this case made an unprecedented Statement[1423] speaking out publically about what in his opinion was a process that was not consistent with "all the values of international criminal justice". The Defendant was denied the right to a fair and public trial by serious procedural

[1422] Notice of Appeal, para. 104.
[1423] See Ground 36.

irregularities associated with the making of this Statement. A sitting Judge's microphone was silenced in open court; his Statement was removed from the official transcript of the proceedings when the statement was already recorded on the unofficial live note transcript; and his name was removed from official transcripts, orders and judgment cover pages after he spoke out. Each of these actions was undertaken without any decision or order from the Trial Chamber setting out the legal basis upon which they were taken. Each of these actions constitute a serious procedural irregularity which breached Mr. Taylor's right to a fair and public hearing.

679. These measures were taken in the context of at least one serious public dispute between the Trial Judges about the proper composition of the Trial Chamber in the absence of one of the Judges and the subsequent refusal to let Justice Sow sit as a Judge in that situation.

680. The right to a fair trial is a fundamental pillar of international criminal justice and of the conduct of proceedings before the Special Court.[1424] Security Council Resolution 1315 (2000) makes it clear that the Trial Chamber must ensure that the proceedings before it observe "international standards of justice, fairness, and due process of law".[1425] Any deviation from these standards compromises the integrity of the judicial processes and therefore the fairness of the trial process against Mr. Taylor.[1426]

681. The right to a fair and public trial is a universally recognised right. It is provided for in all of the seminal international human rights instruments.[1427] Importantly, the right to a fair and public trial is enshrined in the SCSL Statute and

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[1424] Disqualification Decision, para. 23.

[1425] Security Council Resolution 1315, Adopted by the Security Council at its 4186th meeting, on 14 August 2000.

[1426] It has been recognised that it is axiomatic that an international tribunal must fully respect internationally recognised standards regarding the rights of the accused at all stages of its proceedings. See Report of the Secretary-General pursuant to paragraph 2 of resolution 808 of the Security Council, 3 May 1993, S/25704. This comment was specifically made with respect to the ICTY but is equally applicable to all international courts and tribunals.

[1427] Article 10 of the UDHR provides, for instance, that '[e]veryone is entitled in full equality to **a fair and public hearing** by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.' Article 14(1) ICCPR provides that, '[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a **fair and public hearing** by a competent, independent and impartial tribunal established by law.'[1427] Article 6 of the ECHR provides that "everyone is entitled to a **fair and public hearing** within a reasonable time by an independent and impartial tribunal established by law". This is similarly provided for under Article 8(1) of the ACHR and Article 26(2) of the *American Declaration on the Rights and Duties of Man*. Article 8(5) of the ACHR provides that, '**[c]riminal proceeding shall be public, except insofar as it may be necessary to protect the interests of justice**.' (Emphasis Added.)

Rules of Evidence and Procedure. The right to a *'fair and public hearing'* is enunciated in Article 17(2) of the Statute of the SCSL,[1428] which mirrors Article 14(1) of the ICCPR. Rule 26*bis* of the Rules of Procedure and Evidence affirms the court's duty to "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".[1429] Accordingly, the central issue before the Appeal Chamber is whether the trial proceedings as a whole have been conducted publically and fairly.

682. This general right is given further expression in Article 17(4) of the Statute of the SCSL, which provides a number of *minimum* guarantees to which the accused is entitled.[1430] The ICTY Appeals Chamber in *Tadić* has held that "the relationship between [the right to fair and the minimum guarantees] is of the general to the particular".[1431] Thus, the minimum guarantees in Article 17(4) are specific examples of the broader right to a fair trial laid down in Article 17(2). It is therefore not necessary for the accused to point to any particular breaches of Article 17(4) in order to establish an infringement of the right to a fair trial.[1432] This interpretation is consistent with both jurisprudence and customary international law. For instance, Judge Sylvia Steiner, acting as Single Judge of the ICC's Pre-Trial Chamber I, has emphasised that "the concern is whether the proceedings, as a whole, are fair".[1433] Likewise, the ECHR has repeatedly confirmed that the right to a fair trial requires that

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[1428] Statute.

[1429] Rules. This fundamental right has been recently confirmed by this Appeals Chamber, Disqualification Decision, para. 23, fn.59. Similar guarantees of the right to a fair and public hearing can be found in the Statutes of the ICTY, ICTR, the Special Tribunal for Lebanon, the Rome Statute, and the ECHR. See Article 21(2), ICTY Statute; Article 20(2), ICTR Statute; Article 67 (1), Rome Statute; Article 16, STL Statute; Article 6(1), ECHR.

[1430] Article 17(4) of the Statute.

[1431] *Tadić* AJ, para. 47.

[1432] Zahar and Sluiter , *International Criminal Law*, (Oxford University Press 2008), p. 293.

[1433] *Lubanga Dyilo* Judgement on Appeal against the Decision on Jurisdiction, "Where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed. To borrow an expression from the decision of the English Court of Appeal in *Huang v. Secretary of State*, it is the duty of a court: "to see to the protection of individual fundamental rights which is the particular territory of the courts [...]". Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial. In those circumstances, the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice. In both Courts, the concern is whether the proceedings, as a whole, are fair."

the proceedings as a whole are fair.[1434] The general entitlement to due process is now so entrenched that a reference to it was dropped from the Rome Statute because it was seen as redundant.[1435] Moreover, academic commentary suggests that "[t]he term 'fair hearing' also suggests that, where individual problems with specific rights set out in Article 67 do not, on their own, amount to a violation, the requirement of a fair hearing may allow a cumulative view and lead to the conclusion that there is a breach where there have been a number of apparently minor or less significant encroachments on Article 67".[1436]

683. The Appeals Chambers of the ICTY,[1437] ICTR,[1438]and SCSL[1439] have consistently affirmed the importance of due process and the right to a fair trial. The European Court of Human Rights has on a number of occasions stipulated that, "[t]he right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting the guarantees … of the Convention restrictively."[1440]

[1434] *Edwards* Judgement, paras. 33-4: "The Court recalls that the guarantees in paragraph 3 of Article 6 (art. 6-3) are specific aspects of the right to a fair trial set forth in paragraph 1 (art. 6-1). In the circumstances of the case it finds it unnecessary to examine the relevance of paragraph 3 (d) (art. 6-3-d) to the case since the applicant's allegations, in any event, amount to a complaint that the proceedings have been unfair. It will therefore confine its examination to this point. In so doing, the Court must consider the proceedings as a whole including the decision of the appellate court. [...] The Court's task is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair. *Stanford* Judgment, para. 24: "The Court must consider the proceedings as a whole including the decisions of the appellate courts. Its task is to ascertain whether the proceedings in their entirety, as well as the way in which evidence was taken, were fair". *Taxquet* Judgment, para. 84: "Accordingly, the institution of the lay jury cannot be called into question in this context. The Contracting States enjoy considerable freedom in the choice of the means calculated to ensure that their judicial systems are in compliance with the requirements of Article 6. The Court's task is to consider whether the method adopted to that end has led in a given case to results which are compatible with the Convention, while also taking into account the specific circumstances, the nature and the complexity of the case. In short, it must ascertain whether the proceedings as a whole were fair."

[1435] Schabas, 'Article 67' in O. Triffterer, ed., *Commentary on the Rome Statute*, Beck (Baden-Baden 2nd ed., 2008), p. 848.

[1436] Schabas, William, *An Introduction to the Criminal Court*, Cambridge University Press (Cambridge 3rd ed., 2011) p. 207.

[1437] The ICTY Appeals Chamber has affirmed this right on numerous occasions. For example "The right to a fair trial is central to the rule of law: it upholds the due process of law." *Tadić* AJ, para. 43. Similarly, in *Furundžija* the Appeals Chamber held that "Trial Chambers have been consistently mindful of the primary function of the International Tribunal, which is to ensure that justice is done and that the accused receives a fair trial." *Furundžija* AJ, para. 148. "Any accused before the International Tribunal has a fundamental right to a fair trial, and Chambers are obliged to ensure that this right is not violated." *Simić* AJ, para 71.

[1438] For instance, the Appeals Chamber of the ICTR has held that "[w]here the failure to give sufficient notice of the legal and factual reasons for the charges against him violated the right to a fair trial, no conviction can result" *Nahimana* AJ, para 326.

[1439] For example the Appeals Chamber has held that "The Statute and Rules provide for an accused's right to a fair trial". *AFRC* AJ, para. 220.

[1440] *A.B.* Judgment, para 54; *Azevedo* Judgment, para. 66. *Cable* Judgment, Partly Dissenting Opinion of Judge Zupančič: "It cannot be logically maintained that a conviction and sentence in a criminal case are legitimate if the criminal procedure in question violates the essential precepts of a fair trial, due process and so on. The legitimacy of a substantive judgment depends on the legitimacy of the

684. The conduct and disposition of judges is an indispensible foundation of the right to a fair trial. An accused has the right to an impartial tribunal which, in turn, is guaranteed by requiring that judges be independent and persons of high moral character, impartiality and integrity who have made a solemn declaration to serve honestly, faithfully, impartially and conscientiously.[1441]

685. The Defence submits that there have been a number of serious procedural irregularities that, if considered individually or collectively, amount to a contravention of the above outlined fundamental principles of a fair and public trial as well as due process, and occasion a miscarriage of justice which invalidates the Judgment.

686. The first of these irregularities relate to the conduct of Judges in the Trial Chamber, and in particular to the refusal "on principle"[1442] by a Judge to attend a hearing on 25 February 2011 and the subsequent failure of the Trial Chamber to properly constitute itself.[1443] In this regard the Trial Chamber adjourned the disciplinary hearing against Lead Trial Counsel for Mr. Taylor indefinitely on 25 February 2011[1444] after Justice Sebutinde had stated that she would not attend the hearing due to recent and unspecified developments in the Trial Chamber.[1445] The Presiding Judge, stating that "this is not a situation to which rule 16 applies",[1446] refused to allow the Alternate Judge to participate in the proceeding, although he had expressed himself ready and willing to do so. Justice Sow said, "Let me make this very clear: This Bench is regularly composed with three judges sitting, as it shows, Two judges cannot sign decisions. When the Bench is sitting, it's sitting with three judges, not two judges, and I don't know what. I'm not here for decoration. I am a

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procedure by which it was arrived at. To hold otherwise – that is, to separate the procedure entirely from its substantive outcome (conviction and sentence) – would reduce the meaning and import of the procedure to an ancillary status. This would mean, as it used to mean in the purely inquisitorial procedure, considering the procedure a mere "adjective" to the "substantive" importance of the case. That, however, is no longer a tenable position. If it were, a fair trial would not be as central to the meaning of Article 6 of the Convention as it is, neither would the exclusionary rule figure as an essential procedural sanction in most national jurisdictions as well as in some international instruments such as the United Nations Convention against Torture (Article 15)."

[1441] *Taylor* Withdrawal Decision, para. 23 citing Article 13(1) of the Special Court Statute and Rule 14(A) of the Special Court Statute.

[1442] TT, 25 Feb. 2011, p. 49316, lines 12-3.

[1443] TT, 25 Feb. 2011, p. 49316, lines 5-13.

[1444] TT, 25 Feb. 2011, p. 49318, lines 8-10: "this Trial Chamber is not properly constituted and we consider we have no alternative but to adjourn this hearing..."

[1445] TT, 25 Feb. 2011, p. 49316, lines 9-10.

[1446] TT, 25 Feb. 2011, 49318, lines 7-8.

judge. This Bench is regularly composed, as everybody can see... We are three judges sitting."[1447]

687. The role of an Alternate Judge according to Article 12(4) of the Statute is to "replace a judge if that judge is unable to continue sitting". Rule 16(B) provides that "[i]f a Judge is, for any reason, unable to continue sitting in a proceeding [...] the President may designate an alternate Judge as provided in Article 12(4) of the Statute". In order to avoid disruption of the proceedings in the event that a Judge could not continue to sit, the President had designated Justice Sow as Alternate Judge for the entire trial of Mr. Taylor.[1448] As Alternate Judge, Justice Sow "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."[1449]

688. Thus, when Justice Sebutinde was unable to sit in the proceedings of 25 February 2011, the Trial Chamber should have made use of the Alternate Judge whose sole function was to replace Judges who are unable to sit. This is particularly so considering that the only party to the proceeding had invited Justice Sow's participation.[1450] Instead, the remaining Judges rejected Justice Sow's involvement outright and without explanation, notwithstanding that allowing his participation would have allowed the hearing to continue without interruption.

689. Given that Justice Sebutinde had refused "on principle" to attend the proceedings, and the requirements in Article 12(4) and Rule 16(B) had been fulfilled, the Trial Chamber's failure to even consider Justice Sow as replacement for Justice Sebutinde is one of a number of procedural irregularities which undermine Mr. Taylor's right to a fair and public hearing.

690. A second significant procedural irregularity in this regard is the removal of the Alternate Judge's Statement[1451] from the trial record from 26 April 2012.

691. The video footage of the oral pronouncement of Judgment on 26 August 2012[1452] shows that the proceedings were declared adjourned by the Presiding Judge

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[1447] TT, 25 Feb. 2011, p. 49317, lines 22-7, and p. 49318, lines 3-4 See, also, Defence Motion Seeking Termination of the Disciplinary Hearing and Order on Defence Motion Seeking Termination of the Disciplinary Hearing.

[1448] Order Designating Alternate Judge, p. 2.

[1449] Rule 16*bis*(D) of the Rules.

[1450] TT, 25 Feb. 2011, p. 49317, lines 18-21: "Yes, thank you, Madam President, we would like to invite the Chamber to invite Justice Sow to participate, so the Bench is constituted of three regularly constituted judges."

[1451] See Ground 36.

at 13:15:44. After this, at 13:15:45, Justice Sow began to speak, stating: "Excuse me, I would like to say just something before the court is adjourned". The registrar then states "All rise"[1453] and three Judges of the Trial Chamber, excluding Justice Sow who is pictured sitting, rise and leave the bench. Immediately after this, at 13:16:04, the screen goes black. From that moment Justice Sow can be heard stating "the only moment when a judge...". Then his microphone goes dead to match the black screen. The video and audio record ends.

692. Justice Sow continued to make his Statement. It was transcribed by the court reporters and appeared on the live note transcript contemporaneously. The live note transcript notes that the sitting on that day ended after Judge Sow's Statement at 1.17 p.m. In contrast, the official transcript of that sitting day does not record Justice Sow's statement.[1454] It records the Presiding Judge's last statement that court was adjourned[1455] and in the next line states that the hearing was adjourned at 1.17 p.m.[1456] Thus, both the live note and official transcripts record proceedings ending at precisely the same time, however the transcription of Justice Sow's Statement has been removed from the official record prior to its official publication.

693. While the Statement was made and recorded, the general public did not hear anything but the first few words of Justice Sow's Statement, nor is it contained in the official record of the proceeding. The Trial Chamber did not issue any order or decision setting out to the parties or to the public the basis upon which Justice Sow was publically silenced while making his Statement or subsequently, the basis of the removal of his Statement from the official record.

694. A majority of this Appeals Chamber has subsequently addressed this issue stating:

> ...the Defence's submissions with respect to the trial record are ill founded. The hearing of 26 April 2012 officially concluded when it was adjourned by the Presiding Judge of Trial Chamber II. The official transcript accordingly ends with that adjournment, and could not have included further statements made after the hearing was officially closed. On 16 May 2012, the Presiding Judge described for the record Justice Sow's behaviour following the adjournment. The Plenary Resolution regarding Justice Sow's behaviour was further entered into the official record. The Defence is fully aware of

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[1452] Public Annex B, Copy of video footage of the last 11 minutes 48 seconds of the Taylor Delivery of Judgement as retained by Court Management Section.
[1453] Public Annex B, Copy of video footage of the last 11 minutes 48 seconds of the Taylor Delivery of Judgement as retained by Court Management Section, 13:15:55.
[1454] TT, 26 Apr. 2012, pp. 49623-79.
[1455] TT, 26 Apr. 2012, p. 49679.
[1456] TT, 26 Apr. 2012, p. 49679.

> the content of Justice Sow's statement. There is no basis to suggest that the official transcript is anything but accurate and transparent.[1457]

695. The Defence appreciates that this finding was made specifically in relation to an issue it had raised in its motion and prior to the full ventilation of arguments on applicable law and facts on the substance of this appeal. However, in so far as the finding informs or affects or constitutes a judgment on the substance of Mr. Taylor's appeal, it respectfully submits that it should be (re)considered in light of the following submissions.

696. As noted above, a Chamber must ensure that a trial is both fair and public. A public hearing is mainly for the benefit of the accused because the purpose of allowing the public and the press access to a hearing is that their presence contributes to ensuring a fair trial.[1458] In so doing a public hearing offers protection against arbitrary decisions and builds confidence by allowing the public to see justice administered.[1459] The importance of holding public hearings was underlined by Chief Justice Warren of the United States Supreme Court, when he stated that:

> There can be no blinking the fact that there is a strong societal interest in public trials. Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, *cause all trial participants to perform their duties more conscientiously...* [1460]

The right to a fair and public hearing under the Statute of the Special Court is only "subject to measures ordered by the Special Court for the protection of victims and witnesses".[1461] This is reflected in the rules which permit Chambers to deviate from the fundamental requirement of a public trial in ordering protective measures for witnesses.[1462] The Rules also permit the Trial Chamber to exclude the press and the public from all or part of the proceedings for reasons of national security or in the interests of justice.[1463] This case is not one where the protection of witnesses or national security is implicated. Therefore the discretion of the Chamber to exclude the press and the public should have been exercised considering "the interests of justice".

[1457] Disqualification Decision. para. 33.
[1458] *Delalić* Decision on Protective Measures, para. 34.
[1459] *Pretto* Judgement, cited in *Delalić* Decision on Protective Measures, para. 34.
[1460] (Emphasis Added.) *Estes v Texas*, 381 U.S. 532 at 583 (1965).
[1461] Article 17(2) of the Statute.
[1462] Rules 75, 79(A)(ii) of the Rules.
[1463] Rule 79(A)(i) & (A)(iii) of the Rules.

697. In this case it is not disputed that Justice Sow made the Statement and that his behaviour in making it was the basis of a finding of judicial misconduct by a majority of the Plenary in the Plenary Decision.[1464] Nor is it contentious that this Statement was not publically broadcast when it was uttered or made publically available on the official record, by the Trial Chamber. The contents of the Statement was not put on the public record on 16 May 2012 by the Presiding Judge when he described Justice Sow's behaviour following the adjournment; nor were they put on the record in the Plenary Decision. While the Defence was fortunate to have captured the live note screen shot of the Statement and to have brought it into the public domain after the hearing and in its Preliminary Motion;[1465] it was not broadcast to the public and it was not published to the parties or the public on the official record, by the Trial Chamber. Thus, as a matter of fact, the video recording and the official trial transcript are neither accurate nor transparent to the parties or to the public of all that transpired in the court room on 26 April 2012.

698. A majority of Judges of this Chamber have opined that the official transcript does not include Justice Sow's Statement because it was made after the Presiding Judge of the Trial Chamber had adjourned and the proceedings were officially closed. The legal issue therefore is whether the right of the accused to a public and fair trial ends with the official adjournment of a trial, or whether this right transcends this formal break in proceedings and may include the statements of a sitting Alternate Judge who is publically expressing his professional opinion about whether or not the trial and deliberations have been conducted in accordance with the applicable legal principles in open court. The Defence submits that to ask that question is to answer it. The interest of justice dictate that such a statement should have been included on the public trial record by the Trial Chamber on the basis of fundamental fairness, transparency and on the basis of the Defendant's right to appeal.

699. This conclusion is even more pressing considering that the Trial Chamber would use the fact that Justice Sow made the Statement as a basis for a complaint to the Plenary which ultimately resulted in the Plenary Decision finding that Justice Sow had engaged in judicial misconduct and sanctioning him for such misconduct. If the making of the Statement was considered serious enough by the Trial Chamber for the purpose of sanctioning a sitting Alternate Judge for misconduct, then the contents of

[1464] TT, 16 May 2012, pp. 49682-3.
[1465] Disqualification Decision, Annex A.

that Statement should also have been considered serious enough to be included on the official trial record by the Trial Chamber in order to fully inform the public and the parties about the exact nature of that Alternate Judge's behaviour and the reasons for it.

700. A third significant procedural irregularity in this regard is the Trial Chamber's unexplained and unjustified removal of the Alternate Judge's name from transcripts, orders and judgment cover pages from the date he made his Statement on 26 April 2012.

701. It had been the practice of the Trial Chamber of the Special Court to include Justice Sow's name, as Alternate Judge, on each of the transcripts, orders and decisions in the trial. Justice Sow's name appeared on the official transcripts up until the delivery of summary judgement on 26 April 2012, and thereafter was removed. Similarly, the Trial Chamber had included Justice Sow's name on every decision and order of the Trial Chamber since 22 May 2007.[1466]

702. After his Statement on 26 April 2012, Justice Sow's name was omitted from the subsequent orders in this case.[1467] Further, his name was removed from the cover pages of the written judgements in this case.[1468] Not witstanding this removal, Justice Sow is referred to as the Alternate Judge in footnote 8 and paragraph 4 of Annex B of both the written and subsequently corrected version of the judgment.[1469] Thus, he remained an Alternate Judge of the Trial Chamber, however his name was inexplicably removed from the judgments of the Chamber.

703. According to the Rules, judgments must be rendered by a majority of Judges and shall be accompanied by a reasoned decision in writing.[1470] Therefore, it may be reasonably inferred that the Trial Chamber, which was formally responsible under the Rules for the production of the written judgments, removed Justice Sow's name from these orders and judgments for reason(s) that have not been disclosed to the Defence

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[1466] The first time the Trial Chamber included Justice Sow's name on the cover of a filing was in this decision: Decision on Adequate Time and Facilities.
[1467] Order Authorising Court Photography on 16 May 2012; Order Authorising Court Photography on 30 May 2012.
[1468] *Prosecutor v. Taylor*, SCSL-03-01-T-1281, [Written] Judgement, 18 May 2012; *Prosecutor v. Taylor*, SCSL-03-01-T-1283, [Corrected] Judgement, 30 May 2012 ("Judgement"): *Prosecutor v. Taylor*, SCSL-03-01-T-1284, Corrigendum to Judgement filed on 18 May 2012, 30 May 2012 ("Corrigendum to Judgement"); *Prosecutor v. Taylor*, SCSL-03-01-T-1285, Sentencing Judgement, 30 May 2012 ("Sentencing Judgement").
[1469] *Prosecutor v. Taylor*, SCSL-03-01-T-1281, [Written] Judgement, 18 May 2012 & *Prosecutor v. Taylor*, SCSL-03-01-T-1283, [Corrected] Judgement, 30 May 2012.
[1470] Rule 88(C) of the Rules.

or the public. This constitutes yet another breach of Mr. Taylor's right to a fair and public hearing by the Trial Chamber.

704. A fourth and most important factor which establishes the most serious breaches of principles and values of international criminal law and fundamentally undermines fairness of the trial, was the content of the Statement by the Alternate Judge made in open court on 26 April 2012:

> And my only worry is *that the whole system is not consistent with all the principles we know and love*, and the *system is not consistent with all the values of international criminal justice*, and I'm afraid *the whole system is under grave danger of just losing all credibility*, and I'm afraid *this whole thing is headed for failure*.[1471]

705. This can be characterised as a courageous statement from a sitting Alternate Judge in a trial, who was in a unique position to have insider knowledge about the conduct of proceedings. He possessed the expert professional qualifications and experience in order to make an assessment about the consistency of the trial with fundamental principles and values of international criminal justice.[1472] Justice Sow found the process so severely deficient that he took the unprecedented step of speaking out publically and declaring it to be inconsistent with "all the values of international criminal justice" and "all the principles we know and love". In his view these inconsistencies were so grave that "the whole system is under grave danger of losing all credibility" and "headed for failure". The strength of these words and these assessments cannot be underestimated or summarily swept away.

706. This evidence alone is sufficient to establish significant procedural errors and a serious breach of the fairness of the trial that should lead to the reversal of all adverse findings against Charles Taylor in the Judgment, the quashing of all convictions, and vacatur of the Judgement and Sentencing Judgement. This conclusion is only strengthened when it is seen in the context of actions by the Trial Chamber to deny the Defendant a fair and public trial.

707. As noted in Mr. Taylor's Notice of Appeal dated 19 July 2012, this ground is subject to a filing under Rule 115 to present additional evidence before the Appeals Chamber.[1473] As such the Defence reserves the right to present further argument on this ground after the resolution of the matters relating to additional evidence.

[1471] (Emphasis Added.) See Public Annex C, Statement of Justice El Hadji Malick Sow on 26 April 2012. See Ground 36.
[1472] Article 13(1) of the Statute.
[1473] Notice of Appeal, para. 104.

iii. **GROUND OF APPEAL 38: The Trial Chamber erred in law and/ or procedure, in that the Trial Chamber was irregularly constituted with a Judge of the International Court of Justice (ICJ) from the time of that Judge's election to the ICJ until the time Judgement was rendered against the Accused, in the absence and fulfilment of undertakings by that Judge to the Plenary of the Special Court for Sierra Leone (SCSL) – notified to the parties – (i) that if elected as a Judge of the ICJ they would fulfil their judicial functions at the SCSL on a full-time basis, (ii) that the Judge would not assume any of their functions at the ICJ until completion of their tenure as a member of the Trial Chamber, (iii) that their duties at the ICJ would not be incompatible with their judicial duties at the SCSL, and (iv) that they would not to be diverted by anything from the fulfilment of their mandate at the SCSL.**

708. The constitution of the Trial Chamber with Justice Sebutinde, who was for a significant period contemporaneously a Judge of the ICJ, was irregular because she failed to seek, give and fulfil undertakings to the Plenary, with notification to the parties, that, if elected as Judge of the ICJ she would fulfil her judicial obligations at the SCSL in the trial of Mr. Taylor conscientiously, to the exclusion of other outside activities and giving absolute precedence to the work of the court. To that end, the following undertakings should have been given: (i) that if elected as a Judge of the ICJ she would fulfill her judicial functions at the SCSL on a full-time basis, (ii) that the Judge would not assume any of her functions at the ICJ until completion of her tenure as a member of the Trial Chamber, (iii) that her duties at the ICJ would not be incompatible with her judicial duties at the SCSL, and (iv) that she would not to be diverted by anything from the fulfillment of their mandate at the SCSL (Undertakings). The failure to seek, give and therefore fulfill such undertakings constitutes an error of law and procedure and a breach of the fair trial rights of the Defendant because it contravened applicable requirements of the lawful constitution of the Trial Chamber and of judicial independence, impartiality, integrity and conscientiousness.

709. From 6 February 2011 up until 30 May 2011, for a significant period of time amounting to 16 weeks, Justice Julia Sebutinde was contemporaneously both a Judge

of the SCSL in the Trial of Mr. Taylor and a Judge of the ICJ.[1474] This period was critical to the proceedings against Mr. Taylor. It encompassed the time period between the end of trial hearings and the delivery of Judgment. As such it represented the important time during which deliberations on the guilt or innocence of Mr. Taylor would ordinarily have been conducted and concluded by the Trial Chamber.[1475] This period also encompassed the hearings and submissions on sentencing and therefore represented the critical period during which deliberations on sentencing were conducted and concluded by the Trial Chamber.

710. The Defendant has a right to a 'fair and public hearing' at the Special Court which has been addressed in legal submissions made under Ground 37, which are hereby incorporated by reference. An integral aspect of a fair and public trial is the right to a tribunal which is independent, impartial and which is established under law.[1476] This requirement for an independent and impartial tribunal, as well as the applicable law of the Special Court, mandate that Judges are persons of "high moral character, impartiality and integrity"[1477] who have made a solemn declaration to serve "honestly, faithfully, impartially and conscientiously."[1478] Therefore the fair trial requirement of an independent and impartial tribunal incorporates principles of judicial integrity and conscientiousness.

[1474] Justice Julia Sebutinde was a Judge of Trial Chamber II from her assignment to the Chamber on 17 January 2005 during the Pre-Trial Phase of the proceedings against Mr. Taylor. See the Second Annual Report of the President of the Special Court for Sierra Leone, 2004-2005, p. 5. She served continuously as a Judge of the Trial Chamber until the conclusion of the trial on 11 March 2011 (TT, 11 March 2011, p. 49622, lines 12 – 15). On 26 July 2011, while the trial against Mr. Taylor was ongoing, the Secretary-General of the United Nations announced Justice Sebutinde's nomination as a Judge of the ICJ (List of Candidates by Nominated National Groups, Note by the Secretary-General, 26 July 2011 A/66/183-S/2011/453, p. 5). She was subsequently elected to that position on 13 December 2011 and her term as a Judge on the ICJ commenced on 6 February 2012. United Nations Security Council 6682nd Meeting, 13 December 2011 (S/PV.6682).

[1475] TT, 11 Mar. 2011, p. 49622, lines 12-5.

[1476] The independence and impartiality of a tribunal which is legally established or constituted is an absolute right, provided for in numerous international law instruments: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him", Article 10 of the UDHR; "In the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law", Article 14(1) ICCPR; "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law", Article 6 ECHR. Also see Article 8(1) ACHR & Article 26(2) of the *American Declaration of the Rights and Duties of Man*, 2 May 1948. As noted by the ICTY Appeals Chamber, the 'fundamental human right to be tried before an independent and impartial tribunal' is 'an integral component' of the right and guarantee to a fair trial. *Furundžija* AJ, para. 177.

[1477] Article 13(1) of the Statute.

[1478] Rule 14(A) of the Rules, Disqualification Decision, para. 23.

711. Judges of international courts and tribunals are required to comply with a number of principles pursuant to the fair trial rights of the Defendant to an independent and impartial tribunal whose Judges act with judicial integrity and conscientiousness. The first and most fundamental principle is that Judges must not engage in outside activities that may interfere with their judicial functions. Secondly, in the event that a Judge wishes to engage in an outside activity, the Judge must notify the parties to any proceedings in which the Judge is sitting as well as the court of which they are currently serving as a Judge or the authority that appointed them as a Judge. Thirdly, it is for that court or authority to decide whether any outside activities are compatible with a Judge's judicial duties and if so, on what basis.

712. These principles are embodied in the Statute and applicable procedure of the ICJ. Article 16(1) of the ICJ Statute provides that, '[n]o member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature.'[1479] Pursuant to Article 16(2), "[a]ny doubt on this point shall be settled by decision of the court." The ICJ has interpreted the provisions of Article 16 as prohibiting Judges of the Court from engaging in any other occupation of a professional nature.[1480] This does not debar ICJ Judges from limited participation in other judicial or quasi-judicial activities of an occasional nature.[1481] But permitting ICJ Judges to engage in any outside activities is subject to the precondition that "the judges must give absolute precedence to the obligations as members of the Court."[1482]

[1479] ICJ Statute. Article 13*bis* (3) of the ICTY Statute states that with respect to permanent judges of the ICTY, '[t]he terms and conditions of service shall be those of the judges of the International Court of Justice.' Therefore the prohibition on engaging 'in any other occupation of a professional nature' and the ICJ's interpretation of this provision is also applicable to ICTY Judges.

[1480] *Conditions of service and compensation for officials other than Secretariat officials: members of the International Court of Justice: Report of the Secretary-General,* UN GAOR, 5th Comm, 53rd sess, Agenda Item 113, UN Doc A/C.5/53/11 (6 October 1998), para. 46

[1481] *Conditions of service and compensation for officials other than Secretariat officials: members of the International Court of Justice: Report of the Secretary-General*, UN GAOR, 5th Comm, 53rd sess, Agenda Item 113, UN Doc A/C.5/53/11 (6 October 1998), para. 47. ICJ judges were in the past, on occasion, permitted to sit simultaneously in the European Court of Human Rights and the ICJ, given that the workload of the ICJ has not always been as immense as it is today. However, today such a practice is inconceivable. *Conditions of service and compensation for officials other than Secretariat officials: members of the International Court of Justice: Report of the Secretary-General,* UN GAOR, 5th Comm, 53rd sess, Agenda Item 113, UN Doc A/C.5/53/11 (6 October 1998), para. 49; The ICJ has also interpreted Article 16(1) 'as permitting acceptance of occasional appointments as arbitrators.' The Secretary-General in his report notes that the courts of a number of UN Member States, permit a similar practice. *Conditions of service and compensation for officials other than Secretariat officials: members of the International Court of Justice: Report of the Secretary-General*, UN GAOR, 5th Comm, 53rd sess, Agenda Item 113, UN Doc A/C.5/53/11 (6 October 1998), para. 47.

[1482] *Conditions of service and compensation for officials other than Secretariat officials: members of the International Court of Justice: Report of the Secretary-General*, UN GAOR, 5th Comm, 53rd sess, Agenda Item 113, UN Doc A/C.5/53/11 (6 October 1998), para. 48.

713. These principles are also embodied in the Rome Statute of the ICC. Article 40(3) provides that, "Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature."[1483] Article 40(4) states that "[a]ny question regarding the application of paragraphs 2 and 3 shall be decided by an absolute majority of the judges". Article 3 (2) of the Code of Judicial Ethics for the ICC provides that "Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence."[1484]

714. Similarly, Article 21(3) of the European Convention on Human Rights provides that "[d]uring their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality *or the demands of a full-time office*; all questions arising from the application of this paragraph shall be decided by the Court." A prohibition on Judges engaging in any outside occupation "incompatible with their independence and impartiality or with the demands of a full-time office" can also be found under Rule 4 of the Rules of Court applicable to the European Court on Human Rights. Any Judge of the Court who engages in an "additional activity" is required to declare this to the President of the Court, and any disagreement between the President and the Judge in question in relation to this activity must be settled by a Plenary of Judges of the European Court of Human Rights.[1485]

715. These principles are also encompassed in numerous international instruments on judicial independence, conduct and ethics, which is indicative of their general acceptance as applicable principles of judicial conduct.[1486] For example, Principle

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[1483] (Emphasis Added.) Article 40(1) provides that, '[t]he judges shall be independent in the performance of their functions.' Pursuant to Article 40(2) '[j]udges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.'

[1484] ICC Code of Judicial Ethics.

[1485] ECHR Rules of Court; See also, COE Judicial Ethics Resolution. A similar approach is taken with respect to judges of the European Court of Justice, under Article 4 of the Statute of the Court of Justice. Article 4 provides that 'Judges may not hold any political or administrative office. They may not engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the Council, acting by a simple majority. When taking up their duties, they shall give a solemn undertaking that, both during and after their term of office, they will respect the obligations arising there from...Any doubt on this point shall be settled by decision of the Court of Justice...'. *Protocol (No. 3) on the Statute of the Court of Justice of the European Union*, 1 83/210 *Official Journal of the European Union*, 30 March 2010.

[1486] Principle 8(1) of the Burgh House Principles provides that, '[j]udges shall not engage in any extra-judicial activity that is incompatible with their judicial function or the efficient and timely functioning of the court of which they are members, or that may affect or may reasonably appear to affect their independence or impartiality.' Pursuant to Principle 14(1), international judges 'shall disclose to the court and, as appropriate, to the parties to the proceeding any circumstances which come to their notice

17(1) of the *Mount Scopus Approved Revised International Standards of Judicial Independence* states that international Judges should avoid engaging in "any extra-judicial activity that is incompatible with their judicial function or the efficient and timely functioning of the court of which they are members...". Principle 23(1) states that Judges shall disclose to the court and, as appropriate, to the parties to the proceedings any matters which come to their notice at any time by virtue of which any of Principles 16 to 22 apply. Pursuant to Principle 24(1) a Judge may continue to sit in a case where "appropriate disclosure" has been made, and "where the court expresses no objections and the parties give their express and informed consent to the judge acting."[1487]

716. These principles are also embodied in UN regulations regarding outside employment. These regulations prohibit staff members from engaging in any outside occupation or employment, whether remunerated or not, without the approval of the Secretary-General. Further, it is at the discretion of the Secretary-General to authorize the outside employment, but he may do so if it does not conflict with the staff member's official functions.[1488] These provisions are also consistent with standards of conduct for the international civil service which state that it is improper for

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at any time by virtue of which any of the Principles 7 to 13 apply.' The Burgh House Principles, the Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals, June 2004. Principle 4(2) of COE Charter for Judges states that: "[j]udges freely carry out activities outside their judicial mandate including those which are the embodiment of their rights as citizens. This freedom may not be limited *except* in so far as such outside activities are incompatible with confidence in, or the impartiality or the independence of a judge, *or his or her required availability to deal attentively and within a reasonable period with the matters put before him or her. The exercise of an outside activity, other than literary or artistic, giving rise to remuneration, must be the object of a prior authorization on conditions laid down by the statute.* COE Charter for Judges. The explanatory memorandum on Principle 4(2) states that: "The Charter deals here with activities conducted alongside judicial functions. It provides that judges may freely exercise activities outside their judicial mandate, including those which are the embodiment of their rights as citizens. This freedom, which constitutes the principle, may not know of limitation except only in so far as judges engage in outside activities incompatible either with public confidence in their impartiality and independence or *with the availability required to consider the cases submitted to them with due care and within a reasonable time.* The Charter does not specify any particular type of activity. *The negative effects of outside activities on the conditions under which judicial duties are discharged must be pragmatically assessed. The Charter stipulates that judges should request authorisation to engage in activities other than literary or artistic when they are remunerated,* COE Charter for Judges, para. 4.2. This has been the subject of approval by the Consultative Council of European Judges which has stated that maintaining the dignity of judicial office requires that judges 'behave in such a way as to avoid conflicts of interest or abuses of power. This requires judges to refrain from any professional activity which might divert them from their judicial responsibilities...' CCJE Principle Governing Judges, para. 37.

[1487] Mount Scopus Standards.

[1488] Regulations 1.2(o) & 1.2(p), UN Staff Regulations UNOPS. The Regulations relating to outside activities were phrased identically in 2011. Secretary-General's Bulletin Staff Regulations, UN Doc ST/SGB/2011/1.

international civil servants to engage, without prior authorization, in any outside activity that interferes with the primary obligation to devote their energies to the work of their organizations.[1489] The UN Secretary-General appointed Justice Sebutinde as a Judge of the SCSL.[1490] To the extent that these provisions were applicable to Her Honour,[1491] she ought to have sought authorisation for her contemporaneous appointment as a Judge to both the Special Court and the ICJ.

717. The relevant practice from other international tribunals in situations similar to that of Justice Sebutinde establish that if judges wish to undertake a full time outside activity, they may be permitted to do so on the basis that they have sought, given and fulfilled undertakings (also otherwise referred to as assurances or guarantees), that they will perform their judicial obligations conscientiously.

718. An important international precedent for good judicial practice and adherence to this principle can be found in the *Čelebići case* in relation to Judge Odio Benito, who continued to sit on the Trial Chamber of the ICTY after being elected as Vice President of Costa Rica. Her Honour commenced a four year term as Judge of the ICTY on 17 November 1993.[1492] Her term of office at the ICTY was to expire in November 1997 and she was not re-elected for another term. On 27 August 1997 the UN Security Council, on the basis of a recommendation by the UN Secretary-General and following a request by the President of the ICTY, passed Resolution 1126, which

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[1489] The UN Standard of Conduct, provide that: "The primary obligation of international civil servants is to devote their energies to the work of their organizations. It is therefore improper for international civil servants to engage, without prior authorization, in any outside activity, whether remunerated or not, that interferes with that obligation or is incompatible with their status or conflicts with the interests of the organization. Any questions about this should be referred to the executive head." See UN Standard of Conduct, para 41, in UN Standards of Conduct, para. 42. See, UN Human Resources Handbook.

[1490] Judgement, fn. 8: "Composed of Justice Teresa Doherty (Norther Ireland), appointed by the Secretary General of the United Nations; Justice Richard Lussick (Samoa), appointed by the Government of Sierra Leone; **Justice Julia Sebutinde (Uganda), appointed by the Secretary General of the United Nations**; Justice El Hadji Malick Sow (Senegal) appointed as Alternat Judge by the Secretary General of the United Nations and by the Government of Sierra Leone" (emphasis added).

[1491] UN Staff Rules and Regulations are attached to individual staff members' letters of appointment. UN Staff Regulations provide that: '[t]he Staff Regulations embody the fundamental conditions of service and the basic rights, duties and obligations of the United Nations Secretariat. They represent the broad principles of human resources policy for the staffing and administration of the Secretariat. For the purposes of these Regulations, the expressions "United Nations Secretariat", "staff members" or "staff" shall refer to all the staff members of the Secretariat, within the meaning of Article 97 of the Charter of the United Nations, whose employment and contractual relationship are defined by a letter of appointment subject to regulations promulgated by the General Assembly pursuant to Article 10, paragraph 1, of the Charter.' UN Staff Regulations. See, UN Human Resources Handbook; See also, *Turner* Judgement, para 28.

[1492] *Delalić* AJ, para. 652.

explicitly permitted Judge Benito to continue to serve as an ICTY Judge on the *Čelebići* case until the case was completed.[1493]

719. Upon expiration of her term as a Judge of the ICTY, Judge Benito had planned to stand for election as Vice President of Costa Rica. Since her term had been extended by the Security Council, there were concerns that her potential election to a political office would be incompatible with her judicial functions. Addressing these concerns, in a letter dated 16 October 1997 to the then President of the ICTY, Antonio Cassese, Judge Benito undertook that, *if elected, she would not take office before the end of her functions as a Judge sitting in Čelebići and in addition undertook, if elected, to fulfil her judicial functions on a full time basis*. In the light of this commitment, President Cassese decided that Judge Odio Benito was entitled to run as a candidate for the position of Vice-President. Nonetheless, President Cassese felt that it was advisable to submit the matter to the Plenary. He did so and the Fourteenth Plenary assembly of all Judges endorsed the decision of the President.[1494]

720. In February 1998, prior to the completion of the *Čelebići* case, Judge Benito was elected as the Second Vice President of Costa Rica.[1495] Hence the issue arose again after her election. The then President of the ICTY, Judge McDonald, noted *the renewed commitment of Judge Odio Benito not to assume the functions of Second Vice-President prior to the termination of her tenure as a Judge. Judge Odio Benito further undertook not to be diverted by anything from the fulfilment of her mandate as a Judge* until November 1998.[1496] In light of these undertakings, President McDonald decided that there was no incompatibility between Judge Odio Benito's judicial duties and her new status of Second Vice-President of Costa Rica. President McDonald also felt it was advisable to submit the matter to the Seventeenth Plenary of Judges on 11 March 1998. The Plenary assembly of Judges unanimously endorsed President McDonald's decision.[1497]

721. On 25 May 1998, the four accused in the *Čelebići* case submitted a Motion on Judicial Independence, arguing that Judge Benito should recuse herself on the grounds

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[1493] *Delalić* AJ, para. 674.
[1494] *Delalić* Decision on Disqualification or Recusal, para. 12.
[1495] Judge Benito took an oath of office for the role of Vice President on 8 May 1998. Thereafter she was also appointed as Minister for Environment and Energy in Costa Rica and as a member of the Board of Mediators.
[1496] *Delalić* Decision on Disqualification or Recusal, para. 12.
[1497] (Emphasis added.). *Delalić* Decision on Disqualification or Recusal, para. 12; See, also, *Delalić* AJ, para. 684.

that, having taken on an executive role, she was no longer qualified as an ICTY Judge.[1498] In addition, they claimed that her impartiality might be undermined, contrary to Rule 15 (A) of the ICTY's Rules of Procedure and Evidence, which prohibits ICTY Judges from sitting on cases in which their independence or impartiality may be affected.[1499] The motion was referred by the Presiding Judge to the Bureau pursuant to Rule 15(B).[1500] Drawing on the case law of the European Court of Human Rights, the Bureau considered it relevant whether the Judge had given sufficient guarantees so as not to place his/her impartiality into question.[1501] The Bureau further stated that the real question was not whether a prohibition existed with respect to the exercise of an outside political or administrative function, but rather whether any such function was actually exercised by the Judge, in light of the undertakings that the Judge had given. It found that Judge Benito was Vice President 'in name only', and consequently no inconsistency arose.[1502]

722. The four accused appealed. The Appeals Chamber noted that, prior to accepting the nomination as Vice President of Costa Rica, Judge Benito had given ample assurances to the President of the ICTY that she would not assume any of her duties as a Vice President until the case was completed. This was put to a Plenary of ICTY Judges who accepted her undertaking. When Judge Benito was elected as Vice President a Plenary of ICTY Judges approved her taking the oath of office. Judge Benito's undertaking not to assume the office of Vice President until 17 November 1998 was supported by a letter from the President of Costa Rica.[1503] Thus, the

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[1498] *Delalić* AJ, para 653. At the time, Article 13 of the ICTY Statute (which has since been slightly amended by SC Resolution 1329) provided that: '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...'. The highest judicial office in Costa Rica is a magistrate of the Supreme Court. Therefore the defence argued that Judge Benito was constitutionally disqualified from election as a magistrate on appointment as Vice President, which in turn disqualified her from acting as a judge at the ICTY. The Prosecution in turn argued that Article 13 did not apply in so far as SC Resolution 1126 took precedence in permitting Judge Benito to remain on the *Čelebići* case. The Appeals Chamber rejected the defence argument that Judge Benito was disqualified from serving as an ICTY judge on the basis of being constitutionally disqualified in Costa Rica to serve as a judge. The Appeals Chamber in *Čelebići* made clear that what the SC Resolution did was extend the terms of office of the three judges in *Čelebići* as ICTY judges, if only for the limited purpose of completing the case. *Delalić* AJ, paras. 656-681.

[1499] (Emphasis Added.) *Delalić* AJ, para. 653; *Delalić* Motion on Judicial Independence, p. 8.

[1500] *Delalić* AJ, paras. 653; See also, *Delalić* Decision on Judicial Independence.

[1501] *Delalić* Decision on Judicial Independence, pp. 7-8. Again drawing on the case law of the European Court of Human Rights, the Bureau noted a number of factors to be taken into account in measuring independence, including the manner of appointment, duration of office, guarantees given by judges, and appearance of independence.

[1502] *Delalić* Decision on Judicial Independence, pp. 9-11.

[1503] *Delalić* AJ, para. 684.

conscientious assurances given by Judge Benito that her election as Vice President of Costa Rica would in no way interfere with her duties as a Judge on the ICTY were of the essence in permitting her to continue in her function as a Judge on the ICTY.

723. An important international precedent for good judicial practice and adherence to these principles can also be found in the case of Judge Byron. In 2011, Judge Dennis Byron, then President of the ICTR, sent a letter to the UN General Assembly and Security Council, requesting that he be authorized to continue to work on a part-time basis as a Judge in the *Karemera et al* case while engaged in another judicial occupation.[1504]

724. Judge Byron had been elected as President of the Caribbean Court of Justice. He was due to take up this appointment on 1 September 2011, but the judgement in *Karemera* was not due to be delivered until December 2011. In his letter he guaranteed that for the duration of this period he would remain committed "to the work of the Tribunal and the complete and honourable discharge" of his obligations. He further stated that, "[t]his arrangement will not give rise to any conflict of interest and will not delay the judgement delivery in this case."[1505]

725. Judge Byron's request was authorized by the Security Council pursuant to SC Res 1995, on the basis that such practice is "exceptional" and should not be considered precedent. The Security Council stated that "[t]he President of the International Tribunal shall have the responsibility to ensure that this arrangement is compatible with the independence and impartiality of the judge, does not give rise to conflicts of interest and does not delay the delivery of the judgment."[1506] Once more, the conscientious assurances provided by Judge Byron that he would not become diverted from his judicial duties were of the essence in permitting him to sit as a Judge on two courts contemporaneously.

726. In the present case there is no evidence that Justice Sebutinde sought, gave or fulfilled any such undertakings or assurances or guarantees to the Special Court, with notification to the parties, before taking up a contemporaneous appointment as an ICJ Judge. She continued to sit as a Judge in the Trial Chamber despite the fact that an

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[1504] See, *Letter dated 5 May 2011 from the President of the international Criminal Tribunal for Rwanda addressed to the Secretary-General*, UN GAOR, 65th sess, Agenda item 125, UN Doc A/65/855, UN SCOR, 66th sess, UN Doc S/2011/329 (25 May 2011), Annex, pp. 3-4.

[1505] See, *Letter dated 5 may 2011 from the President of the international Criminal Tribunal for Rwanda addressed to the Secretary-General*, UN GAOR, 65th sess, Agenda item 125, UN Doc A/65/855, UN SCOR, 66th sess, UN Doc S/2011/329 (25 May 2011), Annex, pp. 3-4.

[1506] Security Council Resolution S/RES/1995, 6 July 2011, para. 4.

Alternate Judge could have been designated in the circumstances.[1507] This resulted in errors in the application of applicable procedure and law, and the denial of a fair trial to Mr. Taylor.

727. These errors are material and applicable to all findings made, and convictions entered,[1508] in the Judgement. Individually or collectively, the errors vitiate the proceedings, occasion a miscarriage of justice and invalidate the decision. The specific remedy requested is the reversal of all adverse findings against Charles Taylor in the Judgment, the quashing of all convictions, and vacatur of the Judgement and Sentencing Judgement.

iv. GROUND OF APPEAL 39: The Trial Chamber erred in law, in fact and/ or procedure in finding that the Defence failed to make a *prima facie* showing that there "has been" interference with the independence and impartiality of the Court, despite being satisfied that statements in leaked Wikileaks cables attributed to sources within the Prosecution, Registry, and Chamber indicate that information may have been provided to the United States Government (USG) by employees within the Court.

728. The Trial Chamber erred in fact, law, and procedure in dismissing the Defence's Wikileaks Motion regarding United States Government (USG) sources within the Prosecution, Registry and the Chamber.[1509] The errors involved the misapplication of the *prima facie* legal standard in respect of a request for disclosure and/ or an investigation pursuant to Rule 54 of the Rules, and the failure to consider relevant factors, or to give them sufficient weight.

729. More specifically, the Trial Chamber erred in finding that the Defence failed to make a *prima facie* showing that there "has been"[1510] interference with the independence and impartiality of the Court, despite being satisfied that statements in leaked Wikileaks cables attributed to sources within the Prosecution, Registry, and Chamber indicate that information may have been provided to the USG by employees within the Court.[1511]

730. No reasonable trier of fact, having assessed the totality of the import of the cables, could have concluded that the Defence had failed to show the appearance of

[1507] Rules 16 and 16*bis* of the Rules.
[1508] Judgement, para. 6994.
[1509] Wikileaks Decision. Interlocutory leave to appeal was denied the Defence by Wikileaks Decision on Leave to Appeal.
[1510] Wikileaks Decision, page 7.
[1511] (Emphasis added) Wikileaks Decision, page 7.

bias or interference with the independence and impartiality of the Court. The errors compromised the independence and/ or integrity of the judicial process and occasion a miscarriage of justice invalidating the decision, in that they contravene the principles that undergird Article 13(1), and Article 15(1) of the Statute, and Rule 54 and Rule 26*bis* of the Rules. The resulting errors are material and applicable to all findings made and convictions entered.[1512]

731. The Wikileaks Motion was based on two diplomatic "code cables" that were made public by the Wikileaks website in late 2010.[1513] The previously confidential cables disclosed in no uncertain terms the position of the USG vis-à-vis Charles Taylor: the U.S. Ambassador to Liberia, Linda Thomas-Greenfield, states in a cable dated 10 March 2009 that "...the best we can do for Liberia is to see to it that Taylor is put away for a long time and we cannot delay for the results of the present trial to consider next steps. All legal options should be studied to ensure that Taylor cannot return to destabilize Liberia."[1514] A second cable, dated 15 April 2009, revealed that sensitive information about Mr. Taylor's trial before the Special Court was leaked to the United States Embassy in The Hague by unnamed contacts in the Trial Chamber, the Office of the Prosecutor (OTP) and the Registry.[1515]

732. The cables also underscored the financial dependence of the Special Court on USG funding and support, in order to engage other countries in financial donations to the Court. Moreover, language used in the cables to describe communications suggest a close relationship between the Court officials in question and the USG representative, such as, that the source "intimated" to the USG representative.[1516] One of the cables went further by indicating that "one Chamber contact believes that the Trial Chamber could have accelerated the Court,s [sic] work... Moreover, contacts in 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."[1517] This resulted in Justice Sebutinde voluntarily withdrawing herself from participating in the deliberations and

[1512] Judgement, para. 6994.
[1513] Wikileaks Motion.
[1514] See Exh. D-481; Annex A to Wikileaks Motion. Reference by Ms. Thomas-Greenfield to the results of "the present trial" were to the outcome of the trial proceedings in this case. No reference was made by Ms. Thomas-Greenfield to Taylor's guilt or innocence regarding any alleged crimes in Sierra Leone.
[1515] See Exh. D-482; Wikileaks Motion, Annex B.
[1516] See Exh. D-482; Wikileaks Motion, Annex B.
[1517] See Exh. D-482; Wikileaks Motion, Annex B.

the Decision on the Wikileaks Motion and other related motions.[1518] Indeed, Justice Sebutinde gave a telephone interview to a newspaper in Uganda, indicating that the allegations against her were "odd and factually incorrect," that since she was "the only African Judge, some of these racists think it is easier to target the black one," and that the cable in question contained manifest "ignorance and racism."[1519]

733. The Wikileaks Motion requested the Chamber to order the immediate disclosure and/ or investigation into the identity of sources within the Chambers, the Prosecution and the Registry who communicated with USG officials outside the official lines of communication, pursuant to Rules 54 and Rule *26bis of* the Rules.[1520]

734. In denying the Wikileaks Motion, the Chamber held that: "The Defence has not shown any *prima facie* evidence that there **has been** interference with the independence and impartiality of the Court, and therefore has shown no evidentiary basis for either disclosure by, or an investigation of, any organ of the Court (emphasis added)."[1521]

735. The Defence submits that no such showing was required and the Chamber erred in applying a higher legal standard than the correct standard which was articulated in the same decision, but ultimately not followed. Having considered the jurisprudence of the Special Court dealing with a request for disclosure or an investigation, the Chamber concluded that "in determining whether an order for disclosure and/ or an investigation pursuant to Rule 54 is necessary, the Trial Chamber must determine whether a *prima facie* case has been established that there **may have been** interference with the independence and impartiality of the Court."[1522] This was a correct statement of the threshold showing that the Defence had to make – a showing that involves a probability of interference (there "may have been") and not actual interference (there "has been") with the independence and impartiality.

736. All that was required of the Defence was a *prima facie* showing that there *may have* been interference with the independence and impartiality of the Court and that

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[1518] See, Declaration of Justice Julia Sebutinde, 26 January 2011, appended to the Wikileaks Decision. See also, Declaration of Justice Julia Sebutinde, 27 January 2011, appended to *Prosecutor v. Taylor*, SCSL-03-01-T-1171, Decision on Urgent and Public with Annexes A-C Defence Motion to Re-Open its Case in Order to Seek Admission of Documents Relating to the Relationship between the United States Government and the Prosecution of Charles Taylor, 27 January 2011.

[1519] See Annex A to *Prosecutor v. Taylor*, SCSL-03-01-T-1155, Defence Motion Seeking Leave to Appeal the Decision on Defence Request for a Status Conference Pursuant to Rule 65*Bis* and Defence Motion for Stay of Proceedings Pending Resolution of Outstanding Issues, 14 January 2011.

[1520] Wikileaks Motion, paras. 17-8.

[1521] Wikileaks Decision, page 7.

[1522] (Emphasis added) Wikileaks Decision, page 6.

showing was made, considering that the Chamber was satisfied that statements in the cables attributed to sources within the Prosecution, Registry, and Chamber, indicate that information may have been provided to the USG by employees within the Court.[1523] That should have reasonably led the Chamber to order an investigation, or at the very least, order disclosure as requested by the Defence. The Chamber erred in deciding otherwise and thereby breached its obligations under Rule 26*bis*.

737. The Chamber's application of an incorrect standard invariably derived from its reliance on a decision in the *Sesay, et al.*, case.[1524] The Sesay Chamber observed that "mere evidence of the cooperation between the Prosecution and the FBI or the US Government, without proof that the former received instructions from the latter, including the nature and contents of such instructions, does not, per se, fulfil the test to establish a violation of Article 15(1) of the Statute."[1525] The Chamber drew from the articulated standard in *Sesay* without appreciating the differences between the Wikileaks Motion and motion that was at issue in *Sesay*.[1526]

738. First, *Sesay* involved a finding that the Prosecution was exercising its legitimate prosecutorial authority by seeking assistance from the USG, as can permissibly be done, in certain instances, under the Statute and Rules.[1527] Second, the Defence in *Sesay* contended that the Prosecution violated Article 15 of the Statute,[1528] while the Defence at bar did not contend that an actual breach had occurred, arguing instead that the cables created "serious doubts" regarding the impartiality and independence of Court that required further investigation in order to see determine whether or not a breach occurred.[1529] Third, and significantly, the motion in *Sesay* was denied because:

> in seeking to establish a breach of Article 15(1) of the Statute, there has been a total lack of specificity of instructions received which the Defence alleges amount to a breach by the Prosecution of its statutory obligations under Article 15(1)....
> ...In this regard, the Chamber would like to state here that for the Defence to succeed in this Motion, it is not enough to premise its application either on presumptions, on speculations or on probabilities. If it does, as it seems, seek to establish the subservience of the Prosecutor to a foreign Government or Agency, it must provide concrete proof of those instructions and their contents and not just invite this Chamber, merely on the basis of speculation

[1523] Wikileaks Decision, page 7.
[1524] See, e.g., *RUF* USG Agencies Decision, paras. 21-2, 41, 43.
[1525] *RUF* USG Agencies Decision, para. 52.
[1526] Wikileaks Decision, page 7.
[1527] See, e.g., Article 15(2) of the Statute and Rules 8(C),(D) and (E), and Rule 40 of the Rules.
[1528] *RUF* USG Agencies Decision, para. 2.
[1529] See Wikileaks Motion, paras. 19 and 21.

> and without any legal or factual proof, to draw such a conclusion or even such an inference.[1530]

739. Unlike in *Sesay*, what was at issue in this case were "communications" with, and not "instructions" from, the USG sources. The Defence presented *specific evidence*, in the form of the cables, indicating that inappropriate communications outside official channels took place between Court officials and the USG. The Wikileaks Motion was grounded on objective facts and not on "presumptions, speculations or probabilities." Accordingly, the Chamber erred in law when it focused its evaluation on whether or not the cables disclose that Court officials received *instructions* from the USG. The misplaced inquiry into whether or not it had been demonstrated that instructions were received contributed to the Chamber's erroneous conclusion that the Defence had failed to make the requisite *prima facie* showing.[1531]

740. In applying the standard of the Sesay USG Agencies Decision to the Wikileaks Motion, the Chamber erred when it sought evidence of "instructions" between the Court sources and the USG. It was not necessary for the Defence to prove an actual violation of Articles 13(1) and 15(1) of the Statute to satisfy the requisite standard. The Chamber erred in failing to conclude that the cables sufficiently demonstrate that *there may have been* interference by the USG. Instead, the Chamber sought evidence conclusively indicating that interference *had actually occurred.* This requirement for a conclusive finding of fact is inconsistent with the '*prima facie*' threshold announced by the Chamber.

741. The Chamber also erred in fact whilst ruling on the Wikileaks Motion. While the first cable was admittedly focused on the specific interest of the USG in the outcome of the trial (i.e., the conviction of Mr. Taylor),[1532] the second cable went far beyond that framework.[1533] Indeed, the contents of the second cable were serious enough to impel a Judge of the Chamber to voluntarily withdraw from participating in the deliberations and decision of the Wikileaks Motion. Moreover, the Chamber found the communications at issue in the second cable to be a source of concern. Thus, is it is illogical and incongruous to state, on the one hand, that the

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[1530] *RUF* USG Agencies Decision, paras 50 – 52.
[1531] Wikileaks Decision, page 7 ("...while statements attributed to the sources within the Prosecution, Registry, and Chambers in the Second USG Cable indicate that *information may have been provided* to the USG government by employees within the Court, the statements do not demonstrate that such sources were receiving *instructions* from the USG" (emphasis added).
[1532] See Exh. D-481; Annex A to Wikileaks Motion.
[1533] See Exh. D-482; Wikileaks Motion, Annex B.

communications are a source of concern and "information may have been provided to the USG," by employees within the Court and, on the other hand, attempt to encompass such developments within the framework of legitimate/official communications. The Chamber clearly failed to accord sufficient weight[1534] to the contents of the cables and no reasonable trier of fact, having assessed the totality of the import of the cables, would have failed to conclude that the Defence had met the requisite legal standard for the ordering of disclosure and/ or an investigation.

742. Considering that the resulting errors – including a violation of Rule 26*bis* -- are material and applicable to all findings made and convictions entered,[1535] the requested remedy is reversal of all adverse findings against Charles Taylor in the Judgement, the quashing of all convictions, and vacatur of the Judgement and Sentencing Judgement. Alternatively, and at a minimum, a reduction of fifteen years in the imposed sentence is requested.

E. PART V: ERRORS UNDERMINING THE FAIRNESS OF THE PROCEEDINGS

i. GROUND OF APPEAL 40: GROUND OF APPEAL 40: The Trial Chamber erred in law and in fact in failing to find that payments and incentives received by certain Prosecution witnesses (specifically, TF1-276[1536], TF1-334[1537], TF1-532[1538], TF1-548[1539], TF1-274[1540]) went beyond that which is reasonably required for the management of a witness, were objectively unreasonable or excessive, and/ or amounted to an abuse of the Prosecution's discretion pursuant to Rule 39(ii), thereby necessitating that their respective testimony be treated with caution.[1541]

(i) Introduction

743. The fairness of proceedings is undoubtedly compromised whenever the evidence of witnesses is influenced by ulterior motives, such as financial gain. However, and to ensure that witnesses are not financially penalised as a result of their

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[1534] *CDF* AJ, para. 36.
[1535] Judgement, para. 6994.
[1536] Judgement, paras. 218-9; Defence Final Brief at paras. 1397-8; TT, TF1-276, 24 Jan. 2008, pp. 2154-5.
[1537] Judgement, paras. 287-9; TT, TF1-334, 29 Apr. 2008, pp. 8889-90.
[1538] Judgement, paras. 269-74; TT, TF1-532, 7 Apr. 2008, pp. 6703-11.
[1539] Judgement, para. 2222; TT, TF1-548, 13 Feb. 2008, p. 3805.
[1540] Judgement, paras. 357-8; TT, TF1-274, 11 Dec. 2008, pp. 22247-51.
[1541] Judgement, Sections IV(B)(h) and III(E). See also TT, 10 Mar. 2011; Defence Final Brief at paras. 23-6.

participation in international criminal trials, it is accepted practice that they are entitled to receive assistance necessary for their support and safety, which can include payments "reasonably required for [their] management."[1542] This is not controversial.

744. In the present case, the Court's Witnesses and Victims Section (WVS) provided assistance to both Prosecution and Defence witnesses. Prosecution witnesses also regularly received additional payments and assistance from the Prosecution's Witness Management Unit (WMU).[1543] Indeed, one potential prosecution witness, DCT-097 (a.k.a., TF1-354), received sums totalling $40,441.37[1544] from the Prosecution and the Chamber at one time noted that "The payments do not appear to have been made by the Witness and Victims Service of the Special Court (WVS) and on the face of it, appear to be beyond that which is reasonably required for the management of witnesses or victims."[1545] These WMU payments were governed by Rule 39(ii), which provides that the Prosecutor may:

> take all measures deemed *necessary* for the purpose of the investigation, including the taking of any special measures to provide for the safety, the support and the assistance of potential witnesses and sources.

745. The difficulty in this case is not that Prosecution witnesses received payments from either the Court's WVS or the Prosecution's WMU. The problem arises because payments made by the Prosecution's WMU to certain witnesses were egregiously excessive, and simply unjustifiable. Some payments fell clearly outside the plain meaning of Rule 39(ii) as being *necessary* for the witness' safety, support and the assistance. Others were demonstrably exorbitant and irregular, and were duplicative of payments made by the Court's WVS.

(ii) The Chamber erred in failing to make findings as to whether payments by the Prosecution to witnesses went beyond that which is reasonably required for the management of a witness, were objectively unreasonable or excessive, and/or amounted to an abuse of the Prosecution's discretion pursuant to Rule 39(ii)

[1542] Disclosure Decision relating to DCT-097, para. 21; Disclosure Decision relating to DCT-032, para. 30, citing *Karemera* Disclosure Decision, para. 6.

[1543] See, Defence Contempt Motion , paras. 19-28 and related annexes, K, L and N. See, also,Corrigendum to Defence Contempt Motion. See, also, Defence Motion relating to DCT-097 and Disclosure Decision relating to DCT-097, paras. 17- 20. The witness was, in the first instance, a prospective Prosecution witness known by the pseudonym, TF1-354. See para. 10 of said Decision.

[1544] Contempt Decision, para. 111.

[1545] Disclosure Decision relating to DCT-097, para 22.

746. The Defence raised the issue of excessive payments/ benefits given to witnesses by the Prosecution during the trial[1546] and in the Defence's Final Trial Brief.[1547] The Chamber delayed its adjudication of the issue, noting that "whether there has been any abuse of the Prosecution's discretion under Rule 39(ii)... would be considered at the final stage of deliberations."[1548]

747. The Chamber then stated in the Judgement that:

> [i]n assessing witness credibility, the Trial Chamber has therefore taken into account information about witness payments made both by the WVS and by the Prosecution... in particular, the Trial Chamber has considered, on a case by case basis whether the benefits conferred upon and/or payments made to witnesses went beyond that "which is reasonably required for the management of a witness". In assessing whether such a payment is "reasonably required", the Trial Chamber has also taken into account the cost of living in West Africa and the station in life of the witness receiving the payment.[1549]

748. This was the last word on the subject. Credibility assessments did not address whether payments went beyond what was "reasonably required for the management of a witness," nor did the Chamber draw any conclusions as to whether payments constituted an abuse of the Prosecution's discretion under Rule 39(ii). The Chamber simply noted when payments had been made and then, without exception, concluded that these payments had no impact on credibility, without performing any substantive analysis of the appropriateness of the payments in question.[1550]

749. The Chamber's failure to make findings as to the propriety of these payments was an error. No reasonable trier of fact could have concluded that payments to Prosecution witnesses TF1-276, TF1-334, TF1-532, TF1-548 and/or TF1-274 fell within the scope of the Prosecution's discretion under Rule 39(ii). As a result of these errors, the Chamber failed to treat the evidence of these witnesses with appropriate caution, undermining factual findings which rely on their testimony.

(a) TF1-334

750. In addition to the general costs associated with bringing a witness to testify in The Hague, the SCSL spent an additional 30,000 US Dollars on TF1-334. The large amount of money involved begs the related questions of "why" and "how" was this

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[1546] See, Defence Contempt Motion and Defence Motion to Recall Witnesses.
[1547] See, Defence Final Brief, paras. 23-6, 1396.
[1548] Contempt Decision.
[1549] Judgement, para. 195.
[1550] Judgement, paras. 218 (TF1-276), 257 (TF1-532), 287 (TF1-334), 357 (TF1-274) and 2222 (TF1-548).

necessary, considering that his rent was paid by the Court between 2006 and 2008 – i.e., in the two years leading up to his testimony.[1551]

751. Many of the payments made to this witness are entirely unjustifiable. The witness was imprisoned in 2004 and despite this continued to receive payments for 'transport' to interviews.[1552] In 2006, TF1-334 received payments on 47 separate occasions for transportation, meals, communication and lost wages, despite there being no corresponding interviews or records of meetings with the Prosecution during that period.[1553]

752. In such circumstances, it is difficult to reasonably view these payments as anything other than rewards or encouragement for continued favourable cooperation with the Prosecution. The Chamber held that these payments did not appear to influence TF1-334's testimony.[1554] It made no finding as to whether the payments were objectively excessive or constituted an abuse of the Prosecution's discretion pursuant to Rule 39(ii).

(b) TF1-276

753. TF1-276 was provided funds apparently for travel expenses, far in excess of what he could possibly have needed to pay. In a period as short as three days, the witness received a total amount of USD 2,502 from the Prosecution's WMU; USD 2,180 for travel and hotel expenses and an additional USD 322 for unspecified "other expenses". These payments of USD 2,502 correspond to a single interview with the Prosecution.[1555] TF1-276 also received payments from the Court's WVS, but was not able to estimate the amount.[1556]

754. Again, such significant payments go beyond that which is reasonably necessary for the management of the witness. The Chamber determined that the payments received by TF1-276 did not undermine his credibility,[1557] but made no finding in relation to the Prosecution's discretion, or the abuse thereof, under Rule 39(ii).

(c) TF1-532

[1551] Judgement, para. 195.
[1551] TT, TF1-334, 24 Apr. 2008, p. 8537; 29 Apr. 2008, p. 8896.
[1552] TT, TF1-334, 29 Apr. 2008, pp. 8884-5.
[1553] TT, TF1-334, 29 Apr. 2008, pp. 8889-99.
[1554] Judgement, para. 287.
[1555] TT, TF1-276, 24 Jan. 2008, pp. 2154-5; Defence Final Brief, paras. 1397-8.
[1556] TT, TF1-276, 24 Jan. 2008, p. 2156.
[1557] Judgement, para. 218.

755. Between 30 August 2006 and 5 December 2007, TF1-532 was interviewed by the Prosecution on at least 26 different dates. On each occasion, he received a payment from the WMU, in an amount varying between 15,000 and 120,000 Leones.[1558] Needless to say, all these payments were made by the WMU in addition to payments made by the WVS, which started from 10 March 2007 onwards.[1559]

756. From 10 March 2007, the purpose of the payments made by the Prosecution is hard to understand, as the Court's WVS had covered all the possible expenses the witness could have incurred; including 234,600 Leones for medical expenses for the witness and his family, 660,000 Leones for childcare, 285,000 Leones for transportation (for the witness to visit his family in the provinces, thus private trips, rather than covering his travel expenses when meeting with the investigators), 3,117,000 Leones for rent, maintenance and utility bills and 7,852,000 Leones for food only – a total of 14,337,000 Leones.[1560] Further, 2,223,400 Leones was paid for the witness for unspecified other expenses, not falling into any of the categories mentioned above.[1561]

757. Accordingly, all additional payments provided by the Prosecution's WMU after 10 March 2007 fall outside the constraints of Rule 39(ii). The Chamber stated that TF1-532 "did not testify for monetary gain." It neither considered nor evaluated whether the payments were objectively excessive or unreasonable.[1562]

(d) TF1-548

758. In addition to other smaller payments, TF1-548 regularly received USD 100 for interviews with the Prosecution.[1563] In the witness's own words: "they have given me assistance on many occasions."[1564] From 27 February 2007 onwards, TF1-548 received a total of USD 1,506.18 from the Prosecution's WMU.[1565] He was also receiving payments before that.[1566] It is particularly the discrete and unexplained payments of USD 100 per witness interview which are objectively unreasonable, on grounds that include the doubtful fact that the witness' personal expenditure on every

[1558] TT, TF1-532, 7 Apr. 2008, pp. 6703-10.
[1559] TT, TF1-532, 7 Apr. 2008, p. 6711.
[1560] TT, TF1-532, 7 Apr. 2008, p. 6712-14.
[1561] TT, TF1-532, 7 Apr. 2008, p. 6715-6.
[1562] Judgement, para. 271.
[1563] TT, TF1-548, 13 Feb. 2008, pp. 3773, 3788, 3790, 3791-2, 3793, 3800, 3802.
[1564] TT, TF1-548, 13 Feb. 2008, p. 3799.
[1565] TT, TF1-548, 13 Feb. 2008, p. 3805.
[1566] TT, TF1-548, 13 Feb. 2008, p. 3805.

occasion was a neat USD 100. As such, these payments also constitute an abuse of the Prosecution's discretion.

759. The Chamber concluded that it considered TF1-548 "to be generally credible".[1567] The issue of the payments received by this witness, or the propriety of these payments by the Prosecution, was simply ignored.

(e) TF1-274

760. In addition to extensive medical expenses paid for the witness by the Prosecution (amounting to 893,000 Leones),[1568] TF1-274 received frequent payments in exchange for information, and to allegedly compensate for lost wages, food and transportation during periods when no interviews with the witness were taking place.[1569] Moreover, the witness was provided the sum of 480,000 Leones for a year's rent.[1570] He also received further payments for his assistance to Prosecution investigations.[1571]

761. All these amounts were provided by the Prosecution's WMU; again, in addition to substantial sums of money paid by the Court's WVS. Specifically, TF1-274 received 1,720,000 Leones from the WVS for transportation, 695,000 Leones for medical costs and an additional 2,154,000 and 1,548,850 Leones for an unspecified "Witness Attendance Allowance" and for "miscellaneous" costs.[1572] In total, TF1-274 was provided the sum of 3.9 million Leones by the Prosecution and nearly 6.5 million Leones by the WVS.[1573] These substantial and regular payments are not justifiable as being reasonable required for the management of the witness.

762. The Chamber concluded that "these payments do not appear to be unreasonable."[1574] No reference was made to Rule 39(ii), nor was any basis given for the Chamber's conclusion, nor was it one that a reasonable Trial Chamber could have reached, given the duplicative and unspecified nature of these substantial payments.

(iii) Impact of the Chamber's error

763. Elsewhere in the Judgement, the Chamber acknowledged that in assessing the evidence of an accomplice, it was required to consider whether the accomplice "has

[1567] Judgement, para. 2222.
[1568] TT, TF1-274, 11 Dec. 2008, pp. 22233 (182,000 Leones for medical treatment), 22234 (110,000 Leones), 22236 (425,000 Leones) and 22238 (176,000 Leones).
[1569] TT, TF1-274, 11 Dec. 2008, pp. 22226-7, 22231-7, 22243.
[1570] TT, TF1-274, 11 Dec. 2008, p. 22242.
[1571] TT, TF1-274, 11 Dec. 2008, pp. 22243-5.
[1572] TT, TF1-274, 11 Dec. 2008, pp. 22247-50.
[1573] TT, TF1-274, 11 Dec. 2008, p. 22251.
[1574] Judgement, para. 357.

an ulterior motive to testify as he did."[1575] All of the foregoing witnesses were linkage witnesses who fall within the purview of being considered accomplices to the charged crimes. Significant payments to such witnesses, made simultaneously with (or immediately following) instances of favourable cooperation, reasonably give rise to the risk, or indeed likelihood, that such witnesses would seek to perpetuate continued payments through on-going cooperation. This is particularly the case when such payments cannot be linked to any particular reimbursement, or are for services or expenditures that have already been paid for.

764. It is for this reason, as discussed in Ground 5 above, that the ICTY and ICTR automatically apply caution to the testimony of witnesses who have received significant financial or personal benefits as a result of their association with the Prosecution.[1576] In failing to find that the payments to TF1-276, TF1-334, TF1-532, TF1-548 and/or TF1-274 were objectively unreasonable or excessive, or constituted a breach of the Prosecution's discretion under Rule 39(ii), and thus failing to treat their evidence with the requisite caution, the Trial Chamber erred in fact and law.

(iv) The Chamber's error warrants relief

765. The Chamber erred by failing to make findings regarding the exercise the Prosecution's discretion (or the abuse thereof), pursuant to Rule 39(ii), even in the face of manifestly excessive and duplicative payments in respect of witnesses TF1-276, TF1-334, TF1-532, TF1-548 and/or TF1-274. This error occasioned the further error of failing to treat the evidence of these witnesses with the requisite caution and warrants a reversal of all factual findings and subsequent convictions which rely, in whole or in part, on the evidence of witnesses TF1-276, TF1-334, TF1-532, TF1-548 and/or TF1-274.[1577] In the alternative, the Appeals Chamber is respectfully requested

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[1575] Judgement, para. 183.

[1576] *Martić* TJ, paras. 36-8. *Karemera* Decision on Abuse of Process, para. 7. *Karemera* TJ, paras. 623-4. *Bizimungu* TJ, paras. 830-1. *Zigiranyirazo* TJ, para. 139-40.

[1577] **TF1-276** – Judgement, paras. 2702; 2706 – 2709; 2718; 2744; 2749; 2753; 3092; 3110; 3116; 3129 – 3130; 3373; 3399; 3481 – 3486; 3555; 3563; 3606; 3609; 3723; 3726 – 3727; 3729 – 3730; 3906; 3909; 3914; 3915; 3918; 4065; 4068; 4147; 4152; 4381; 4383; 4394 – 4396; 4452 – 4462; 4469; 4471; 4476 – 4477; 4480 – 4481; 4487 – 4489; 4491; 4493 – 4495; 4618 (iv), (v); 4620; 4716; 4723 – 4724; 4734; 4943 – 4944; 4965; 5152; 5184; 5189; 5191; 5195; 5220; 5224; 5525; 5527; 5702; 5719 – 5720; 5738; 5750; 5752 – 5753; 5937 – 5938; 5940 – 5941; 5947; 5948; 6399; 6402 – 6404; 6406; 6408; 6412; 6414; 6656; 6658 – 6660; 6662; 6663; 6704; 6706; 6715; 6725; 6727; 6768; 6783.
TF1- 334 – Judgement, paras. 2335; 2831; 2835 – 2839; 2841 – 2842; 2863 – 2864; 2933; 2944; 2951; 3091; 3106; 3121; 3123 – 3125; 3129 – 3130; 3370 – 3371; 3373 – 3375; 3382; 3385; 3388; 3394 – 3396; 3398; 3400 – 3401; 3403 – 3404; 3407 – 3409; 3411; 3413 – 3414; 3425 – 3426; 3428; 3435; 3437; 3445; 3450; 3454 – 3455; 3457; 3462; 3464; 3468; 3472; 3475; 3481 – 3486; 3659; 3665 – 3666; 3832; 3834; 3906; 3912 – 3913; 3914; 3979 – 3980; 3982; 4090; 4094; 4365; 4368 – 4373; 4375 – 4378; 4380; 4382; 4385; 4388 – 4393; 4394 – 4396; 4556 – 4560; 4562 – 4565; 4579, 4581 – 4583;

to overturn all factual findings and subsequent convictions which rely in whole or in part on the evidence of these witnesses, in the absence of corroboration by another witness whose evidence is not subject to treatment with caution.[1578]

F. PART VI: MISCELLANEOUS GROUNDS

i. GROUND OF APPEAL 41: The Chamber erred in law and in fact by entering impermissible cumulative convictions for rape and sexual slavery.

766. The Appeals Chamber set out the applicable test for the determination of the permissibility of cumulative convictions in the RUF Appeal Judgement:

> The test applied is therefore two-part: first it is permissible to enter cumulative convictions under different statutory provisions for the same

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4946; 4957; 4965; 5384; 5389; 5395; 5397 – 5399; 5403; 5406 – 5409; 5581 – 5586; 5591 – 5593; 5652 – 5659; 5666 – 5667; 5706 – 5709; 5711; 5713; 5718; 5719 – 5721; 5742; 5752 – 5753; 5825; 5832 – 5834; 6341; 6343 – 6344; 6345; 6656; 6659; 6663; 6749 – 6750; 6759; 6761 – 6762; 6768; 6776; 6792.

TF1-532 – Judgement, paras. 2320 – 2321; 2323 – 2329; 2331 – 2332; 2334; 2337; 2366 – 2367; 2378; 2390 – 2391; 2476 – 2478; 2480; 2481; 2553 – 2559; 2561; 2703; 2706; 2711; 2718; 2744 – 2745; 2747; 2753; 2831; 2838 – 2839; 2841 – 2842; 2844; 2853; 2857; 2863 – 2864; 2927; 2929; 2932; 2951; 3090; 3093; 3100 – 3101; 3107; 3116; 3119 – 3120; 3125; 3129 – 3130; 3369; 3371; 3375 – 3376; 3383; 3388; 3393; 3397; 3399; 3406; 3410 – 3412; 3417; 3437; 3447; 3464; 3466; 3480; 3481 – 3486; 3660; 3662; 3664; 3665 – 3666; 3832; 3834; 3906; 3910; 3914; 4065; 4068; 4147; 4152; 4385; 4394 – 4396; 4467; 4491; 4493 – 4495; 4833; 4842; 4844; 4845; 4946 – 4947; 4960; 4965; 5345; 5384; 5389 – 5390; 5394 – 5395; 5397; 5399; 5402; 5404; 5406 – 5408; 5511; 5513; 5515; 5525; 5527; 5546; 5554; 5559 – 5560; 5587 – 5588; 5591; 5593; 5621 – 5622; 5629 – 5631; 5632; 5702 – 5703; 5719 – 5721; 5820; 5826; 5832 – 5834; 5868 – 5869; 5873; 5874; 5923; 5931; 5948; 6188; 6191 – 6192; 6515; 6518; 6520; 6544; 6546 – 6547; 6656; 6659; 6663; 6761; 6764; 6768; 6772; 6776; 6790; 6792.

TF1-548 – Judgement, paras. 2219; 2222 – 2223; 2225; 2227; 2230; 2251 – 2253; 2259; 2702; 2747 – 2748; 2753; 5940 – 5941; 5948; 6769.

TF1-274 – Judgement, paras. 2367; 2379 – 2380; 2387; 2390 – 2391; 2448; 2451; 2457 – 2458; 2626; 2629; 2765; 2769; 3100; 3110; 3129 – 3130; 3369; 3384; 3394 – 3400; 3405; 3410; 3413; 3416 – 3419; 3437 – 3438; 3440 – 3442; 3445 – 3447; 3449; 3451; 3454; 3456; 3464; 3473; 3478; 3481 – 3486; 3554 – 3556; 3562 – 3563; 3565; 3567 – 3568; 3571 – 3572; 3575; 3577 – 3578; 3587 – 3589; 3591; 3596; 3600; 3606, 3609; 3660 – 3661; 3665 – 3666; 3722; 3724; 3726; 3729 – 3730; 3783 – 3785; 3787 – 3788; 3795 – 3797; 3801; 3803; 3804 – 3805; 3832; 3834; 3840; 3842; 3855; 3862; 3856; 3868 – 3869; 3915; 3918; 3936; 3937; 4239 – 4240; 4247; 4248 (ix, xi); 4612 – 4613; 4800; 4802; 4843; 4943; 4946; 4948; 4965; 5008; 5014; 5021 – 5022; 5028; 5030 – 5031; 5123; 5126; 5128; 5130; 5316; 5325; 5329 – 5330; 5511; 5514 – 5515; 5519; 5527; 5587 – 5588; 5591; 5593; 5702; 5705; 5714 – 5716; 5719 – 5721; 5722(d); 5829; 5835 (xi, xxxv); 6222; 6280; 6519; 6520; 6659; 6663; 6768; 6792.

[1578] **TF1-276** – Judgement, paras. 3909; 3914; 4452 – 4458; 4476; 4480 – 4481; 4488; 4491; 4493 – 4495; 4618 (iv), (v); 4620.

TF1-334 – Judgement, paras. 3394 – 3396; 3398; 3400 – 3401; 3403 – 3404; 3462; 3481 – 3486; 4388 – 4393; 4394 – 4396; 4556 – 4560; 4562 – 4565; 4579, 4581 – 4583; 5581 – 5586; 5591 – 5592; 5593; 5652 – 5659; 5666 – 5667; 5711; 5713; 5718; 6343 – 6344; 6345.

TF1-532 – Judgement, paras. 3125; 3129 – 3130; 3383; 3399; 3447; 3481 – 3486; 3664; 3665 – 3666; 5587 – 5588; 5591; 5593; 6792.

TF1-274 – Judgement, paras. 2626; 2629; 2765; 2769; 3384; 3394 – 3400; 3405; 3410; 3413; 3416 – 3419; 3440 – 3442; 3445 – 3447; 3449; 3456; 3481 – 3486; 3554 – 3556; 3606, 3609; 3801; 3804 – 3805; 3936; 3937; 4612 – 4613; 4800; 4802; 5126; 5128; 5130; 5325; 5329 – 5330; 5587 – 5588; 5591; 5593.

> criminal act if each statutory provision has a 'materially distinct element' that is not contained in the other statutory provision. Second, if this is not the case then the conviction for the criminal act should be upheld under the 'more specific provision.' It is the legal elements of each statutory provision, and not the acts themselves that must be considered when applying this test. The issue of whether the same act can lead to a conviction under multiple statutory provisions is a question of law."[1579]

767. In assessing whether convictions under sexual slavery and rape can be based on the same criminal conduct in this case, the Chamber stated:

> The Trial Chamber considers that it is permissible to enter multiple convictions for the crime charged under Count 5 (sexual slavery) and the crime charged under Count 4 (rape). While both are forms of sexual violence, each offence contains a distinct element not required by the other. The offence of rape requires non-consensual sexual penetration. The definition of rape does not require that the perpetrator exercise ongoing control or ownership over the victim, as is required by the crime of sexual slavery. The Trial Chamber further notes that the requisite sexual act in the definition of sexual slavery can be committed by multiple means, and does not necessarily entail non-consensual sexual penetration. The Trial Chamber therefore finds that rape (Count 4) and sexual slavery (Count 5) contain materially distinct elements, and that it is legally permissible to enter convictions on both counts.[1580]

768. Notably, this is a departure from the precedent set by Trial Chamber I in the RUF Trial Judgement, which stated:

> 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.[1581]

769. The Chamber erred in law when it stated that "each offence contains a distinct element not required by the other."[1582] Not only did it depart from the precedent set by Trial Chamber I, but it also departed from its own jurisprudence in the AFRC Trial Judgement, which states:

[1579] *RUF* AJ, para. 1190. This formulation was based on the test to determine the permissibility of cumulative convictions as set out in the *Delalić* AJ, paras. 412-3.
[1580] Judgement, para. 6989.
[1581] *RUF* TJ, para. 2305.
[1582] Judgement, para. 6989.

> **Sexual slavery, which may encompasses [sic] rape** and/or other types of sexual violence as well as enslavement, entails a similar humiliation and degradation of personal dignity.[1583] (Emphasis added.)

The offence of rape[1584] does not contain any materially distinct element from the offence of sexual slavery[1585] and the former is, therefore, entirely subsumed by the latter. Non-consensual sexual penetration, an element of rape, is contained within the offence of sexual slavery as the offence requires that "[t]he perpetrator caused such person or persons to engage in one or more acts of a sexual nature"[1586] whilst the perpetrator "exercised any or all of the powers attaching to the right of ownership".[1587] Causing a person to engage in sexual acts whilst under the duress of ownership clearly encompasses "non-consensual sexual penetration," as was recognised by the Chamber in the AFRC Trial Judgement.[1588]

770. The Chamber further implicitly acknowledged that non-consensual sexual penetration is encompassed by sexual slavery when it stated, "the requisite sexual act in the definition of sexual slavery can be committed by multiple means, and does not necessarily entail non-consensual sexual penetration."[1589]

771. However, the fact that the "sexual act" can be committed by multiple means does not support the Chamber's finding that the cumulative convictions are permissible.[1590] It is irrelevant that sexual slavery can be committed in multiple ways. The only relevant fact is that the offence of rape has no materially distinct element not

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[1583] *AFRC* TJ, para. 719.

[1584] As laid out in the Judgement at para. 415: "In addition to the *chapeau* requirements of Crimes against Humanity pursuant to Article 2 of the Statute, the following elements of the crime of rape must be proved beyond reasonable doubt:

> i. The non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or by any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator; and
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> ii. The perpetrator must have the intent to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim."

[1585] As laid out in the Judgement at para. 418: "In addition to the *chapeau* requirements of Crimes against Humanity pursuant to Article 2 of the Statute, the following elements of the crime of sexual slavery must be proved beyond reasonable doubt:

> i. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
>
> ii. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature;
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> iii. The perpetrator intended to engage in the act of sexual slavery or acted with the reasonable knowledge that this was likely to occur."

[1586] Judgement, para. 418(ii).

[1587] Judgement, para. 418(i).

[1588] *AFRC* TJ, para. 719.

[1589] Judgement, para. 6989.

[1590] Judgement, para. 6989.

contained in the offence of sexual slavery.[1591] Therefore, the offence of rape is subsumed by the offence of sexual slavery as sexual slavery is the "more specific provision".[1592]

772. Consequently, the Chamber erred by finding that it is legally permissible to enter convictions on both rape and sexual slavery for the same conduct. The finding is impermissible and, therefore, invalid. The Appeals Chamber is requested to reverse this finding[1593] and any convictions for rape based on the same conduct establishing the convictions for sexual slavery.[1594]

G. PART VII: ERRORS IN SENTENCING

i. GROUND OF APPEAL 42: The Trial Chamber erred in fact and in law when it imposed on Charles Taylor a sentence of 50 years imprisonment, which is manifestly unreasonable in the circumstances of this case.

(i) Introduction

773. It is a fundamental principle of international criminal law that persons are convicted and sentenced on the basis of their individual conduct and not on the basis of their official position. The Trial Chamber has considered the conduct of the accused in this case but has impermissibly given much greater and undue adverse weight to the official position of Mr. Taylor as a Head of State of Liberia. As such, in addition to other errors in sentencing, the Trial Chamber has transgressed the applicable principles of sentencing with the result that the sentence against Mr. Taylor is manifestly excessive.

(ii) Preliminary Matter

774. As a preliminary matter, the Defence requests that in so far as any of its Grounds of Appeal on the Merits are upheld, the Appeals Chamber should revise (or

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[1591] See the formulation of the test by the Appeals Chamber in the *RUF* AJ, para. 1190. "The test applied is therefore two-part: first it is permissible to enter cumulative convictions under different statutory provisions for the same criminal act if each statutory provision **has a 'materially distinct element' that is not contained in the other statutory provision**. Second, if this is not the case then the conviction for **the criminal act should be upheld under the 'more specific provision**." (Emphases added).

[1592] See *RUF* AJ, para. 1190.

[1593] Judgement, para. 6989.

[1594] Specifically the rape convictions based on these findings of rape (the corresponding sexual slavery findings are cited also): Judgement, paras. 893-4, 1127; paras. 898 (see also para. 967) and 1116-8; paras. 908 and 1094; paras. 913 and 1108; paras. 914 and 1132; paras. 919 and 1108; paras. 929-30 and 1142-3; paras. 931-2; paras. 961 and 1060; paras. 966 and 1066; paras. 970 and 1071-2; paras. 971-2; paras. 999 and 1169; paras. 1007 and 1179; paras. 1015 and 1187; para. 1016; paras. 1073-5; paras. 1144-6; paras. 1188-91.

quash, as may be appropriate) the sentence to reflect any diminution of Mr. Taylor's criminal liability.

(iii) Applicable Law

775. As a general rule, the Appeals Chamber will not revise a sentence, unless the Appellant demonstrates that the Trial Chamber has committed a "discernible error" in exercising its discretion or has failed to follow the applicable law.[1595]

776. In order to establish that the Trial Chamber committed a discernible error in exercising its discretion, "the Appellant has to demonstrate 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 exercise its discretion properly".[1596]

777. The Trial Chamber has made a number of discernible errors of law and of fact and in the exercise of its discretion according to this standard, resulting in a manifestly excessive sentence.

(a) The Trial Chamber erred in law by finding that serving sentence abroad is not a factor to be taken into account during sentencing and erred in fact and in the exercise of its discretion by failing to consider this factor.

778. The Trial Chamber held that "the fact that a sentence is to be served in a foreign country should not be considered in mitigation".[1597] However the RUF Appeals Chamber Judgment finding that it cited for this proposition does not support this legal finding.[1598] In the RUF case, the Trial Chamber finding on applicable legal

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[1595] *RUF* AJ, para. 1202; *CDF* AJ, para. 466.

[1596] *RUF* AJ, para. 1203; *CDF* AJ, para. 46; *AFRC* AJ, para. 309.

[1597] Sentencing Judgement, para. 35 citing *RUF* AJ, paras. 1246, 1316.

[1598] Sentencing Judgement, paras. 35 and 93, citing *RUF* AJ, paras. 1245-6.
"The Appeals Chamber finds no error in the Trial Chamber's decision not to mitigate the Appellants sentences as a consequence of the fact that they will likely be served outside of Sierra Leone. As discussed in the *Mrđa* case, which is relied upon by Sesay, it is common practice that convicted persons from international criminal tribunals serve their sentences in foreign countries. Sesay does not refer to any case in which serving the sentence in a foreign country has been considered as a mitigating factor for sentencing purposes." This Appeals Decision is in turn based on para. 109 of *Mrđa* SJ, which states: "Nevertheless, the fact remains that Darko *Mrđa* will serve his sentence in a state different from his country of origin and at some distance from his wife and children. This is however a common aspect of the prison sentences imposed by the Tribunal. *The Trial Chamber takes into account this factor in determining the length of imprisonment*, but it does not consider it to be a mitigating circumstance" (emphasis added). Also see para. 126. Therefore this trial decision, properly understood, stands for the proposition that even if serving a sentence in a foreign country is not

principles recognised that "in general terms, sentences served abroad, where family visits are likely to be few, may be harder to bear. Such circumstances would normally amount to a factor in mitigation."[1599] However, the *Sesay* Trial Chamber declined to find this as a matter of mitigation because it did not have conclusive factual information regarding where sentences would be served. The appellate finding in respect of the Trial Chamber's findings of law and of fact in that case was that there was "no error in the ... decision not to mitigate the Appellants sentences as a consequence of the fact that they will likely be served outside of Sierra Leone."[1600] The Trial Chamber in this case has therefore erred in law by finding that serving a sentence abroad is not a factor to be taken into account for sentencing.

779. The Trial Chamber, having made this finding, failed to consider the substantive factual submissions of the defence on this issue.[1601] The Trial Chamber does make reference to the fact that the determination as to where Mr Taylor will serve his sentence will be made by the President of the Special Court.[1602] Notwithstanding the fact that this decision was pending conclusion of the legal process, as a result of the operation of the Rules of the Special Court and the public Enforcement Agreements entered into by the Special Court, sentences can only be served in: Sierra Leone, Rwanda, Finland, Sweden and the United Kingdom.[1603] Accordingly, the only factual finding open to the Trial Chamber on this issue was that

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considered a factor in mitigation it should be taken into account when considering the length of imprisonment.

[1599] "The Trial Chamber found that: '[W]hilst it seems more likely than not at this stage that the convicted persons in this trial will serve sentences outside Sierra Leone, this is a decision that ultimately lies within the discretion of the President of the Court, based upon agreements concluded by the Registrar. The Chamber is unable to speculate on the result of these negotiations and decision-making processes, upon which it has no conclusive information, which lie outside of its control. It therefore notes for purposes of record that it has not given any weight to this factor in the consideration of the sentences of any of the convicted persons in this case. The Chamber, however, wishes to recognize that, in general terms, sentences served abroad, where family visits are likely to be few, may be harder to bear. Such circumstances would normally amount to a factor in mitigation'." *RUF* AJ, para. 1245, quoting *RUF* SJ, paras. 205-6.

[1600] *RUF* AJ, para. 1246.

[1601] The Trial Chamber made reference to these arguments but did not consider them substantively as a result of its legal finding. Sentencing Judgement, para. 68. See, also, Defence Sentencing Brief, paras. 200-11.

[1602] Sentencing Judgement, para. 93.

[1603] Rule 103(A) of Rules; Agreement between the Special Court for Sierra Leone and the Government of the United Kingdom of Great Britain and Northern Ireland on the Enforcement of Sentences of the Special Court for Sierra Leone, 9 July 2007; Agreement between the Special Court for Sierra Leone and the Government of Sweden on the Enforcement of Sentences of the Special Court for Sierra Leone, 15 October 2004; Agreement between the Special Court for Sierra Leone and the Government of Finland on the Enforcement of Sentences of the Special Court for Sierra Leone, 29 June 2009; Amended Agreement between the Special Court for Sierra Leone and the Government of the Republic of Rwanda on the Enforcement of Sentences of the Special Court for Sierra Leone, 16 January 2002.

Mr. Taylor would serve his sentence in a foreign state, other than his native Liberia. Therefore the serious consequences of serving a sentence in a foreign State referred to in the Defence submissions, were relevant to the length of his imprisonment and should have served to reduce it.[1604]

(b) The Trial Chamber erred in law by taking into account the extraterritoriality of Mr. Taylor's conduct based on principles of State Responsibility as an aggravating factor.

780. The Trial Chamber held that "it had taken into account, as an aggravating factor, the extraterritoriality of the criminal acts of the accused." [1605] It made this finding on the basis of case law from the International Court of Justice (ICJ) which has held that acts of intervention by a State in support of an opposition within another State constitute a breach of the customary principle of non-intervention and may constitute a breach of the principle of non-use of force. The Trial Chamber acknowledged that these provisions of customary law govern conduct between States but nonetheless, and without any further reasoning, held that it "considers the violation of this principle by a Head of State individually engaging in criminal conduct can be taken into account as an aggravating factor."

781. As explicitly acknowledged by the Trial Chamber, the principles it relied upon are customary international law principles of state responsibility. Customary international law principles and rules may be used "where applicable" before the Tribunal.[1606] Custom is used to determine the substantive crimes punishable before this court.[1607] The principles of state responsibility do not have any legal application to sentencing in criminal trials. There is no basis in the ICJ case law, customary international law or international criminal law to apply these principles as a basis for asserting that the extraterritoriality of conduct by a Head of State is an aggravating factor in sentencing him as an individual in a criminal trial.

[1604] Defence Sentencing Brief, paras. 200-11.
[1605] Sentencing Judgement, paras. 27, 98.
[1606] Rule 72*bis* (ii) of the Rules.
[1607] The Secretary-General in his report on the creation of this Court has reflected that "[i]n recognition of the principle of legality, in particular *nullum crimen sine lege*, and the prohibition on retroactive criminal legislation, the international crimes enumerated, are crimes considered to have had the character of customary international law at the time of the alleged commission of the crime. U.N. Secretary General, Report of the Secretary General on the Establishment of a Special Court for Sierra Leone, S/2000/915, 4 October 2000, para. 12.

782. The Defendant may have held the position of the Head of State of Liberia but he was convicted on the basis of individual criminal responsibility for his conduct.[1608] It was not alleged that Liberia was responsible under customary principles of State responsibility for the crimes alleged against Mr. Taylor. This would have been beyond the jurisdiction of the Special Court. Therefore, the territoriality or extra-territoriality of the criminal conduct of an individual is not an aggravating factor relevant in sentencing.

783. This has been implicitly confirmed by a recent decision of the ICTY Trial Chamber in the Perišić case.[1609] The accused, who was Chief of the General Staff of the Yugoslav Army, was convicted for supplying ammunition, weaponry, fuel, technical expertise, repair services and personnel training and payments to the Bosnian Serb Army, which operated across a state border in Bosnia.[1610] In that case, there was no reference to extraterritoriality as a factor in aggravation of sentence; rather, the Trial Chamber considered the actual role and conduct of the defendant in aiding crimes and not whether that conduct traversed an international border, for the purposes of sentencing.[1611]

784. In sum, it was legally impermissible and beyond the jurisdiction of the Special Court to utilise these principles of state responsibility and consequent factor of extraterritoriality, against Mr. Taylor. As such, the sentence against Mr. Taylor should be reduced to reflect this discernible error of law and the consequent error in exercise of discretion by the Trial Chamber when using this as a factor in aggravation in Mr. Taylor's sentence.

(c) The Trial Chamber made a discernible error in the exercise of its discretion by giving weight to a breach of trust as an aggravating factor.

785. The Trial Chamber held that "a breach of trust or authority, where the accused is in a position which carries with it a duty to protect or defend the victims, such as in the case of a governmental official, police chief or commander, can be an aggravating factor."[1612] The Trial Chamber went on to find that as the President and Commander-in-Chief of the Liberian Army, Mr. Taylor held a position of public trust with inherent

[1608] Judgement, para. 14.
[1609] *Perišić* TJ.
[1610] *Perišić* TJ, paras. 1622-3.
[1611] *Perišić* TJ, paras. 1815-26.
[1612] Sentencing Judgement, para. 29.

authority which he abused. The Trial Chamber utilised Mr. Taylor's breach of trust as an aggravating factor on the basis of his role as a foreign head of state in international peace negotiations.[1613] However, this factor has been considered as an aggravating factor when the person in authority has a direct duty or obligation to protect or defend civilians under his protection, such as governmental officials, police chiefs or army commanders, and he breaches this obligation.[1614] Mr. Taylor undoubtedly held a position of public trust and authority with respect to the population of Liberia. However, he did not hold such a position of public trust and authority in relation to the victims of crimes committed in Sierra Leone, nor has this been established beyond reasonable doubt.[1615] Accordingly, the Trial Chamber erred when it gave weight to abuse of trust as an aggravating factor.

(d) The Trial Chamber erred in law and made a discernible error in the exercise of its discretion by failing to take into account the sentencing practices of the Special Court, ICTR, and ICTY and by failing to apply the principle that aiding and abetting as a mode of liability generally warrants a lesser sentence than that imposed for more direct forms of participation.

786. The Trial Chamber stated that it should take into account the sentencing practices of the SCSL as well as those of the ICTY and the ICTR. Further it recognised the principle that aiding and abetting as a mode of liability generally warrants a lesser sentence than that imposed for more direct forms of participation.[1616] The Trial Chamber also stated that

> while generally *the application of the principle would indicate a sentence in this case that is lower than the sentences that have been imposed on the principal perpetrators* who have been tried and convicted by this Court, the *Trial Chamber considers that the specific status of Mr. Taylor as Head of State puts him in a different category of offenders for the purposes of sentencing.....Mr. Taylor was functioning in his own country at the highest*

[1613] Sentencing Judgement, para. 97.
[1614] The Trial Chamber referred to several authorities where breach of trust has been utilised as an aggravating factor. Sentencing Judgement, para. 29, fn. 58. In each of these cases, the accused had a legal obligation to protect or defend civilians under their authority. Jean Kambanda was Prime Minister of Rwanda and he and his government were responsible for maintenance of peace and security in Rwanda. He abused his authority and the trust of the civilian population by personally participating in the genocide of the Rwandan population: *Kambanda* SJ, para. 44. Athanase Seromba was a priest who betrayed the trust of parishioners who were seeking refuge in his church, by participating in its destruction and their killing; *Seromba*AJ, para. 230. Emmanuel *Ndindabahizi* was a Minister in the Interim Rwandan Government who participated in the killings of Rwandans. *Ndindabahizi* AJ, para. 136.
[1615] Sentencing Judgement, para. 24.
[1616] Sentencing Judgement, paras. 21, 36, 100.

> *level of leadership, which puts him in a class of his own* when compared to the principal perpetrators who have been convicted by this Court.[1617]

787. The Trial Chamber thus declined to follow the applicable law, not on the basis of the conduct of the accused, but on the basis of his official status as Head of State. This approach contravenes one of the fundamental pillars of international criminal law that an accused individual should be convicted and sentenced on the basis of their conduct and not on the basis of their official status.[1618] As such, the Trial Chamber erred in making a legal finding that an aider and abettor will not receive a lower sentence than a principle perpetrator, if that aider and abettor is a Head of State. The Trial Chamber should have followed the applicable law and found a lower sentence than it did. Had the Chamber followed Special Court practice vis-á-vis accused convicted of aiding and abetting, a significantly lesser sentence would have been imposed.

(1) Special Court Sentencing practice for Aiding and Abetting

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[1617] Sentencing Judgement, paras. 100-1 (Emphasis added).

[1618] At the ICTY, the *Delalić* TJ stated, at para. 1225, "[b]y far the most important consideration, which may be regarded as the litmus test for the appropriate sentence is the gravity of the offence." Shortly thereafter, the *Kupreškić* TJ stated it as follows, at para. 852: "[t]he sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crimes." This statement in the *Kupreškić* TJ has been endorsed by the ICTY Appeals Chamber in the *Aleksovski* AJ, at para. 182; the *Furundžija* AJ, at para. 249; the *Delalić* AJ, at para 731; and the *Kupreškić* AJ, at para. 442. The ICTY Appeals Chamber recalled the principle in the *Vasiljević* AJ, at para. 182, by stating, "[t]he Appeals Chamber recalls that the sentence to be imposed must reflect the inherent gravity of the criminal conduct of an accused. The *Blaškić* AJ further refined it at para. 683, drawing on the wording of the *Delalić* TJ, by stating, "[t]he gravity of the offence is the primary consideration in imposing a sentence and is the 'litmus test' in the determination of an appropriate sentence. The Appeals Chamber has ruled that sentences to be imposed must reflect the inherent gravity or totality of the criminal conduct of the accused, the determination of which requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime." In discussing how to approach the gravity of the offence, the *Galić* AJ, at para. 409, stated: "[w]hen addressing the gravity of the offence, a Trial Chamber must take into account the inherent gravity of the crime and criminal conduct of the accused, the determination of which requires a consideration of the particular circumstances of the case and the crimes for which the accused was convicted, as well as the form and degree of participation of the accused in those crimes." At the Special Court, this principle has been followed and applied by this Appeals Chamber, at para. 546 of the *CDF* AJ, which stated: "the Trial Chamber ultimately must impose a sentence that reflects the totality of the convicted person's culpable conduct. The totality principle is, in fact, recognized by all Parties and firmly supported in the case law of the international criminal tribunals. The totality principle requires that a sentence must reflect the inherent gravity of the totality of the criminal conduct of the accused, giving due consideration to the particular circumstances of the case and to the form and degree of the participation of the accused." In stating that, this Appeals Chamber cited authorities in the form of the *Furundžija* AJ at para. 249, *Blaškić* AJ at para. 683, *Aleksovski* AJ at para. 182, and *Delalić* AJ at para. 731, as stated above. The principle was reiterated by this Appeals Chamber in the *RUF* Appeal Judgement, at para. 1229, which stated: "[a] Trial Chamber must ultimately impose a sentence that reflects the totality of the convicted person's culpable conduct. This principle, the totality principle, requires that a sentence must reflect the inherent gravity of the totality of the criminal conduct of the accused, giving due consideration to the particular circumstances of the case and to the form and degree of the participation of the accused in the crimes."

788. In the AFRC case, the accused Brima was convicted pursuant to Article 6(1) of the Statute of aiding and abetting the murders of civilians in Fourah Bay, Freetown and Western Area.[1619] He was also found liable under other modes of liability under Article 6(1) (committing, planning, and ordering)[1620] and as a superior pursuant to Article 6(3).[1621] Furthermore, Brima was found to be a primary perpetrator of murders.[1622]

789. The 2nd AFRC accused, Kamara, was convicted pursuant to Article 6(1) of the Statute of aiding and abetting the murder/ extermination of civilians in Fourah Bay, Freetown and Western Area, and aiding and abetting the mutilation of civilians in Freetown and Western Area.[1623] He was also found liable under other modes under Article 6(1) (planning and ordering)[1624] and as a superior pursuant to Article 6(3) for crimes committed by his subordinates.[1625] Kamara was found to be a "violent and active participant in the crimes" involving the killing of civilians by his subordinates on his orders.[1626]

790. The 3rd AFRC accused, Kanu, was convicted pursuant to Article 6(1) of aiding and abetting the murder/ extermination of civilians at Fourah Bay in Freetown, and the Western Area.[1627] He was also found liable under other modes of liability within Article 6(1) (committing, planning, instigating, and ordering)[1628] and as a superior pursuant to Article 6(3) for crimes committed by his subordinates.[1629] Kanu was found to be a direct participant in unlawful killings, mutilations, the recruitment and use of child soldiers, enslavement and outrages upon personal dignity.[1630]

791. Brima, Kamara, and Kanu received global sentences of 50, 45, and 50 years imprisonment, respectively.[1631] Those sentences were upheld on appeal.[1632]

[1619] *AFRC* SJ, para. 41; *AFRC* TJ, paras. 1785-6.
[1620] *AFRC* SJ, para. 41; *AFRC* TJ, paras. 1709, 1711, 1716, 1719, 1755, 1760, 1764, 1769, 1770, 1775, 1776, 1778, 1779, 1780, 1782, 1783, 1827, 1834, 1835, 1836, 1837.
[1621] *AFRC* SJ, para. 42; *AFRC* TJ, paras. 1744, 1810.
[1622] *AFRC* SJ, para. 43; *AFRC* TJ, paras. 1709, 1755, 1760, 1764.
[1623] *AFRC* SJ, para. 70; *AFRC* TJ, paras. 1939-41.
[1624] *AFRC* SJ, para. 70; *AFRC* TJ, paras. 1915-16.
[1625] *AFRC* SJ, para. 71; *AFRC* TJ, paras. 1893, 1926-8, 1950, 1969, 1976. On appeal, the Appeals Chamber revised the "Trial Chamber's Disposition by substituting Article 6(3) for Article 6(1) in respect of Counts 9, 12 and 13." *AFRC* AJ, paras. 239-40.
[1626] *AFRC* SJ, para. 86.
[1627] *AFRC* SJ, para. 94.
[1628] *AFRC* SJ, para. 94; *AFRC* TJ, paras, 2052, 2056-61, 2063, 2092-8.
[1629] *AFRC* SJ, para. 95; *AFRC* TJ, paras. 2044, 2080.
[1630] *AFRC* SJ, para. 99.
[1631] *AFRC* SJ, p. 36.
[1632] *AFRC* AJ, pp. 105-6.

792. In the RUF case, Augustine Gbao was the only accused found guilty of aiding and abetting, pursuant to Article 6(1) of the Statute. For the act of aiding and abetting attacks on peacekeepers (Count 15), Gbao received a sentence of 25 years imprisonment.[1633] Besides aiding and abetting, Gbao (like the other RUF Accused – Sesay and Kallon) was convicted of more serious modes of liability under Article 6(1), including "committing" crimes by way of participation in a joint criminal enterprise.[1634] Unlike Sesay and Kallon, however, Gbao was not found guilty of any crime by virtue of having been a superior, pursuant to Article 6(3) of the Statute.[1635]

726. Sentences imposed against the RUF Accused for individual crimes were made to run concurrently,[1636] with 52 years as the highest sentence imposed against Sesay, 40 years in respect of Kallon, and 25 years against Gbao.[1637] Despite revisions to the imposed sentences for certain counts, the Appeals Chamber upheld global sentences that corresponded to the highest sentence imposed against each accused by the Trial Chamber.[1638]

727. In the CDF case, both accused were found liable for aiding and abetting Counts 2, 4 and 7, pursuant to Article 6(1) of the Statute, and responsible as a superior under Article 6(3) for crimes committed by subordinates (Counts 2, 4, 5 and 7).[1639] In sentencing both accused, the Trial Chamber took into account the mode of liability under which the accused were convicted and considered, in particular, "whether the Accused was held liable as an indirect or secondary perpetrator."[1640] With respect to the Accused Moinina Fofana, the Chamber observed that he was found liable for aiding and abetting and was not present at the scenes of the crimes, and his degree of participation amounted to only encouragement.[1641] The Chamber also noted that "[t]he jurisprudence of the ICTY and ICTR indicates that aiding and abetting as a mode of liability generally warrants a lesser sentence than that to be imposed for more

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[1633] *RUF* SJ, p. 98.
[1634] *RUF* SJ, paras. 3-10; *RUF* TJ, pp. 677-87. The RUF Trial Chamber determined that "committing" under Article 6(1) includes "committing through participation in a joint criminal enterprise." See *RUF* TJ, para. 244.
[1635] *RUF* TJ, pp. 677-87; *RUF* SJ, paras. 3-10.
[1636] *RUF* SJ, pp. 93-8.
[1637] *RUF* SJ, pp. 93-8. Gbao also received a sentence of 25 years imprisonment for "committing" Acts of Terrorism (Count 1) and Enslavement (Count 13) by participation in a joint criminal enterprise. *RUF* SJ, pp. 96 and 98.
[1638] *RUF* AJ, p. 480.
[1639] *CDF* SJ, paras. 45 and 52.
[1640] *CDF* SJ, para. 34.
[1641] *CDF* SJ, para. 50.

direct forms of participation."[1642] Concurrent sentences of three, four and six years imprisonment were consequently imposed against Fofana.[1643]

728. With respect to the Accused Kondewa, the Chamber noted that while he was found liable as an aider and abettor and as a superior, "he was also liable for the direct perpetration of some acts, including the shooting of a town commander in Talia/Base Zero," and for the enlistment of child soldiers.[1644] Concurrent sentences of five, six, seven, and eight years imprisonment were consequently imposed against Kondewa.[1645]The Appeals Chamber revised the sentences of both CDF accused upwards, sentencing Fofana to concurrent sentences of 15 and 5 years for the various counts on which he was convicted and Kondewa to concurrent sentences of 20 and 7 years for the various counts on which he was convicted.[1646]

729. This review of SCSL sentencing practices with respect to aiding and abetting makes clear that as a lesser mode of liability, it carries along with it significantly lesser sentences than more serious forms of participation, especially where the accused (such as Fofana) is not a direct perpetrator and was not present at the scene of the crimes. The fact that Gbao received a significantly lesser sentence (25 years) than Sesay (52 years) and Kallon (40 years) is primarily-related to his conviction for aiding and abetting and the absence of any convictions as a superior. It is also noteworthy that Gbao's age of 60 years was found to be a factor in mitigation by the Trial Chamber.[1647]

730. In this case, there is no dispute that Charles Taylor never set foot in Sierra Leone during the entire indictment period.[1648] Neither was he liable for any crimes on the basis of participation in a joint criminal enterprise under Article 6(1) (as was Gbao) or superior responsibility, pursuant to Article 6(3) (as were Fofana and Kondewa). Unlike Gbao and Kondewa, Mr. Taylor was an indirect or secondary

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[1642] *CDF* SJ, para. 50.
[1643] *CDF* SJ, pp. 33-4.
[1644] *CDF* SJ, para. 57.
[1645] *CDF* SJ, pp. 33-4..
[1646] *CDF* AJ, pp. 188-91. The sentences were revised upwards because the Appeals Chamber determined that inappropriate considerations were taken into account by the Trial Chamber -- namely, consideration of "just cause" and "civic duty" – in the exercise of its discretion, leading to the erroneous conclusion that the sentences of the accused deserved to be reduced. *CDF* AJ, paras. 559-60. In revising the sentences, the Appeals Chamber, however, took "note of the opinion of the Majority of the Trial Chamber that Fofana and Kondewa have been found responsible mainly as aiders and abettors and the gravity of their respective responsibility as superiors in respect of some of the crimes." *CDF* AJ, para. 566.
[1647] *RUF* SJ, para. 278.
[1648] Sentencing Judgement, para. 98.

participant in the crimes for which he was convicted. Bearing in mind these factors and the sentencing practice of the SCSL for aiding and abetting, the 50 year sentence that imposed on Mr. Taylor is manifestly excessive in relation to the range of sentences imposed at the SCSL for a person convicted of aiding and abetting. In the light of Mr. Taylor's age, he has effectively been sentenced to life imprisonment. This is manifestly unjust and should give rise to an inference that the Trial Chamber failed to exercise its discretion properly.

731. The sentence against Mr. Taylor should be reduced to reflect this discernable error of law and the consequent error in exercise of discretion by the Trial Chamber by failing to take into account relevant sentencing practices and by failing to apply the principle that aiding and abetting as a mode of liability warrants a lesser sentence than that imposed for more direct forms of participation.

(e) The Trial Chamber erred in law and made a discernible error in exercising its discretion by considering Mr. Taylor's official position as a Head of State on multiple occasions under several factors in aggravation and as a factor precluding reduction of sentence, thereby impermissibly multiplying the significance of this factor.

The leadership role of an accused is one relevant aggravating factor in sentencing.[1649] However, this factor cannot be used repeatedly against the accused to inflate the factors leading towards a higher sentence. Double-counting the accused's role in the crimes is impermissible because it allows the same factor to detrimentally influence the accused's sentence more than once.[1650] It is well-settled in the jurisprudence of the SCSL that "double-counting" is impermissible.[1651] Indeed, this Chamber has held that "A Trial Chamber must ensure that they do not allow the same factor to detrimentally influence the Appellant's sentence twice."[1652]

733. In this case, the Trial Chamber based at least 5 (five) significantly weighted adverse findings against Mr. Taylor in sentencing, on his official role as a Head of State of Liberia. First, it relied upon Mr. Taylor's role as President of Liberia and as a member of the ECOWAS Committee of Five as a leadership role constituting an

[1649] Sentencing Judgement, para. 25.
[1650] *Nikolić* AJ, para. 61.
[1651] *RUF* SJ, para. 23. *AFRC* AJ, para. 317. *RUF* AJ, paras. 1235-7.
[1652] *RUF* AJ, para. 1235. Having found that the RUF Trial Chamber "impermissibly double-counted the specific intent of acts of terrorism and collective punishments as increasing the gravity of the underlying offences, the Appeals Chamber" revised the relevant sentences, as appropriate. *RUF* AJ, para. 1237.

aggravating factor.[1653] Second, it relied upon Mr. Taylor's role as President of Liberia and as a member of the ECOWAS Committee of Five and Committee of Six, as the basis for finding the aggravating factor of abuse of trust.[1654] Third, it found that Mr. Taylor's role as the President of Liberia was the factual basis for finding that the extraterritoriality of his criminal acts were an aggravating factor.[1655] Fourth, it found that the special status of Mr. Taylor as a Head of State precluded the Trial Chamber from applying the established legal principle that an aider and abettor generally warrants a lesser sentence than a direct perpetrator.[1656] Fifth, the Trial Chamber held that Mr. Taylor's "unique status as Head of State *and* other factors above, should be reflected in his sentence."[1657] Hence, the Trial Chamber considered Mr. Taylor's role as Head of State for the fifth time, separate from the preceding aggravating factors, noted herein, which were all in turn based on this same position Mr. Taylor held as a Head of State. This constitutes both an error of law and a discernible error in the exercise of discretion in relation to the aggravating factor which was given most weight by the Trial Chamber. These errors had a significant impact on Mr. Taylor's sentence.[1658]

734. The sentence against Mr. Taylor should be reduced to reflect this discernable error of law and the consequent error in exercise of discretion by the Trial Chamber when using repeatedly considering Mr. Taylor's official position as Head of State as a factor in aggravation in Mr. Taylor's sentence.

735. Based on the submissions relating to this Ground 42, the Trial Chamber committed discernable errors of law and of fact, and in the exercise of its discretion, and, as a consequence, imposed a sentence on Mr. Taylor which is manifestly unreasonable and excessive in the particular circumstances of this case. No reasonable trier of law and fact, having assessed the totality of the evidence on the record, could have imposed such a harsh punishment. The sentence of 50 years' imprisonment must be quashed and replaced by a new and significantly lower sentence.

ii. GROUND OF APPEAL 43: The Trial Chamber committed discernible error when it noted Sierra Leonean law on sentencing practice when Mr

[1653] Sentencing Judgement, para. 96.
[1654] Sentencing Judgement, para. 97.
[1655] Sentencing Judgement, para. 98.
[1656] Sentencing Judgement, para. 100.
[1657] Sentencing Judgement, para. 103.
[1658] Cf., *AFRC* AJ, para. 320.

Taylor has not been convicted of any offences under Article 5 of the Statute.

736. Article 19(1) of the Statute of the Special Court for Sierra Leone states:

> 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.[1659]

737. In the Sentencing Judgement, the Trial Chamber stated:

> Article 19(1) of the Statute directs the Trial Chamber to consider, where appropriate, the sentencing practices of Sierra Leonean national courts. This does not oblige the Trial Chamber to conform to that practice, but rather to take into account that practice as and when appropriate. In the present case, the Trial Chamber notes that Mr. Taylor was not indicted for, nor convicted of, offences under Article 5 of the Statute in the Sierra Leonean law. Nevertheless, 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".[1660]

738. The Trial Chamber committed a discernable error when it noted Sierra Leonean law on sentencing practice when Mr. Taylor has not been convicted of any offences under Article 5 of the Statute. The jurisprudence of both the Trial Chambers and the Appeals Chamber in previous cases before the SCSL has consistently found that a Trial Chamber is to have recourse to the national courts in Sierra Leone only for convictions under Sierra Leone law contained in Article 5 of the Statute.

739. In the *AFRC* Sentencing Judgement, Trial Chamber II stated:

> 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 that practice as and when appropriate. 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.[1661]

740. In the *CDF* Sentencing Judgement, Trial Chamber I stated:

> 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,

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[1659] Article 19(1), Statute.
[1660] Sentencing Judgement, para. 37.
[1661] *AFRC* SJ, para. 32, citing, also, *Serushago* AJ, para. 30; *Semanza* AJ, para. 377.

> would attract the death penalty or life imprisonment under Sierra Leonean law. 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.
> 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.[1662]

This finding was challenged on appeal by the Prosecution, who argued that the Trial Chamber should have taken into account, *inter alia*, the sentencing law and practice of Sierra Leone even though Fofana and Kondewa were not convicted pursuant to Article 5 of the Statute.

741. In the *CDF* Appeal Judgment, the Appeals Chamber rejected the submissions put forward by the Prosecution and ruled on the proper construction and application of Sierra Leonean law in relation to sentencing pursuant to Article 19(1) of the Statute:

> 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." Similarly, at the time the ICTR Statute took effect, Rwanda had domestic legislation criminalizing war crimes, crimes against humanity and genocide. 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.
> 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.
> 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.[1663]

The Appeals Chamber therefore found that the a Trial Chamber "is to have recourse to the national courts in Sierra Leone for convictions under Sierra Leone law contained in Article 5 of the Statute".

[1662] *CDF* SJ, paras. 42-3.
[1663] *CDF* AJ, paras. 475-7.

742. The Trial Chamber misdirected itself and committed a discernable error at paragraph 37 of the Sentencing Judgement when it noted Sierra Leonean law with regard to its consideration of the appropriate relative penalties when Mr. Taylor was not indicted for, nor convicted of, offences under Article 5 of the Statute in the Sierra Leonean law. The Chamber should not have considered this factor in determining sentence. It was an error of law to consider the practice of the national courts of Sierra Leone in the circumstances of this case.

743. The Appeals Chamber is requested to correct this error of law by quashing the sentence imposed by the Trial Chamber and to impose a new and appropriate sentence in conformity with the law of the SCSL.

iii. **GROUND OF APPEAL 44: The Trial Chamber committed a discernible error when it considered *proprio motu*, aggravating factors that the Prosecution did not plead and, consequently to which, the Defence has not had the opportunity to respond.**

744. In this case, the Trial Chamber considered the following to be aggravating factors: (a) Extraterritoriality;[1664] (b) Mr Taylor's leadership role;[1665] (c) Mr Taylor's special status, and his responsibility at the highest level;[1666] (d) Exploitation of the conflict for financial gain.[1667] Only one of these factors, Mr Taylor's leadership role, was argued by the Prosecution in its sentencing brief.[1668] The Defence had no notice of the other three factors, including the aggravating factor to which the Trial Chamber ostensibly attached the greatest weight - Mr Taylor's unique and special status as a Head of State.[1669] The Trial Chamber erred in law and fact by considering these factors *proprio motu* and placing substantial weight on them as factors in aggravation of sentence without according the Defence its basic fair trial right to be heard. These errors have been accorded significant weight in sentencing. As a result, the imposed sentence against Mr. Taylor should be significantly reduced (by at least two-thirds), in light of the impermissible emphasis the Trial Chamber placed on these factors.

745. The Rules of the Special Court enshrine the right of the parties to be heard on sentencing. Rule 100(A) provides that after conviction or plea "the Prosecutor shall submit any relevant information that may assist the Trial Chamber in determining an

[1664] Sentencing Judgement, paras. 27, 98.
[1665] Sentencing Judgement, paras. 25, 29, 96, 101 and 102.
[1666] Sentencing Judgement, paras. 97 and 100-3.
[1667] Sentencing Judgement, paras. 23 and 99.
[1668] Prosecution Sentencing Brief, paras. 83-9.
[1669] Sentencing Judgement, paras. 97 and 100-3.

appropriate sentence" and then that the "Defendant shall thereafter... submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence". The Trial Chamber then has the discretion to hear submissions of the parties at a sentencing hearing, pursuant to Rule 100(B). This discretion is retained in respect of relevant sentencing information provided and briefed by both parties, and cannot be read as being tantamount to a discretion to consider factors *proprio motu* without affording the parties the opportunity to be heard. Such an understanding follows and emanates from the rules and established practice of international criminal tribunals to give the parties the opportunity to present submissions in the form of evidence and law which they consider relevant to the Trial Chamber's determination of sentence.[1670]

746. The sequence of these submissions as set out in the Rules is significant. The Prosecution must first present its evidence and law. The Defence, having had notice of the Prosecution's arguments then makes its submissions of evidence and law. This practice thereby provides the Defence with a fair opportunity to answer the submissions of the Prosecution. This process is consistent with the principle of *audi alteram partem*.[1671] This is a principle of natural justice which means that a decision cannot stand unless the person directly affected by it was given a fair opportunity, both to state his case and to know and answer the other side's case.

747. The right to be heard extends beyond simply answering the other parties in litigation but also encompasses the fundamental fair trial right[1672] of parties to address proposed findings of law and fact raised *proprio motu* by a Chamber before they are made. In the *Jelisić* case, the Appeals Chamber of the ICTY held that:

> the fact that *a Trial Chamber has a right to decide proprio motu* entitles it to make a decision whether or not invited to do so by a party; *but the fact that it can do so does not relieve it of the normal duty of a judicial body first to hear a party whose rights can be affected by the decision to be made.* Failure to hear a party against whom the Trial Chamber is provisionally inclined is not consistent with the requirement to hold a fair trial. *The Rules* must be read on this basis, that is to say, that *they include a right of the parties to be heard in accordance with the judicial character of the Trial Chamber.* The

[1670] Rule 100(A), ICTY RPE; Rule 100(A), ICTR RPE (for guilty pleas). The practice is evident from the procedural histories and summaries of arguments in the sentencing judgments from the ICTY, ICTR and SCSL.

[1671] "To hear the other side". See *R v Chief Constable of North Wales Police, ex p Evans* [1982] 1 WLR 1155 (HL). See *Jelisić* AJ, para. 26.

[1672] The right to a 'fair and public hearing' is reaffirmed in Article 17(2) of the Statute, which mirrors Article 14(1) of the ICCPR. Rule 26*bis* of the Rules, affirms the Court's duty to "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".

> availability of this right to the prosecution and its exercise of the right can be of importance to the making of a correct decision by the Trial Chamber: the latter could benefit in substantial ways from the analysis of the evidence made by the prosecution and from its argument on the applicable law.[1673]

A similar finding has been made by the ICC, expressly in relation to sentencing. The Trial Chamber in the *Lubanga* case held that under Article 76(1) of the ICC Statute, the Chamber should, when considering the appropriate sentence, take into account the evidence presented and submissions made during the trial that are relevant to sentencing. Further and pursuant to Article 76(2) of the ICC Statute, the Trial Chamber may on its own motion, and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence. On this basis, the evidence admitted at the sentencing stage can exceed the facts and circumstances set out in the Confirmation Decision, "*provided the defence has had a reasonable opportunity to address them.*"[1674] The *Lubanga* Chamber found that its extensive sentencing process had ensured that the defence "had adequate notice of the matters that may be taken into consideration by the Chamber" at the sentencing stage.[1675]

749. Indeed, after the Defence had been given sufficient notice about the relevant sentencing matters, the Defence in *Lubanga* sought and was permitted to introduce additional witness testimony and documents for the purposes of additional arguments on sentence.[1676] The principle that parties should have the opportunity to present evidence on sentencing has also been confirmed at the ICTY.[1677]

750. If a factor in aggravation has not been raised during the sentencing phase of proceedings, and therefore the Defence has not had an opportunity to be heard on it, that factor should not be considered by the Trial Chamber in reaching sentence. In the

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[1673] Emphasis Added. *Jelisić* AJ, para. 27.
[1674] Emphasis *Lubanga Dyilo* Decision on Sentence, para. 29.
[1675] "As set out above, during the preparation stage of the trial, the Chamber indicated that it would hold a separate sentencing hearing in the event of a conviction and, for reasons of efficiency and economy, it ordered that evidence relating to sentence could be admitted during the trial. The defence has had a sufficient opportunity to challenge the evidence and the allegations relevant to the sentence as advanced during the trial. In addition, the Chamber has provided the defence an opportunity to respond to all the submissions and evidence that have been relied on for the purposes of sentence following Mr Lubanga's conviction. The Chamber requested written submissions on: (i) the procedure to be adopted for sentencing and the principles to be applied by the Chamber; and (ii) the relevant evidence presented during trial, the aggravating and mitigating factors, and the sentence to be imposed on Mr Lubanga. This has ensured that he has had adequate notice of the matters that may be taken into consideration by the Chamber at this stage of the proceedings." *Lubanga Dyilo* Decision on Sentence, para. 30.
[1676] *Lubanga Dyilo* Decision on Sentence, paras. 10-1.
[1677] *Delalić* Scheduling Order, p. 2; *Delalić* AJ, para. 83.

case of *Prosecutor v Kvočka et al.*, the Trial Chamber rejected the Defendant's submission that intoxication should be a mitigating factor and instead found that it was an aggravating factor. However, and because the issue was not raised by the Prosecution during sentencing, the Trial Chamber declined to treat it as an aggravating factor in determining sentence.[1678]

751. For all of the foregoing reasons, the Trial Chamber erred in law and fact by considering and placing substantial weight on the said factors as factors in aggravation of sentence without according the defence its basic right to be heard. The imposed sentence against Mr. Taylor should consequently be reduced by at least two-thirds, in light of the impermissible emphasis the Trial Chamber placed on these factors.

iv. GROUND OF APPEAL 45: The Trial Chamber committed a discernible error in failing to consider expressions of sympathy and compassion in the statement of Charles Taylor and those made during the trial by the Defence as a factor in mitigation, due to the impermissible finding that "[a]lthough the Defence accepted that crimes were committed in Sierra Leone, it nevertheless put the Prosecution to proof beyond reasonable doubt of the crimes charged in the Indictment, necessitating the testimony of numerous victims who relived in this Court the pain and suffering they experienced."

752. Article 17 of the Statute of the Special Court for Sierra Leone provides:

> 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:
> [...]
> 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;[1679]

753. In the Sentencing Judgement, the Trial Chamber stated:

> The Defence submits that expressions of sympathy and compassion by Mr. Taylor for the victims of the crimes committed should be taken into account as a mitigating factor. **Although the Defence accepted that crimes were committed in Sierra Leone, it nevertheless put the Prosecution to proof beyond reasonable doubt of the crimes charged in the Indictment, necessitating the testimony of numerous victims who relived in this Court the pain and suffering they experienced.** In his statement to this Court, Mr. Taylor stated that "Terrible things happened in Sierra Leone and

[1678] *Kvočka* TJ, para. 748.
[1679] Article 17(4)(e), Statute.

> there can be no justification for the terrible crimes." Mr. Taylor has not accepted responsibility for the crimes of which he stands convicted, and the Trial Chamber does not consider this statement, and the other comments made by Mr. Taylor, to constitute remorse that would merit recognition for sentencing purposes.[1680] (Emphasis added.)

754. The Trial Chamber committed a discernible error by giving weight to the consideration that, in exercising the right to cross-examine Prosecution witnesses and put them to proof of the crimes, the Defence caused pain and suffering to witnesses who relived their experiences in Court. The right to cross-examine witnesses is a fundamental right recognised under international human rights law.[1681] This right has been codified in Article 17(4)(e) of the Statute of the Special Court as a "minimum guarantee" to which the accused shall be entitled. The Trial Chamber should not have given weight to this consideration when deliberating the mitigating factors put forward by the Defence. Giving weight to this impermissible consideration is an error of law.

755. The Appeals Chamber is requested to correct this error of law by quashing the sentence imposed by the Trial Chamber and to impose a new and appropriate sentence in conformity with the minimum guarantees accorded to Mr. Taylor under Article 17(4)(e) of the Statute.

IV. CONCLUSION

756. The fundamental errors identified in the Grounds of Appeal above render Mr. Taylor's convictions unsafe, warranting appellate intervention. The Chamber's reasoning is replete with significant errors of fact, law and procedure. These errors lead to conclusions which no reasonable trier of fact could reach, are invalid and occasion miscarriages of justice. The weight of the evidence before the Chamber establishes Mr. Taylor's remoteness from the atrocities which occurred in Sierra Leone, and demonstrates that he neither planned nor aided and abetted the crimes which occurred during the Indictment period. The Chamber also abused its discretion in imposing a manifestly excessive sentence based on the discernible errors identified above.

[1680] Sentencing Judgement, para. 91.

[1681] *Prlić* Decision relating to Cross-Examination, p. 2: "Considering that the right to cross-examine witnesses is a fundamental right recognized under international human rights law". In support of this statement, the ICTY Appeals Chamber cited Article 14(3)(e) ICCPR; article 6(3)(d) ECHR; article 8(2)(f) ACHR; *see* also *e.g.* General Comment No. 13, para. 12; *Peart* Communications, paras. 11.4-11.5; *Saïdi* Judgement, paras. 43-4; *van Mechelen* Judgement, para. 51; *Krasniki* Judgement, para. 75; *Kostovski* Judgement, para. 41; *P.S.* Judgement, para. 21."

757. For the foregoing reasons, Charles Taylor respectfully requests that the Appeals Chamber:

(i) reverse the convictions entered against him on Counts 1-11 for aiding and abetting the commission of crimes pursuant to Article 6.1 of the Statute during the Indictment period;[1682]

(ii) reverse the convictions entered against him on Counts 1-11 for planning the commission of crimes pursuant to Article 6.1 of the Statute in the attacks on Kono and Makeni in December 1998, and in the invasion of and retreat from Freetown, between December 1998 and February 1999;[1683] and

(iii) quash the sentence imposed of a single term of imprisonment of fifty years.[1684]

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 1st Day of October 2012, The Hague, The Netherlands

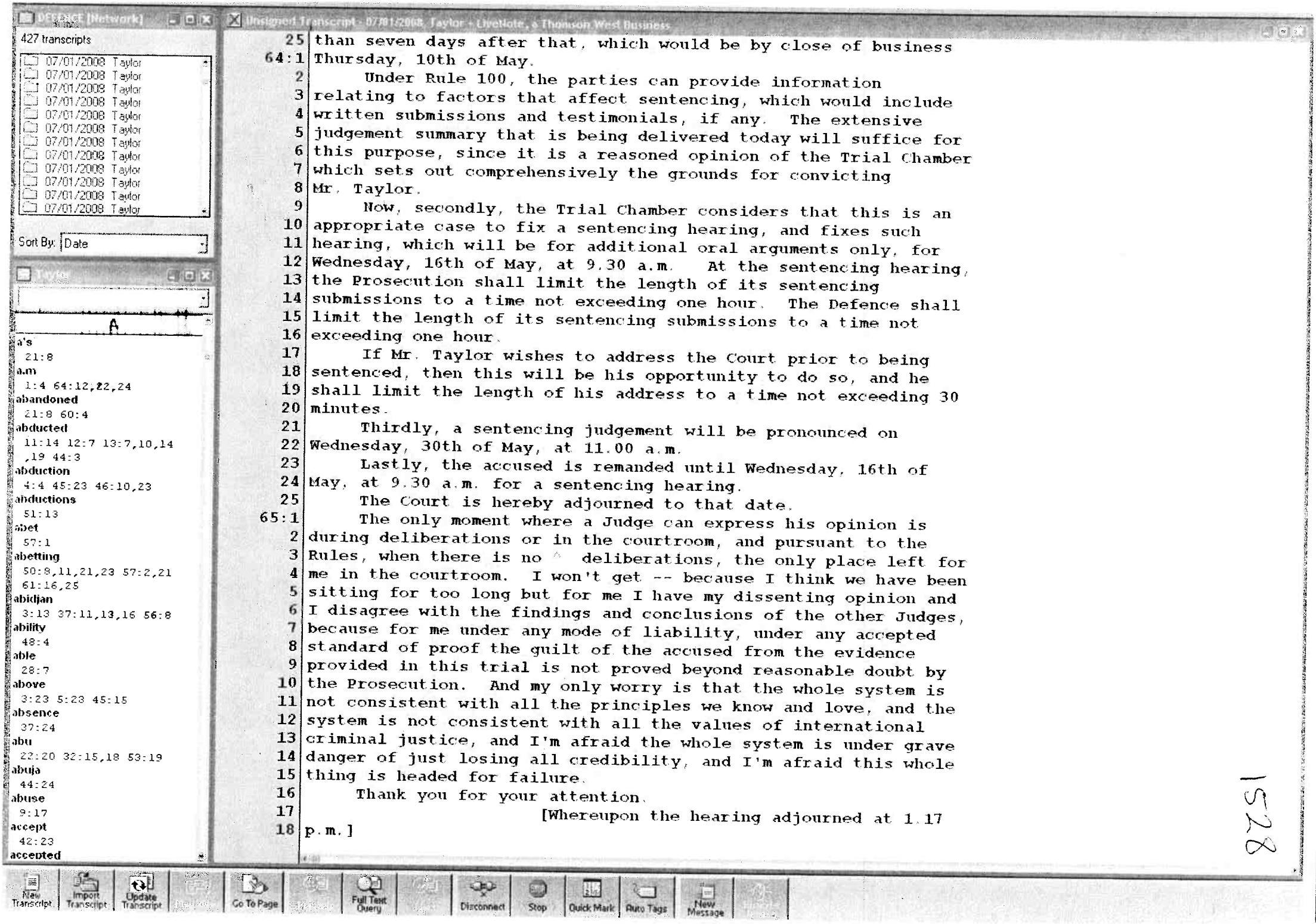
[1682] Judgement, para. 6994(a).
[1683] Judgement, para. 6994(b).
[1684] Sentencing Judgement, p. 40.

Public Annex B

Copy of video footage of the last 11 minutes 48 seconds of the Taylor Delivery of Judgement as retained by Court Management Section

Public Annex C

Statement of Justice El Hadji Malick Sow on 26 April 2012


427 transcripts
07/01/2008 Taylor
Sort By: Date
than seven days after that, which would be by close of business
Thursday, 10th of May.
Under Rule 100, the parties can provide information
relating to factors that affect sentencing, which would include
written submissions and testimonials, if any. The extensive
judgement summary that is being delivered today will suffice for
this purpose, since it is a reasoned opinion of the Trial Chamber
which sets out comprehensively the grounds for convicting
Mr. Taylor.
Now, secondly, the Trial Chamber considers that this is an
appropriate case to fix a sentencing hearing, and fixes such
hearing, which will be for additional oral arguments only, for
Wednesday, 16th of May, at 9.30 a.m. At the sentencing hearing,
the Prosecution shall limit the length of its sentencing
submissions to a time not exceeding one hour. The Defence shall
limit the length of its sentencing submissions to a time not
exceeding one hour.
If Mr. Taylor wishes to address the Court prior to being
sentenced, then this will be his opportunity to do so, and he
shall limit the length of his address to a time not exceeding 30
minutes.
Thirdly, a sentencing judgement will be pronounced on
Wednesday, 30th of May, at 11.00 a.m.
Lastly, the accused is remanded until Wednesday, 16th of
May, at 9.30 a.m. for a sentencing hearing.
The Court is hereby adjourned to that date.
The only moment where a Judge can express his opinion is
during deliberations or in the courtroom, and pursuant to the
Rules, when there is no deliberations, the only place left for
me in the courtroom. I won't get -- because I think we have been
sitting for too long but for me I have my dissenting opinion and
I disagree with the findings and conclusions of the other Judges,
because for me under any mode of liability, under any accepted
standard of proof the guilt of the accused from the evidence
provided in this trial is not proved beyond reasonable doubt by
the Prosecution. And my only worry is that the whole system is
not consistent with all the principles we know and love, and the
system is not consistent with all the values of international
criminal justice, and I'm afraid the whole system is under grave
danger of just losing all credibility, and I'm afraid this whole
thing is headed for failure.
Thank you for your attention.
[Whereupon the hearing adjourned at 1.17
p.m.]
1528

BOOK OF AUTHORITIES[1]

INTERNATIONAL JUDGEMENTS AND DECISIONS

Special Court for Sierra Leone

AFRC Case

AFRC AJ	*Prosecutor v. Brima et al.*, SCSL-04-16-A-675, Judgement, dated 22 February 2008, filed 3 March 2008
AFRC TJ	*Prosecutor v. Brima et al.*, SCSL-04-16-T-628, Judgement, dated 20 June 2007, filed 20 July 2007, pursuant to *Prosecutor v. Brima, et al.*, SCSL-04-16-T, Corrigendum to Judgement filed on 21 June 2007, dated 19 July 2007, filed 20 July 2007
AFRC SJ	*Prosecutor v. Brima et al.*, SCSL-04-16-T-624, Sentencing Judgement, 19 July 2007
AFRC Leave to Appeal Decision	*Prosecutor v Brima et al,* Case No. SCSL-04-16-T, Decision on Brima-Kamara Application for Leave to Appeal from Decision on the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel, Comment of Justice Doherty, 5 August 2005
AFRC Re-Appointment Dissenting Opinion	*Prosecutor v Brima et al,* Case No. SCSL-04-16-T, Dissenting Opinion of the Hon. Justice Julia Sebutinde from the Majority Decision on the Extremely Urgent Confidential Joint Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara and Decision on Cross Motion by Deputy Principal Defender to Trial Chamber II for Clarification of its Oral Order of 12 May 2005, 11 July 2005
AFRC Re-Appointment Decision	*Prosecutor v Brima et al,* Case No. SCSL-04-16-T, Decision on the Extremely Urgent Confidential Joint Motion for Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara and Decision on Cross Motion by Deputy Principal Defender to Trial Chamber II for Clarification of its Oral Order of 12 May 2005, 9 June 2005
AFRC Indictment Decision and Order	*The Prosecutor v. Brima et al.*, Case No. SCSL-04-16-PT, Decision and Order on Defence Preliminary Motion on

[1] Article 7 of the Special Court Practice Direction on dealing with Documents states that documents shall be filed with a "list of the authorities referred to". However, Rule 15 of the Special Court Practice Direction on Structure of Appeal states that "parties' Submissions shall be accompanied by a 'Book of Authorities'".

Defects In The Form of the Indictment, 1 April 2004

CDF Case	
CDF AJ	*Prosecutor v. Fofana et al.*, SCSL-04-14-A-829, Judgement, 28 May 2008
CDF SJ	*Prosecutor v. Fofana et al.*, SCSL-04-14-T-796, Judgement on the Sentencing of Moinina Fofana and Allieu Kondewa, 9 October 2007
CDF TJ	*Prosecutor v. Fofana et al.*, SCSL-04-14-T-785, Judgement, 2 August 2007
RUF Case	
RUF AJ	*Prosecutor v. Sesay et al.*, SCSL-04-15-A-1321, Judgement, 26 October 2009
RUF SJ	*Prosecutor v. Sesay et al.*, SCSL-04-15-A-1251, Sentencing Judgement, 8 April 2009
RUF TJ	*Prosecutor v. Sesay et al.*, SCSL-04-15-T-1234, Judgement, 2 March 2009
RUF Adjudicated Facts Decision	*Prosecutor v. Sesay et al.*, 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
RUF USG Agencies Decision	*Prosecutor v. Sesay, et al.*, SCSL-04-15-T-363, Decision on Sesay – Motion Seeking Disclosure of the Relationship between Governmental Agencies of the United States of America and the Office of the Prosecutor, 2 May 2005
Taylor Case	
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Disqualification Decision	*Prosecutor v. Taylor*, SCSL-03-01-A-1-1323, Decision on Charles Ghankay Taylor's Motion for Partial Voluntary Withdrawal or Disqualification of Appeals Judges, 13 September 2012
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INTERNATIONAL CRIMINAL LAW

Antonio Cassese

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PERPETRATION AND OTHER MODALITIES OF CRIMINAL CONDUCT

9.1 GENERAL

As in any national legal system, also in international criminal law responsibility arises not only when a person materially commits a crime but also when he or she engages in other forms or modalities of criminal conduct. In the following paragraphs I shall set out these different modalities of participation.

Before I do so, it may however prove fitting briefly to discuss the position in national legal systems. They converge in holding that, where a crime involves more than one person, all performing the same act, all are equally liable as co-perpetrators, or principals. In contrast, national legal orders differ when it comes to the punishment of two or more persons participating in a crime, where these persons do not perform the same act but in one way or another contribute to the realization of a criminal design. Many systems (for instance those of the United States, France, Austria, Italy, Uruguay, Australia) do not provide for different categories of participants, and consequently do not attach different penalties to each of the classes (principals or accessories) under which a person may eventually fall. They provide that each participant, whatever his degree of participation, must be considered as a principal; consequently the same penalty may be meted out to each of them. As the California Penal Code provides at §31, all those 'concerned in the commission of a crime' including those who aid and abet the crime, are to be held liable as principals. Nonetheless, a distinction is often drawn between three categories of participation: perpetration, on the one side, and two categories of accomplice liability, on the other, namely instigation (*complicité par instigation*) and aiding and abetting (*complicité par aide et assistance*). This distinction is based on the difference in *actus reus* and *mens rea* for each class (see below). In spite of the difference in such objective and subjective elements, the law does not however attach to each of these categories *different consequences* as far as penalties are concerned; or, at least, under the general sentencing tariff no distinction is made. It is only provided that for accomplices or accessories extenuating circumstances may be taken into account if their participation in the offence is less serious than that of the principal or principals. In fact, for the purposes

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of sentencing, judges often draw a distinction between principals, instigators, and aiders and abettors.

In other national legal systems (for instance, Germany and Russia) the law draws instead a *normative* distinction between two categories, principals, and accomplices or accessories, and provides in terms that the persons falling under the latter category must be punished less severely. Thus, for instance, in German law, the scale of penalties for accomplices (at least in the case of aiders and abettors, *Gehilfe)* is less harsh than for the perpetrator (*Täter*).[1]

We will see that in international law neither treaties nor case law (as indicative of customary rules) make any legal distinction between the various categories, at least as far as the consequent penalties are concerned. This lack of distinction follows both from: (i) the absence of any agreed scale of penalties in international criminal law and from (ii) the general character of this body of law, that is, its still rudimentary nature and the ensuing lack of formalism (see *supra*, 2.2).

Consequently, the differentiation between the various classes of participation in crimes, which I shall set out below, is merely based on the intrinsic features of each modality of participation. It serves a *descriptive and classificatory purpose* only. It is devoid of any relevance as far as sentencing is concerned. It is for judges to decide in each case on the *degree of culpability* of a participant in an international crime and assign the penalty accordingly, whatever the modality of participation of the offender in the crime.

9.2 PERPETRATION

Whoever physically commits a crime, either alone or jointly with other persons, is criminally liable. For instance, the soldier who kills a war prisoner or an innocent civilian is liable to punishment for a war crime. Similarly, the serviceman who rapes an enemy civilian as part of a widespread or systematic sexual attack on civilians is accountable for a crime against humanity.

Perpetration is thus the physical carrying out of the prohibited conduct, accompanied by the requisite psychological element.[2]

[1] In two cases, the Extraordinary Court Martial established in the Ottoman Empire to try persons accused of participating in massacring Armenians in 1915 and plundering their possessions, applied the 'Imperial Penal Code for Officers', which drew a normative distinction between principals and accessories. The Court therefore made a point of distinguishing between the 'principal perpetrators' and the 'accessories', and assigning a different sentence to each category of defendant. In *Kemâl and Tevfîk* it sentenced the principal perpetrator to death and the accessory to 15 years of hard labour (at 5–6); in *Bahâeddîn Şâkir* the majority of judges held that two defendants were accessories, while three dissenting judges held that they 'were equally guilty of having been principal co-perpetrators' (at 4 and 8).

[2] In some cases courts have minimized the role of perpetrators executing illegal orders. This for instance holds true for *Alfons Götzfrid*, which concerns mistreatment at the Majdanek camp. The Stuttgart Court (*Landgericht*) held in a decision of 20 May 1999 that 'According to established case-law (cf. Federal Supreme Court, Part 18, 87 et seq.), the offender or accomplice is defined as one whose thoughts and actions coincide

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9.3 CO-PERPETRATION

Crimes are often committed by a *plurality of persons*. If all of them materially take part in the actual perpetration of the same crime and perform *the same act* (for instance, they are all members of an execution squad shooting innocent civilians), we can speak of co-perpetration. All participants in the crime partake of the same criminal conduct and the attendant *mens rea*.

9.4 PARTICIPATION IN A COMMON PURPOSE OR DESIGN

9.4.1 PARTICIPATION ENTAILING RESPONSIBILITY FOR ALL THE ACTS FLOWING FROM THE CRIMINAL PLAN

When the crime results from the *action of a multitude of persons*, it may happen that *not all participants perform the same act*. In the case of torture one person may order the crime, another may physically execute it, yet another may watch to check whether the victim discloses any significant information, a medical doctor may be in attendance to verify whether the measures for inflicting pain or suffering are likely to cause death so as to stop the torture just before the measures become lethal, another person may carry medicine, or food for the executioners, and so on. The question arises of whether all these participants are equally responsible for the same crime, torture. Similarly, in the case of deportation of civilians or prisoners of war to an extermination camp, a commander may issue the order, several officers may organize the transport, others may take care of food and drinking water, others may carry out surveillance over the inmates so as to prevent their escape, others may search the detainees for valuables or other things before deportation, and so on.

As in most national legal systems, also in international criminal law all participants in a common criminal action are equally responsible if they (i) participate in the action, *whatever their position and the extent of their contribution*, and in addition (ii)

with those of the author of the crime, who willingly gives in to incitement to political murder, silences his conscience and makes another person's criminal aims the basis of his own conviction and his own action or who sees to it that orders of that kind are ruthlessly carried out, or who in so doing otherwise displays consenting enthusiasm or who exploits State terror for his own purposes. Accordingly, the accused could only be shown to have an attitude denoting guilt if, over and above the activity he was instructed to carry out, he had performed some contributory act on his own initiative beyond the call of duty, shown particular enthusiasm, had acted with particular ruthlessness in the extermination operation or had shown a personal interest in the killings. These conditions cannot be shown to exist in the case of the accused. He was at the end of the chain of command, had no power of decision himself and no authority to act . . . Similarly, there is no evidence that the accused had any personal interest in the killings. He merely wanted to carry out the order which had been issued to him.'

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intend to engage in the common criminal action. Therefore they are all to be treated as *principals*,[3] although of course the varying degree of culpability may be taken into account at the sentencing stage.[4]

It is important to add that the common plan or purpose need not be formally set out. As the ICTY Appeals Chamber rightly noted in *Tadić (Appeal)*,

> there is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialize extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise. (§227.)

As in national legal systems, the rationale behind this legal regulation is clear: if all those who take part in a common criminal action are aware of the purpose and character of the criminal action and share the requisite criminal intent, they must perforce share criminal liability, whatever the role and position they may have played in the commission of the crime. This is the case because: (i) each of them is indispens-

[3] However, some courts of common law countries have taken the view that participants in a common criminal design may play the role of, and be regarded as, accessories. Thus, for instance, in *Einsatzgruppen*, with regard to common design, the Prosecutor T. Taylor, in his closing statement noted that 'the elementary principle must be borne in mind that neither under Control Council Law No. 10 nor under any known system of criminal law is guilt for murder confined to the man who pulls the trigger or buries the corpse. In line with recognized principles common to all civilized legal systems, paragraph 2 of Article II of Control Council Law No. 10 specifies a number of types of connection with crime which are sufficient to establish guilt. Thus, not only are principals guilty but also accessories, those who take a consenting part in the commission of crime or are connected with plans or enterprises involved in its commission, those who order or abet crime, and those who belong to an organization or group engaged in the commission of crime. These provisions embody no harsh or novel principles of criminal responsibility' (at 372).

[4] In this connection one may mention, by way of example, a decision of the Supreme Court of Bosnia and Herzegovina in *Tepež*, delivered on 1 October 1999: 'The appeal by the defence counsel argues that the contested judgment has not individualised the criminal responsibility of the accused and his personal involvement in actions characteristic of a war crime against the civilian population. For this crime to exist it is necessary to "commit murder, torture, inhumane acts, inflict severe suffering, physical and mental injuries on civilians, destroying their health and physical integrity". The disposition does not include these essential elements of this criminal act and therefore represents a major violation of the provisions of criminal procedure. This Court finds these allegations groundless.

'The appeal fails to note that the contested judgment states that the accused carried out these actions with three other named individuals (as well as others), which means that he perpetrated the crime for which he has been pronounced guilty in complicity with others. It further means that in cases of this kind where it is not possible to isolate individual actions and their consequences or to distinguish the degree to which each person was involved in their execution, it suffices that these actions complement each other and together form a single entity, which the accused [Tepe] wishes to achieve by being involved. Therefore it was neither possible nor necessary for the court of first instance to separate only the actions of the accused. It suffices that the accused participated in executing these actions, even if it had only been one or two actions of personal involvement in the beating of civilians. However, the court of first instance has established that the accused personally beat up many individuals on many occasions' (at 2).

One may also mention the decision of a Canadian court in *Moreno*: 'In reaching this conclusion, I am influenced by one commentator's view that the closer a person is involved in the decision-making process and the less he or she does to thwart the commission of inhumane acts, the more likely criminal responsibility will attach ... of course, the further one is distanced from the decision makers, assuming that one is not a "principal", then it is less likely that the required degree of complicity necessary to attract criminal sanctions, or the application of the exclusion clause, will be met' (at 18). See also *Ramirez* (at 6–9).

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able for the achievement of the final result, and on the other hand (ii) it would be difficult to distinguish between the degree of criminal liability, except for sentencing purposes.

One may find a particularly clear and significant *illustration* of this category of criminality in *Alfons Klein and others* (the *Hadamar* trial), heard by a US Military Commission sitting at Wiesbaden. It may prove fitting to dwell on this case at some length, because it best shows how the category of criminality at hand works.

The accused were seven Germans. Between July 1944 and April 1945, they killed over 400 Polish and Russian nationals, who had been obliged to work in Germany for the German war effort and were suffering from tuberculosis or pneumonia. Brought to Hadamar, in Germany, where there was a hospital or institution originally designed to care for the mentally unsound, but with no medical facilities to treat persons sick with tuberculosis or pneumonia, they were told that they would be given medication. In fact they were killed by injections of poisonous drugs; afterwards the relevant medical records and death certificates were falsified. It would seem that the primary purpose of these killings was to make space in hospitals for German war victims. The accused comprised Klein, the administrative head of the hospital, a local Nazi Party leader who made all the arrangements leading to the perpetration of the atrocities; Wahlmann, a physician specializing in mental diseases, the Institution's only doctor (he participated in the conferences designed to plan the murders, knew what was going on at the hospital, and acquiesced in it); three nurses, Ruoff, Willig, and Huber, who administered the poisonous drugs; Merkle, the institution's book-keeper (who registered incoming patients for the purpose of recording dates and causes of death, actually falsifying these documents); and Blum, a doorman and telephone switchboard operator, who also served as caretaker of the cemetery, charged with burying the victims in mass graves (but he sometimes walked through the wards to inspect the victims before they were taken, dead, to his cellars a few hours later).

The charge for all of them was of 'violation of international law', namely, as the Prosecutor specified in his opening argument, breach of the laws of warfare (at 202). The specification stated that the seven accused 'acting jointly and in pursuance of a common intent' 'did . . . wilfully, deliberately and wrongfully aid, abet and participate in the killing of human beings of Polish and Russian nationality'. Thus, in addition to the notion of 'participation in killing based on common intent' also the notion of 'aiding and abetting' was used. However, in his Opening Argument the Prosecutor, when setting out the applicable law (there was no Judge Advocate), emphasized that all those who participate in a common criminal enterprise are equally guilty as 'co-principals' whatever the role played by each single participant. Referring to the case of murder committed by several persons, he pointed out that:

> Every single one of those who participated in any degree towards the accomplishment of that result [murder] is as much guilty of murder as the man who actually pulled the trigger . . . That is why under our [that is, US] Federal Law all distinctions between accomplices, between accessories before the fact and accessories after the fact, have been completely eliminated. Anyone who participates in the commission of any crime, whether formerly

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called as an accessory or not, are now co-principals and have been so for several years. (At 203.)

Moving then to the case at bar, the Prosecutor in fact offered an eloquent illustration of the rationale behind the legal notion he was invoking:

> At this Hadamar mill there was operated a production line of death. Not a single one of these accused could do all the things that were necessary in order to have the entire scheme of things in operation. For instance, the accused Klein, the administrative head, could not make the initial arrangements, receive those people, attend to undressing them, make arrangements for their death chamber, and at the same time go up there and use the needle that did the dirty work, and then also turn around and haul the bodies out and bury them, and falsify the records and the death certificates. No, when you do business on a wholesale production basis as they did at the Hadamar Institution, that murder factory, it means that you have to have several people doing different things of that illegal operation in order to produce the results, and you cannot draw a distinction between the man who may have initially conceived the idea of killing them and those who participated in the commission of those offences. Now, there is no question but that any person who participated in that matter, no matter to what extent, technically is guilty of the charge that has been brought . . . every single one of the accused has overtly and affirmatively participated in this entire network that brought about the illegal result. (At 205–7.)

The defence counsel did not dispute these concepts, but in their arguments preferred to rely upon the notions of necessity and superior orders, or argued that German law rather than US or international law should apply. The Court upheld the charge. The administrative head of the hospital and two nurses were sentenced to death; the physician (a 70-year-old man) to life imprisonment and hard labour; the book-keeper to 35 years and hard labour; the third nurse to 25 years and hard labour; the doorman and caretaker to 30 years and hard labour (at 247).

In international *case law* there are many other notable examples of this form of criminality. Some British and US courts, influenced by common law concepts, have utilized the notion of 'persons concerned' in, for instance, the killing of the victim, or the concept of 'common purpose' or 'common design'.[5] In contrast other courts, for instance Dutch, German, and Italian, holding to civil law terminology, have preferred

[5] See for instance *Josef Kramer and others* (the *Belsen* trial), at 638–40; *Heinz Heck and others* (the *Peleus* trial), at 122 as well as *Burgholz (No. 2)* at 82 and the *Loibl Pass (No. 1)* case, at 2. See also *Erich Killinger and others* (the *Dulag Luft* trial), at 224–5, 235. In the latter case the Prosecutor, in the absence of a Judge Advocate, submitted that each of the five accused 'was concerned, in his respective capacity on the staff of Dulag Luft, as a party to the ill-treatment of prisoners of war, and concerned with sufficient proximity to make him criminally responsible on the ordinary standards of criminal responsibility in English law, either by being an accessory before the fact, or a principal in the second degree, or a principal in the first degree, or an accessory after the fact'. He further submitted that the five accused 'were all there at times when that system was working, and . . . those incidents occurred in circumstances in which a reasonable man can only come to the firm judgment that each one of those five accused was criminally concerned in that ill-treatment borne out in the evidence before you' (at 235). However, the Court found that two of the accused were not guilty (at 236).

Falkenhorst also deserves to be mentioned. The Judge Advocate, addressing the third charge against the accused, General von Falkenhorst (that he, 'as Commander-in-Chief, with knowledge, with understanding and with the intention, was concerned in the killing of . . . fourteen British prisoners'), stated that '"Concerned in the killing" is a wide phrase, and we all agree it is not confined to the person who actually

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to rely upon the notion of 'concurrence of persons in a crime'. As the cases brought before the former courts are more numerous, it may prove useful to dwell on some of these cases.

does the killing; I think we all agree that it could only apply to somebody who has some power or authority to influence the result, and the case for the Prosecution on this is very straightforward, that is nothing more nor less than they allege you should find that these people, who should have been treated, according to the Prosecution, as prisoners of war, were shot, or murdered as the Prosecution put it, because of the specific order to which I have already referred emanating from the Commander-in-chief which was binding on the forces of the Wehrmacht who carried out these executions' (at 231); the Court found the accused guilty and sentenced him to 'death by being shot' (at 240–1).

Wolfgang Zeuss and others (the *Natzweiler* trial) is also interesting. Four women working for the Resistance movement were arrested by the Gestapo in France, sent to a detention camp in Struthof/Natzweiler, taken to the crematorium, and executed by injection. The accused included the commandant as well as the head of the political department of the concentration camp, the camp doctor, a prisoner employed in the crematorium, a camp medical orderly, a clerk in the political department, the camp dentist, and some military staff. The Judge Advocate, discussing the charge against the accused, that is, that all of them were concerned in a killing, noted that that charge did not make it necessary 'that any person should actually be present'. 'None of the accused is actually charged with killing any of the women concerned. They are charged with being concerned in a killing, and you can be concerned in a killing without being actually present at the time when the killing takes place. If two or more men set out on a murder and one perhaps stands half a mile away from where the actual murder is committed, perhaps to keep guard, although he is not actually present when the murder is done, if he is taking part with the other man with the knowledge that the other man is going to do the killing, then he is just as guilty as the person who fires the shot or delivers the blow, or however the murder is committed. Although much evidence in this case has been directed towards establishing who was actually present in the crematorium, you have got to cast your vision further afield and consider whether, in spite of anybody not having been proved to be present, they may nevertheless still be concerned in the killing' (at 200–1). The Court found three defendants not guilty and sentenced the camp doctor to death and the others to various terms of imprisonment (at 218 and 222).

It is also worth mentioning *Sumida Haruzo and others* (the '*Double Tenth*' trial). This case is relevant in two respects: the possible criminal responsibility of interpreters, and that of members of special units.

The accused, a Japanese military unit, were charged with ill-treatment and torture of British prisoners of war in Singapore. Among the accused were some interpreters. The defence argued that they had simply acted as a medium of communication (at 245–9). 'The responsibility of an interpreter . . .—argue defence counsel—is a non-commissive responsibility. An interpreter has neither the right nor the authority to stop an act of torture' (at 249). The Prosecution submitted instead that they had in some way participated in ill-treatment by actually taking part in the beating or torture of the prisoners (at 255, 264–5). The Court sentenced the interpreters either to imprisonment or to death (at 280–1).

On the question of criminal liability of members of a military unit committing crimes, the Prosecutor noted that 'where a branch of [a] unit of the Kempei Tai [Japanese military police force; the Singapore branch was charged with preserving public peace and military policing] has been proved beyond reasonable doubt to have been participating in a war crime, then every man who is proved to have been a member of that particular unit during the relevant period may, *prima facie*, be held responsible for that war crime, even though no concrete criminal act has been brought home to him specifically as an individual. And I would go further than that, and suggest respectfully, that in a case such as this, where the very closest privity and connection has been proved to have existed between all members of the Singapore Kempei Tai, *which was charged as a unit with the prosecution of this specific No. 1 Work*, then the Court should consider very carefully whether the mere presence of a man with such a unit does not constitute *prima facie* evidence of his complicity, but goes much further and establishes a strong presumption of guilt. I do not go so far as to suggest a shifting of the burden of proof, which does, and always must, remain with the Prosecution . . . The *degree* of complicity on the part of any particular individual is, of course, a matter to which you, gentlemen, would have to direct your minds much later in apportioning any sentence which might be necessary; but in the determination of the question of guilt or innocence of a crime such as this—the result of a deliberate policy carried out by a whole unit—such a consideration is, in my submission, totally irrelevant' (at 259; see also 271–2). The Court acquitted six defendants and condemned the others to varying sentences (at 275–82).

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In *Ponzano*, a case concerning the unlawful killing of four British prisoners of war by German troops, the Judge Advocate adopted the approach suggested by the Prosecutor, and stressed:

> the requirement that an accused, before he can be found guilty, must have been concerned in the offence . . . [T]o be concerned in the commission of a criminal offence . . . does not only mean that you are the person who in fact inflicted the fatal injury and directly caused death, be it by shooting or by any other violent means; it also means an indirect degree of participation . . . [I]n other words, he must be the cog in the wheel of events leading up to the result which in fact occurred. He can further that object not only by giving orders for a criminal offence to be committed, but he can further that object by a variety of other means. (At 7.)

The Judge Advocate also underlined the necessity of knowledge on the part of the accused as to the intended purpose of the criminal enterprise.[6]

Courts also applied the notion of common purpose in cases where the crimes had allegedly been committed by members of military or administrative units running concentration camps; that is, by groups of persons acting pursuant to a concerted plan. In this respect one may mention such cases as *Dachau Concentration Camp*, brought before a US Tribunal under Control Council Law no. 10 (at 5, 14), *Nadler and others*, decided by a British Court of Appeal under Control Council Law no. 10 (at 132–4), *Auschwitz Concentration Camp*, decided by a German Court (at 882), as well as *Belsen*, decided by a British military court sitting in Germany (at 121). In these cases the accused held some position of authority within the hierarchy of the concentration camps. Normally, the accused were charged with having acted in pursuance of a common design to kill or mistreat prisoners and hence to commit war crimes.[7]

The accused, when found guilty, were regarded as co-principals in the various crimes of ill-treatment, because of their objective 'position of authority' within the concentration camp system and because they had 'the power to look after the inmates

[6] *Georg Otto Sandrock et al.* (also known as the *Almelo Trial*) can also be cited. Three Germans had killed a British prisoner of war; it was clear that they all had had the intention of killing the British soldier, although each of them played a different role. The British Court found all of them guilty of murder under the doctrine of 'common enterprise' (at 35, 40–1). In *Hölzer and others*, brought before a Canadian military court, in his summing up the Judge Advocate emphasized that the three accused (Germans who had killed a Canadian prisoner of war) knew that the purpose of taking the Canadian to a particular area was to kill him. The Judge Advocate spoke of a 'common enterprise' with regard to that murder (at 341, 347, 349). In *Jepsen and others* a British court had to pronounce upon the responsibility of Jepsen and others for the death of inmates of a concentration camp in transit to another concentration camp. The Prosecutor argued that '[I]f Jepsen was joining in this voluntary slaughter of eighty or so people, helping the others by doing his share of killing, the whole eighty odd deaths can be laid at his door and at the door of any single man who was in any way assisting in that act'. The Judge Advocate did not rebut the argument (at 241). In *Schonfeld* the Judge Advocate stated that: 'if several persons combine for an unlawful purpose or for a lawful purpose to be effected by unlawful means, and one of them in carrying out that purpose, kills a man, it is murder in all who are present . . . provided that the death was caused by a member of the party in the course of his endeavours to effect the common object of the assembly' (at 68).

[7] In his summing up in the *Belsen* case, the Judge Advocate took up the three requirements set out by the Prosecution as necessary to establish guilt in each case: (i) the existence of an organized system to ill-treat the detainees and commit the various crimes alleged; (ii) the accused's awareness of the nature of the system; and (iii) the fact that the accused in some way actively participated in enforcing the system, i.e., encouraged, aided, and abetted or in any case participated in the realization of the common criminal design (at 637–41).

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and make their life satisfactory' but failed to do so. In these cases, as the ICTY Appeals Chamber pointed out in *Tadić (Appeal)*:

> the required *actus reus* was the active participation in the enforcement of a system of repression, as it could be inferred from the position of authority and the specific functions held by each accused. The *mens rea* element comprised: (i) knowledge of the nature of the system and (ii) the intent to further the common concerted design to ill-treat inmates. It is important to note that, in these cases, the requisite intent could also be inferred from the position of authority held by the camp personnel. Indeed, it was scarcely necessary to prove intent where the individual's high rank or authority would have, in and of itself, indicated an awareness of the common design and an intent to participate therein. All those convicted were found guilty of the war crime of ill-treatment, although of course the penalty varied according to the degree of participation of each accused in the commission of the war crime. (§203.)

9.4.2 PARTICIPATION ENTAILING RESPONSIBILITY FOR THE FORESEEABLE CRIMES OF OTHER PARTICIPANTS

In other cases where a multitude of persons participates in the commission of a crime, it may happen that, although all participants share from the outset the common criminal design, *one or more perpetrators commit a crime that had not been (expressly or implicitly) agreed upon or envisaged at the beginning*, and therefore did not constitute part and parcel of the joint criminal enterprise. For instance, a group of soldiers, acting under superior orders, set out to detain, contrary to international law, a group of civilians; however, one of the servicemen, in the heat of military action, tortures or rapes one or more of those civilians. Are the other soldiers equally responsible for this additional crime, not envisaged in the joint criminal design?

The ICTY Appeals Chamber clarified this legal issue in *Tadić (Appeal)*. There it held that 'responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*' (§228). The Appeals Chamber showed that this proposition was based on case law, had a solid underpinning in many national legal systems, and in addition was consonant with the general principles on criminal responsibility laid down both in the ICTY Statute and in customary international law (§§224–9).

In the case at issue the Appeals Chamber held that Tadić, the appellant, was 'an armed member of an armed group' that attacked a village in Bosnia and Herzegovina, during the armed conflict raging in the Prijedor region; he took an active part in the attack, rounding up and severely beating some members of the non-Serb population living there. The armed group, in pursuance of its violent action against non-Serbs, killed five of them. According to the Appeals Chamber the only possible inference was that Tadić 'had the intention to further the criminal purpose to rid the Prijedor region of the non-Serb population, by committing inhumane acts against them. That

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non-Serbs might be killed in the effecting of this common aim was, in the circumstances of the . . . case, foreseeable. The Appellant [Tadić] was aware that the actions of the group of which he was a member were likely to lead to such killings, but he nevertheless willingly took that risk'. The Chamber consequently found Tadić guilty of wilful killing as a grave breach as well as a war crime and a crime against humanity (§§230–7).[8]

9.4.3 AIDING AND ABETTING

A person may participate in a crime without sharing the criminal intent of the principal perpetrator, but simply by assisting him in the commission of the crime. In aiding and abetting the objective element is constituted by *practical assistance, encouragement, or moral support*, by the accessory to the principal (namely the author of the main crime); in addition, such assistance, support etc. *must have a substantial effect on the perpetration of the crime*. The subjective element resides in the accessory having *knowledge* that 'his actions assist the perpetrator in the commission of the crime'. (This, with convincing arguments, an ICTY Trial Chamber held in *Furundžija* (§§190–249); see also *Musema* (§126), *Aleksovski* (§63), *Kunarac and others* (§391).)

Thus, unlike the instances considered previously, aiding and abetting does not necessarily presuppose that the aider and abettor shares a common plan or purpose with the principal or his criminal intent or other form of *mens rea*; as stated by the ICTY Appeals Chamber in *Tadić*, 'the principal may not even know about the accomplice's contribution' (§229). What is required is that the person supporting or assisting in the crime be aware that his action furthers and helps the perpetrator or perpetrators in the commission of the crime.

Among the various cases where the notion was applied[9] *Akayesu* can be cited, not so much for outlining the legal contours of the notion (the Trial Chamber at one point stated that 'complicity' was to be defined in the light of the Rwandan Penal Code: §537), as for the legal findings on this matter. The Trial Chamber found that:

[8] The ICTY Appeals Chamber confirmed the decision in *Tadić (Appeal)* in *Aleksovski (Appeal)* (§§163–4). Also a Trial Chamber referred approvingly to that decision in *Kordić and Čerkez* (§§393–400).

[9] Such cases include *Schonfeld* and *Rohde*, both heard by British military courts (at 64 and 56 respectively), *Zyklon B*, also heard by a British court (at 93), *Einsatzgruppen*, brought before by a US Military Tribunal sitting at Nuremberg (at 569–85), *S. and others (Hechingen Deportation* case), brought before a German court in the French Occupied Zone (at 484–90). However, in most of these cases the notion of aiding and abetting was not clearly defined as distinct from that of 'participation in a common purpose'. Trial Chambers of the ICTR and the ICTY have made a better jurisprudential contribution to the outlining and enunciation of the concept in *Akayesu* (dealing with the notion of 'complicity in genocide': §§525–48), in *Tadić* (§§688–92), and in *Furundžija* (§§190–249).

One may also mention a Canadian case involving torture: in *Moreno* (decision of 14 September 1993) the Court held that 'Presence at the commission of an offence can be evidence of aiding and abetting if accompanied by other factors, such as prior knowledge of the principal offender's intention to commit the offence or attendance for the purpose of encouragement . . . While mere presence at the scene of a crime (torture) is not sufficient to invoke the exclusion clause [of the Refugee Convention], the act of keeping watch with a view to preventing the intended victim from escaping may well attract criminal liability' (at 16–17). See also *Ramirez* (at 5–9).

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Akayesu, in his capacity as *bourgmestre* [mayor], was responsible for maintaining law and public order in the commune of Taba and . . . had the effective authority over the communal police. Moreover, as 'leader' of Taba commune, of which he was one of the most prominent figures, the inhabitants respected him and followed his orders. Akayesu himself admitted before the Chamber that he had the power to assemble the population and that they obeyed his instructions. It has also been proved that a very large number of Tutsi were killed in Taba between 7 April and the end of June 1994, while Akayesu was bourgmestre of the Commune. Knowing of such killings, he opposed them and attempted to prevent them only until 18 April 1994, after which date he not only stopped trying to maintain law and order in his commune, but was also present during the acts of violence and killings, and sometimes even gave orders himself for bodily or mental harm to be caused to certain Tutsi, and endorsed and even ordered the killing of several Tutsi . . . The Chamber holds that the fact that Akayesu, as a local authority, failed to oppose such killings and serious bodily or mental harm constituted a form of tacit encouragement, which was compounded by being present [during] such criminal acts. (§§704–5.)

The Chamber added that Akayesu was present during numerous incidents of rape and sexual violence against Tutsi women and, by his attitude and utterances, encouraged such acts, thus giving 'tacit encouragement' to the rapes being committed. The Court concluded that he was criminally responsible 'for having abetted in the preparation or execution of the killings of members of the Tutsi group and the infliction of serious bodily and mental harm on members of the said group' (§§706–7).

In *Furundžija* an ICTY Trial Chamber found that the accused, an officer of the Bosnian Croat armed forces, was present while the victim was being raped by another officer, and interrogated her. It held that in this way he had given assistance, encouragement, or moral support, having a substantial effect on the crime by the other officer, with the knowledge that these acts assisted the commission of the offence. The Trial Chamber therefore found the defendant guilty of aiding and abetting outrages upon personal dignity including rape (§§270–5).

9.5 INCITEMENT OR INSTIGATION AS A FORM OF PARTICIPATION IN INTERNATIONAL CRIMES

Incitement to commit a crime is some form of inducement, encouragement, or persuasion to perpetrate the crime. Incitement does not necessarily presuppose a hierarchical position. It simply means taking all those psychological or physical measures designed to prompt somebody else to commit a crime. It also requires the intent to have the crime perpetrated.

As held in *Blaškić*, 'both positive acts and omissions may constitute instigation' (§280). Furthermore, incitement is a crime only under certain conditions: (i) it must be *direct and explicit*; (ii) *commission of the crime* must follow it up. In other words, incitement is not punished per se, but only if it leads to the commission of a crime. As we shall see, international criminal law provides for an exception to this rule, in the case of genocide.

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An ICTY Trial Chamber held in *Kordić and Čerkez* that:

> although a causal relationship between the instigation and the physical perpetration of the crime needs to be demonstrated (i.e., that the contribution of the accused in fact had an effect on the commission of the crime), it is not necessary to prove that the crime would not have been perpetrated without the accused's involvement. (§387.)

The requisite subjective element may be set out as follows: (i) the person intended to induce the commission of the crime by another person, or in other words 'directly intended to provoke the commission of the crime' (*Kordić and Čerkez*, §387), or (ii) the person was at least aware of the likelihood that commission of the crime would be a consequence of his action; (iii) the person must possess the *mens rea* concerning the crime he is instigating.

In *Kurt Mayer*, tried by a Canadian Military Court sitting at Aurich in Germany, the accused, a Commander of the 25 SS Panzer Grenadier Regiment, was among other things charged with having incited and counselled troops under his command to deny quarter to Allied troops in 1943–4 in Belgium and France. The Judge Advocate stated:

> The first charge is quite clear and I advise the Court that the particulars in that charge allege or constitute a war crime. As it is an offence to deny quarter to prisoners I think an officer may be convicted of a war crime if he incites and counsels troops under his command to deny quarter, whether or not prisoners were killed as a result thereof. It would seem to be common sense to say that not only those members of the enemy who unlawfully kill prisoners may be charged as war criminals, but also any superior military commander who incites and counsels his troops to commit such offences. (At 840.)[10]

9.6 INCHOATE CRIMES: GENERAL

Many legal systems punish not only consummated criminal offences (for instance, murder, theft, etc.), but also 'inchoate', that is preliminary or 'just begun' criminal wrongdoings. These are acts that: (i) are *preparatory* to prohibited offences, (ii) have not been completed, therefore *have not yet caused any harm*, and (iii) are *punished on their own*, that is, in spite of the fact that they have not led to a completed offence.

The rationale behind criminalization of such offences is clear: the legal system intends to protect society as far as possible. Therefore, in addition to punishing offences already perpetrated, it endeavours to prevent the commission of potential transgressions. It consequently intervenes with its prohibitions at an early stage, before crimes are completed, that is, at the stage of their preparation, so as to forestall the consummation of the harmful consequences of actual crimes.

However, within this general category, one ought to distinguish three subcategories:

1. Criminal conduct that is preparatory to crimes proper, and is punished per se, that is, even if it does not lead to the actual perpetration of the crime, but, when this

[10] Cases where incitement to commit war crimes was punished include *Falkenhorst* (at 23 and 29–30).

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perpetration follows, it is no longer punishable per se, as it is 'absorbed' into the actual crime (although it may be taken into account as an aggravating circumstance). This subcategory includes planning and ordering.

2. Criminal conduct that is preparatory to a crime, but which by definition cannot be followed by the intended crime. This subcategory encompasses attempt, where, by definition, the subsequent offence is not consummated (because subjective or external circumstances prevent consummation).

3. Criminal conduct that is punished per se, whether or not it is followed by the consummation of a crime; where a crime does follow, this conduct, as well as the consummated crime is punished. This subcategory includes incitement to commit genocide and conspiracy to genocide.

In many national legal systems (particularly in common law countries) three categories of such crimes are envisaged: attempt, conspiracy, and incitement. In international law, while attempt is regarded as admissible as a *general class* of inchoate crimes, conspiracy and incitement are only prohibited as 'preliminary' (not consummated) offences when connected to the most serious crime, genocide. The very limited acceptance of conspiracy is probably due to the fact that this class of criminal offence is not accepted in most civil law countries; hence it has been considered admissible at the international level only with regard to the most heinous and dangerous crime. Indeed, genocide is a crime that by definition attacks individuals qua members of a group and with a view to destroying the group as such.

As for incitement, as we have seen above, in international criminal law it is prohibited only if it leads to the actual perpetration of the crime, that is, as a form of participation in a crime, probably because States and courts have felt that prohibiting incitement per se in connection with *any* international crime including war crimes and crimes against humanity would excessively broaden the range of criminal conduct, the more so because of the difficulty of clearly delineating the notion of incitement. Incitement as such has been exceptionally prohibited, subject however to some stringent conditions, in connection, again, with the most harmful and serious international crime, genocide.

As for planning and ordering, the rationale behind the tendency of international law to punish them as inchoate crimes lies primarily in this: the most serious and large-scale international crimes result from careful preparation and concerted action by many agents, or are the result of instructions and directives issued by military or political leaders. In consequence, international criminal rules aim to prevent or at least circumscribe such conduct by stigmatizing it as criminal and making it penally punishable.

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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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responsible for planning, instigating or ordering a crime if he directly or indirectly intended that the crime be committed' (§386).

Although there is no consistent case law on this matter, it would seem that the gravity of international crimes (or at least of the most serious among them) may warrant the conclusion that planning the commission of one or more of such crimes is punishable per se even if the crime is not actually perpetrated. The rationale is that international criminal law aims not only to punish persons found guilty of crimes, but also to prevent persons from engaging in serious criminal conduct. Consequently, in case of doubt criminal rules must be interpreted as being also designed as far as possible to prevent offences. It is warranted to infer that planning an international crime is also punishable per se as a distinct form of criminal liability, subject to a set of conditions that can be derived from the general system of international criminal law:

1. Only the planning of serious or large-scale international crimes constitutes a discrete offence: for instance, the planning of massive war crimes (such as the extermination of a large number of prisoners of war, or the large-scale deportation of civilians to extermination camps), or of crimes against humanity, or genocide. Since the rules on planning do not specify the legal ingredients of this crime, it seems warranted to maintain that, for international crimes of lesser gravity (for instance, ill-treatment of one prisoner of war, the taking by members of the Occupying Power of private property belonging to civilians), those rules must be construed in such a way as to favour the accused (*favor rei*). Consequently the mere planning of those crimes of lesser gravity may be held not to constitute a crime per se.

2. If planning is followed up by execution of the crime, planning is no longer punishable as a crime distinct from that resulting from its execution (in this respect planning is different from, hence may not be equated to, such 'inchoate crimes' as conspiracy to commit genocide and incitement to genocide, to be discussed below). As for the requisite *mens rea*, it is necessary for the author to intend that the planned crime be committed, or else he must be aware of the risk that the planned crime would be perpetrated by him or by someone else (recklessness or *dolus eventualis*).

9.8 ORDERING

Ordering presupposes that whoever issues the order is *de jure* or de facto *superior* (within a military or civilian hierarchy) to the one who executes it. However, as a Trial Chamber of the ICTY rightly held in *Kordić and Čerkez* (§388), 'no formal superior-subordinate relationship is required for a finding of "ordering" so long as it is demonstrated that the accused possessed the authority to order'. This proposition, albeit not supported by any legal reason in the judgment, is warranted because international criminal law is not a formalistic body of law geared to legal technicalities but aims at proscribing and punishing crimes whatever the modalities of their commission.

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As ICTY Trial Chambers rightly held in *Blaškić* (§281) and *Kordić and Čerkez* (§388), there is no need for the order to be given in writing or in any particular form. In addition, the existence of an order may be proved through circumstantial evidence.

It would seem that it is not necessary for the order to be executed. An officer or any other higher authority issuing a criminal order may be found guilty even if the order is not carried out by the subordinates, if the superior intended the order to be executed and knew that the order was illegal, or else the order was manifestly illegal. Thus, in *General Jacob H. Smith*, in 1902 a US Court Martial held that General Smith was guilty of ordering that no quarter should be given to the enemy in the Philippines, even though in fact his troops did not comply with this order (at 799–813). In many other cases courts have convicted officers for issuing criminal orders, even if they were not executed.[11]

If the internationally unlawful order is executed, the person issuing the order is criminally liable qua co-perpetrator of the crime carried out by the subordinate.

Also for this category of criminality the requisite mental element is the *intent* to have the crime committed,[12] at least, as long as the order is specific, that is, instructs to perform a specific crime. However, when the order is generic, recklessness or even gross negligence may be considered sufficient.[13]

9.9 ATTEMPT

Attempt as a distinct criminal offence occurs whenever a person intending to commit a crime tries to carry it out without, however, the normal outcome of his action

[11] See, for instance, *High Command* (at 118–23), *The Hostages Trial* (at 118–23), *Kurt Mayer* (at 98 and 108), *Falkenhorst* (at 18, 23, 29–30), *Hans Wickmann* (at 133). In *Tzofan and others* v. *IDF Advocate and others* (*Yehuda Meir* case), Judge D. Levin (concurring) held that 'the higher the rank of the commanding officer and the more comprehensive and more decisive his authority, the greater the responsibility incumbent upon him to examine and determine the justification and legality of the order' (at 745).

It should be noted that ordering is sometimes treated as a species of instigation, for instance ordering that no quarter be given may be regarded as the same thing as inciting troops to commit war crimes.

[12] In *Jung and Schumacher*, decided by a Canadian Military Court sitting at Aurich in Germany, the Judge Advocate, in discussing the position of the defendant Jung, who had ordered the other defendant to shoot and kill a Canadian war prisoner, noted the following: 'The Court may find that the accused uttered the words or some words to do harm to the prisoner, but it must be found that he uttered them with the expectation and intention that they should be acted upon by someone who heard them, including Schumacher. In this event he would have either incited, counselled or procured the acts to have been done, and so be concerned [in the crime]. Now, if you find that the accused Jung handed the prisoner over to Schumacher, knowing or expecting he would be killed, then again he would be concerned [in the killing of the Canadian POW]' (at 219–20).

[13] In one case a Canadian Court Martial held that the defendant was guilty of *negligence* for issuing unlawful orders (he had instructed his subordinates that prisoners 'could be abused'): see *Major A.G. Seward* (at 1079–81); on this case see also above, note 16 in Chapter 8.

Interestingly, the defendant was acquitted on another count, namely of having caused bodily harm to the Somali civilians beaten up, tortured, and killed by his subordinates. The Court Martial Appeal Court of Canada noted in this regard that by this acquittal the defendant 'must be taken to have been found neither to have intended nor to have been capable or reasonably foreseeing that any of his subordinates would mistreat unto death any Somalian [sic] prisoner' (at 1082).

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coming about. One should distinguish between two different possibilities: (i) the perpetrator takes the initial steps but is then *stopped by others*, or (ii) on account of circumstances independent of his will, his action does not produce the effects of his intention. In other words, he *performs all the necessary acts without, however, the intended result following*. An example of the first category is when a soldier starts to beat a prisoner of war savagely with the intention of killing him, and is only prevented from so doing by others who drag him off his intended victim. An example of the second category is when a soldier shoots at a prisoner of war, intending to execute him, but the intended victim is not fatally wounded and subsequently manages to escape.

Although in the case of attempt the intended harm is not caused to the victim, international law nevertheless makes attempt punishable, in order to prevent breaches of international rules as far as possible. Thus, this offence is punished in various national laws on war crimes,[14] or is regarded as a distinct offence in national case law on the same crimes.[15] Recently, customary law on the matter has been codified in Article 25(3)(f) of the ICC Statute, whereby a person is criminally responsible if he 'attempts to commit [a crime under the Court's jurisdiction] 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'.

Clearly, what is required for the attempt to be punishable, is: (i) conduct consisting of a *significant commencement of the criminal action* (to hold to the example given above, it is not sufficient for the guard to take the prisoner out of his cell and possibly even shout at, or abuse, him; it is necessary for the guard to start beating him savagely); (ii) the *clear intention to commit a crime*; (iii) *failure of that intention to take effect owing to external circumstances.*

This last ingredient of the objective element may also occur when the victim of the attempted crime is already dead (unless, of course, the agent *knew* that the victim was dead). In *Charles W. Keenan* the accused had been ordered by his superior to 'finish off' a civilian woman at whom the superior had already shot. A US Court of Military Appeal held that in the case at issue attempted murder was to be ruled out only because the subordinate knew that she was no longer alive when he fired at her (at 114).[16] To support its ruling the Court cited an important case, unrelated to war crimes, where the same Court had extensively dealt with the notion at issue: *Rodger D. Thomas*, a case of attempted rape, which had offered the Court the opportunity to

[14] See, for instance, the laws cited in UN *Law Reports*, vol. XV, at 89 (Norway, Yugoslavia, the Netherlands).

[15] See the cases reported in UN *Law Reports*, vol. VI, 120, as well as in UN *Law Reports*, vol. VII, at 73.

[16] The Court stated that 'so far as attempted murder is concerned, military law "has tended toward the advanced and modern position" that holds one accountable for conduct which would constitute a crime if the facts were as he believed them to be (see *United States* v. *Thomas* 13 USCMA 278, 286, 32 CMR 278). Here the accused expressly testified that he believed the woman was dead; and the board of review specifically refused to find that she was still alive when the accused fired at her. Moore and Eakins also testified that they believed the victim was dead before the accused fired. The board of review could, therefore, reasonably conclude that the accused knew he was firing at a corpse. This conclusion necessarily absolves him of attempted murder' (at 113).

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discuss the requisite ingredients of the offence, with a reasoning that is along the same lines as the notion propounded above for international criminal law (at 287–92).[17]

The ICC Statute codifies international customary laws in another respect as well. Article 25(3)(f) duly takes account of the cessation of the attempter's criminal intention and leaves his initial steps unpunished:

> 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.

Thus, to continue with the aforementioned example, if the guard, after beating the prisoner for a while, suddenly decides not to carry through his initial purpose and takes the prisoner back to his cell, he is not guilty of attempted murder (although he may well be guilty of other crimes). Similarly, if an officer gives an order to shoot and kill a group of innocent civilians and then, just before the order is carried out, changes his mind and orders that their lives be spared, he is not considered criminally liable for murder (although he may be guilty of inhuman treatment or even torture, if he intended to carry out a mock execution).

As for the *mens rea* required for attempt, it may be noted that in common law systems, what is required is normally the *intention* to carry out the offence (recklessness is not enough). This makes it difficult to prosecute, because the question always arises: if the accused wanted, for example to kill his victim, then why did he not do so? (This is why the only cases where prosecutions are successful are where: (i) the would-be perpetrator is dragged off his victim, or (ii) the would-be perpetrator leaves his victim for dead.) It would seem that also in international criminal law the subjective element required is intent.

9.10 CONSPIRACY TO COMMIT GENOCIDE

It is common knowledge that conspiracy is a form of criminality punished in common law systems but either unknown to, or accepted to a very limited extent by, civil law countries. Conspiracy is a group offence, consisting of the *agreement of two or more persons to commit a crime.* It is punished *even if the crime is never perpetrated.* In addition, if the crime is carried out, the perpetrators are held *liable both for conspiracy and for the substantive crime* they commit. The *mens rea* element of conspiracy required for each and every participant is twofold: (i) *knowledge* of the facts or circumstances making up the crime the group intend to commit; (ii) *intent* to carry out the conspiracy and thereby perpetrate the substantive offence. Plainly, the basic rationale behind the prohibition of this crime is the need to prevent offences,

[17] The Court held that the elements of the offence of attempted rape were: '(1) an overt act; (2) specific intent, (3) more than mere preparation, (4) tending to effect the commission of the offense, and (5) failure to effect its commission' (at 286).

especially when they involve several persons and are thus more dangerous to the community.

As noted above, in international law no customary rule has evolved on conspiracy on account of the lack of support from civil law countries for this category of crime. (In civil law systems, entering into agreement to commit a crime is not punishable per se, unless it leads to the perpetration of the crime; only exceptionally, and for such categories of serious offences as those aimed at undermining State security or at setting up associations or organizations systematically bent on criminal conduct in various areas, is conspiracy as such prohibited.)

The only international rules on conspiracy can be found in the London Agreement of 1945. In Article 6 it made punishable persons 'participating in a Common Plan or Conspiracy for the accomplishment' of any crime against peace and in addition made 'leaders, organizers, instigators or accomplices participating in the formulation or execution of a Common Plan or Conspiracy to commit any of the foregoing crimes [that is, crimes against peace, war crimes, and crimes against humanity] responsible for all acts performed by any persons in execution of such plan'. This provision laid down *ex post facto* law. However, as it referred to conspiracy to commit a crime against peace, it punished persons who had conspired to wage the war *that had just ended*. In addition, to the extent that it referred to other crimes, it also made conspiracy punishable for acts already accomplished. In other words, in the end conspiracy was held to be punishable to the extent that any plan or agreement to commit an international crime *had been actually carried out*. (Strikingly, Control Council Law no. 10 only referred to conspiracy to commit crimes against peace: see Article 2(1)(a).) Nevertheless, generally speaking, both the IMT at Nuremberg and the Military Tribunals sitting at Nuremberg took a restrictive view of conspiracy (see in particular *Göring and others* (at 224–6) and *Alstötter and others* (at 289–90). In the former case the influence of the French Judge Donnedieu de Vabres, and his insistence on the novel nature of conspiracy in international law, were indisputably decisive.[18]

Another international provision on the matter is Article 3(b) of the 1948 Genocide Convention, which, on the grounds and motivations set out above, makes 'conspiracy to commit genocide' punishable. It would seem that, like most other substantive provisions of the Convention, it has turned into customary law. Among other things it has been taken up in the Statutes of both the ICTY and the ICTR (but, strikingly, not in Article 6 of the ICC Statute, which consequently differs in this respect from international customary law).

In *Musema* an ICTR Trial Chamber held that conspiracy to commit genocide 'is to be defined as an agreement between two or more persons to commit the crime of genocide' (§191); as for *mens rea*, it 'rests on the concerted intent to commit genocide,

[18] Donnedieu de Vabres, *Procès*, 528–42. He among other things held the view that in the event Article 6 (in fine), of the Nuremberg Charter upheld the French notion of '*complicité*' (at 541). He also emphasized that, with regard to crimes against peace, the IMT ultimately avoided holding that there was a general conspiracy (at 541–2).

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that is, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. Thus . . . the requisite intent for the crime of conspiracy to commit genocide is *ipso facto* the intent required for the crime of genocide, that is the *dolus specialis* of genocide' (§192).

The Chamber also emphasized that the crime of conspiracy to commit genocide is punishable even if it fails to lead to its result, that is, even if genocide is not perpetrated (§194).

9.11 INCITEMENT TO GENOCIDE

International law requires that incitement to genocide be not only *direct* but also *public*. At the same time incitement is punishable even if it is not followed by the commission of genocide.

In *Akayesu* a Trial Chamber of the ICTR held that direct and public incitement to commit genocide:

> must be defined for the purposes of interpreting Article 2(3)(c) [of the ICTR Statute], as directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication. (§559.)

As for the subjective element of the crime, it held that:

> [it] lies in the intent to directly prompt or provoke another to commit genocide. It implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging. That is to say that the person who is inciting to commit genocide must have himself the specific intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. (§560.)

In the case at issue the Trial Chamber concluded that the accused was indeed guilty of the offence under discussion (§§672–5).

Another relevant case is *Ruggiu*, the journalist of 'Radio Mille Collines' accused by the ICTR's Prosecutor of 'direct and public incitement to commit genocide and crimes against humanity (persecution)'. He pleaded guilty. ICTR Trial Chamber I found that:

> when examining the acts of persecution which have been admitted by the accused, it is possible to discern a common element. Those acts were direct and public radio broadcasts all aimed at singling out and attacking the Tutsi ethnic group and Belgians on discriminatory grounds, by depriving them of the fundamental rights to life, liberty and basic humanity enjoyed by members of wider society. The deprivation of these rights can be said to have as its aim the death and removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself. (§22.)

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REPORT OF THE SECRETARY-GENERAL PURSUANT TO PARAGRAPH 2 OF SECURITY COUNCIL RESOLUTION 808 (1993)

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II. COMPETENCE OF THE INTERNATIONAL TRIBUNAL

31. The competence of the International Tribunal derives from the mandate set out in paragraph 1 of resolution 808 (1993). This part of the report will examine and make proposals regarding these fundamental elements of its competence: ratione materiae (subject-matter jurisdiction), ratione personae (personal jurisdiction), ratione loci (territorial jurisdiction) and ratione temporis (temporal jurisdiction), as well as the question of the concurrent jurisdiction of the International Tribunal and national courts.

32. The statute should begin with a general article on the competence of the International Tribunal which would read as follows:

Article 1

Competence of the International Tribunal

> The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

A. Competence ratione materiae (subject-matter jurisdiction)

33. According to paragraph 1 of resolution 808 (1993), the international tribunal shall prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. This body of law exists in the form of both conventional law and customary law. While there is international customary law which is not laid down in conventions, some of the major conventional humanitarian law has become part of customary international law.

34. In the view of the Secretary-General, the application of the principle nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.

35. The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; 3/ the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; 4/ the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; 5/ and the Charter of the International Military Tribunal of 8 August 1945. 6/

36. Suggestions have been made that the international tribunal should apply domestic law in so far as it incorporates customary international humanitarian

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Report of the Secretary-General on the establishment of a Special Court for Sierra Leone

I. Introduction

1. The Security Council, by its resolution 1315 (2000) of 14 August 2000, requested me to negotiate an agreement with the Government of Sierra Leone to create an independent special court (hereinafter "the Special Court") to prosecute persons who bear the greatest responsibility for the commission of crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone.

2. The Security Council further requested that I submit a report on the implementation of the resolution, in particular on my consultations and negotiations with the Government of Sierra Leone concerning the establishment of the Special Court. In the report I was requested, in particular, to address the questions of the temporal jurisdiction of the Court; an appeals process, including the advisability, feasibility and appropriateness of an appeals chamber in the Special Court, or of sharing the Appeals Chamber of the International Tribunals for the Former Yugoslavia and for Rwanda; and a possible alternative host State, should it be necessary to convene the Special Court outside the seat of the Court in Sierra Leone, if circumstances so require.

3. Specific recommendations were also requested by the Security Council on the following issues:

(a) Any additional agreements that might be required for the provision of the international assistance necessary for the establishment and functioning of the Special Court;

(b) The level of participation, support and technical assistance of qualified persons required from Member States, including, in particular, States members of the Economic Community of West African States (ECOWAS) and the Commonwealth, and from the United Nations Mission in Sierra Leone (UNAMSIL) that would be necessary for the efficient, independent and impartial functioning of the Special Court;

(c) The amount of voluntary contributions of funds, equipment and services, including expert personnel from States, intergovernmental organizations and non-governmental organizations;

(d) Whether the Special Court could receive, as necessary and feasible, expertise and advice from the International Tribunals for the Former Yugoslavia and for Rwanda.

4. The present report, submitted in response to the above requests, is in two parts. The first part (chaps. II-VI) examines and analyses the nature and specificity of the Special Court, its jurisdiction (subject-matter, temporal and personal), the organizational structure (the Chambers and the nature of the appeals process, the offices of the Prosecutor and the Registry), enforcement of sentences in third States and the choice of the alternative seat. The second part (chaps. VII and VIII) deals with the practical implementation of the resolution on the establishment of the Special Court. It describes the requirements of the Court in terms of personnel, equipment, services and funds that would be required of States, intergovernmental and non-governmental organizations, the type of advice and expertise that may be expected from the two International Tribunals, and the logistical support and

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security requirements for premises and personnel that could, under an appropriate mandate, be provided by UNAMSIL. The Court's requirements in all of these respects have been placed within the specific context of Sierra Leone, and represent the minimum necessary, in the words of resolution 1315 (2000), "for the efficient, independent and impartial functioning of the Special Court". An assessment of the viability and sustainability of the financial mechanism envisaged, together with an alternative solution for the consideration of the Security Council, concludes the second part of the report.

5. The negotiations with the Government of Sierra Leone, represented by the Attorney General and the Minister of Justice, were conducted in two stages. The first stage of the negotiations, held at United Nations Headquarters from 12 to 14 September 2000, focused on the legal framework and constitutive instruments establishing the Special Court: the Agreement between the United Nations and the Government of Sierra Leone and the Statute of the Special Court which is an integral part thereof. (For the texts of the Agreement and the Statute, see the annex to the present report.)

6. Following the Attorney General's visit to Headquarters, a small United Nations team led by Ralph Zacklin, Assistant Secretary-General for Legal Affairs, visited Freetown from 18 to 20 September 2000. Mr. Zacklin was accompanied by Daphna Shraga, Senior Legal Officer, Office of the Legal Counsel, Office of Legal Affairs; Gerald Ganz, Security Coordination Officer, Office of the United Nations Security Coordinator; and Robert Kirkwood, Chief, Buildings Management, International Tribunal for the Former Yugoslavia. During its three-day visit, the team concluded the negotiations on the remaining legal issues, assessed the adequacy of possible premises for the seat of the Special Court, their operational state and security conditions, and had substantive discussions on all aspects of the Special Court with the President of Sierra Leone, senior government officials, members of the judiciary and the legal profession, the Ombudsman, members of civil society, national and international non-governmental organizations and institutions involved in child-care programmes and rehabilitation of child ex-combatants, as well as with senior officials of UNAMSIL.

7. In its many meetings with Sierra Leoneans of all segments of society, the team was made aware of the high level of expectations created in anticipation of the establishment of a special court. If the role of the Special Court in dealing with impunity and developing respect for the rule of law in Sierra Leone is to be fully understood and its educative message conveyed to Sierra Leoneans of all ages, a broad public information and education campaign will have to be undertaken as an integral part of the Court's activities. The purpose of such a campaign would be both to inform and to reassure the population that while a credible Special Court cannot be established overnight, everything possible will be done to expedite its functioning; that while the number of persons prosecuted before the Special Court will be limited, it would not be selective or otherwise discriminatory; and that although the children of Sierra Leone may be among those who have committed the worst crimes, they are to be regarded first and foremost as victims. For a nation which has attested to atrocities that only few societies have witnessed, it will require a great deal of persuasion to convince it that the exclusion of the death penalty and its replacement by imprisonment is not an "acquittal" of the accused, but an imposition of a more humane punishment. In this public information campaign, UNAMSIL, alongside the Government and non-governmental organizations, could play an important role.

8. Since the present report is limited to an analysis of the legal framework and the practical operation of the Special Court, it does not address in detail specifics of the relationship between the Special Court and the national courts in Sierra Leone, or between the Court and the National Truth and Reconciliation Commission. It is envisaged, however, that upon the establishment of the Special Court and the appointment of its Prosecutor, arrangements regarding cooperation, assistance and sharing of information between the respective courts would be concluded and the status of detainees awaiting trial would be urgently reviewed. In a similar vein, relationship and cooperation arrangements would be required between the Prosecutor and the National Truth and Reconciliation Commission, including the use of the Commission as an alternative to prosecution, and the prosecution of juveniles, in particular.

II. Nature and specificity of the Special Court

9. The legal nature of the Special Court, like that of any other legal entity, is determined by its constitutive instrument. Unlike either the International Tribunals for the Former Yugoslavia and for Rwanda, which were established by resolutions of the Security Council and constituted as subsidiary organs of the United Nations, or national courts established by law, the Special Court, as foreseen, is established by an Agreement between the United Nations and the Government of Sierra Leone and is therefore a treaty-based sui generis court of mixed jurisdiction and composition. Its implementation at the national level would require that the agreement is incorporated in the national law of Sierra Leone in accordance with constitutional requirements. Its applicable law includes international as well as Sierra Leonean law, and it is composed of both international and Sierra Leonean judges,[1] prosecutors and administrative support staff.[2] As a treaty-based organ, the Special Court is not anchored in any existing system (i.e., United Nations administrative law or the national law of the State of the seat) which would be automatically applicable to its non-judicial, administrative and financial activities. In the absence of such a framework, it would be necessary to identify rules for various purposes, such as recruitment, staff administration, procurement, etc., to be applied as the need arose.[3]

10. The Special Court has concurrent jurisdiction with and primacy over Sierra Leonean courts. Consequently, it has the power to request at any stage of the proceedings that any national Sierra Leonean court defer to its jurisdiction (article 8, para. 2 of the Statute). The primacy of the Special Court, however, is limited to the national courts of Sierra Leone and does not extend to the courts of third States. Lacking the power to assert its primacy over national courts in third States in connection with the crimes committed in Sierra Leone, it also lacks the power to request the surrender of an accused from any third State and to induce the compliance of its authorities with any such request. In examining measures to enhance the deterrent powers of the Special Court, the Security Council may wish to consider endowing it with Chapter VII powers for the specific purpose of requesting the surrender of an accused from outside the jurisdiction of the Court.

11. Beyond its legal and technical aspects, which in many ways resemble those of other international jurisdictions, the Special Court is Sierra Leone-specific. Many of the legal choices made are intended to address the specificities of the Sierra Leonean conflict, the brutality of the crimes committed and the young age of those presumed responsible. The moral dilemma that some of these choices represent has not been lost upon those who negotiated its constitutive instruments.

III. Competence of the Special Court

A. Subject-matter jurisdiction

12. The subject-matter jurisdiction of the Special Court comprises crimes under international humanitarian law and Sierra Leonean law. It covers the most egregious practices of mass killing, extrajudicial executions, widespread mutilation, in particular amputation of hands, arms, legs, lips and other parts of the body, sexual violence against girls and women, and sexual slavery, abduction of thousands of children and adults, hard labour and forced recruitment into armed groups, looting and setting fire to large urban dwellings and villages. In recognition of the principle of legality, in particular *nullum crimen sine lege*, and the prohibition on retroactive criminal legislation, the international crimes enumerated, are crimes considered to have had the character of customary international law at the time of the alleged commission of the crime.

1. Crimes under international law

13. In its resolution 1315 (2000), the Security Council recommended that the subject-matter jurisdiction of the Special Court should include crimes against humanity, war crimes and other serious violations of international humanitarian law. Because of the lack of any evidence that the massive, large-scale killing in Sierra Leone was at any time perpetrated against an identified national, ethnic, racial or religious group with an intent to annihilate the group as such, the Security Council did not include the crime of genocide in its recommendation, nor was it considered appropriate by the Secretary-General to include it in the list of international crimes falling within the jurisdiction of the Court.

14. The list of crimes against humanity follows the enumeration included in the Statutes of the International Tribunals for the Former Yugoslavia and for Rwanda, which were patterned on article 6 of the Nürnberg Charter. Violations of common article 3 of the Geneva Conventions and of article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law, and in particular since the establishment of the two International Tribunals, have been recognized as customarily entailing the individual criminal responsibility of the accused. Under the Statute of the International Criminal Court (ICC), though it is not yet in force, they are recognized as war crimes.

15. Other serious violations of international humanitarian law falling within the jurisdiction of the Court include:

(a) Attacks against the civilian population as such, or against individual civilians not taking direct part in hostilities;

(b) Attacks against peacekeeping personnel involved in a humanitarian assistance or a peacekeeping mission, as long as they are entitled to the protection given to civilians under the international law of armed conflict; and

(c) Abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities.

16. The prohibition on attacks against civilians is based on the most fundamental distinction drawn in international humanitarian law between the civilian and the military and the absolute prohibition on directing attacks against the former. Its customary international law nature is, therefore, firmly established. Attacks against peacekeeping personnel, to the extent that they are entitled to protection recognized under international law to civilians in armed conflict, do not represent a new crime. Although established for the first time as an international crime in the Statute of the International Criminal Court, it was not viewed at the time of the adoption of the Rome Statute as adding to the already existing customary international law crime of attacks against civilians and persons hors de combat. Based on the distinction between peacekeepers as civilians and peacekeepers turned combatants, the crime defined in article 4 of the Statute of the Special Court is a specification of a targeted group within the generally protected group of civilians which because of its humanitarian or peacekeeping mission deserves special protection. The specification of the crime of attacks against peacekeepers, however, does not imply a more serious crime than attacks against civilians in similar circumstances and should not entail, therefore, a heavier penalty.

17. The prohibition on the recruitment of children below the age of 15, a fundamental element of the protection of children, was for the first time established in the 1977 Additional Protocol II to the Geneva Conventions, article 4, paragraph 3 (c), of which provides that children shall be provided with the care and aid they require, and that in particular:

> "Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities".

A decade later, the prohibition on the recruitment of children below 15 into armed forces was established in article 38, paragraph 3, of the 1989 Convention on the Rights of the Child; and in 1998, the Statute of the International Criminal Court criminalized the prohibition and qualified it as a war crime. But while the prohibition on child recruitment has by now acquired a customary international law status, it is far less clear whether it is customarily recognized as a war crime entailing the individual criminal responsibility of the accused.

18. Owing to the doubtful customary nature of the ICC Statutory crime which criminalizes the conscription or enlistment of children under the age of 15, whether forced or "voluntary", the crime which is included in article 4 (c) of the Statute of the Special Court is not the equivalent of the ICC provision. While the definition of the crime as "conscripting" or "enlisting" connotes an administrative act of putting one's name on a list and formal entry into the armed forces, the elements of the crime under the proposed Statute of the Special Court are: (a) abduction, which in the case of the children of Sierra Leone was the original crime and is in itself a crime under common article 3 of the Geneva Conventions; (b) forced recruitment in the most general sense — administrative formalities, obviously, notwithstanding; and (c) transformation of the child into, and its use as, among other degrading uses, a "child-combatant".

2. Crimes under Sierra Leonean law

19. The Security Council recommended that the subject-matter jurisdiction of the Special Court should also include crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone. While most of the crimes committed in the Sierra Leonean conflict during the relevant period are governed by the international law provisions set out in articles 2 to 4 of the Statute, recourse to Sierra Leonean law has been had in cases where a specific situation or an aspect of it was considered to be either unregulated or inadequately regulated under international law. The crimes considered to be relevant for this purpose and included in the Statute are: offences relating to the abuse of girls under the 1926 Prevention of Cruelty to Children Act and offences relating to the wanton destruction of property, and in particular arson, under the 1861 Malicious Damage Act.

20. The applicability of two systems of law implies that the elements of the crimes are governed by the respective international or national law, and that the Rules of Evidence differ according to the nature of the crime as a common or international crime. In that connection, article 14 of the Statute provides that the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda shall be applicable mutatis mutandis to proceedings before the Special Court, and that the judges shall have the power to amend or adopt additional rules, where a specific situation is not provided for. In so doing, they may be guided, as appropriate, by the 1965 Criminal Procedure Act of Sierra Leone.

B. Temporal jurisdiction of the Special Court

21. In addressing the question of the temporal jurisdiction of the Special Court as requested by the Security Council, a determination of the validity of the sweeping amnesty granted under the Lomé Peace Agreement of 7 July 1999 was first required. If valid, it would limit the temporal jurisdiction of the Court to offences committed after 7 July 1999; if invalid, it would make possible a determination of a beginning date of the temporal jurisdiction of the Court at any time in the pre-Lomé period.

1. The amnesty clause in the Lomé Peace Agreement

22. While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict,[4] the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.

23. At the time of the signature of the Lomé Peace Agreement, the Special Representative of the Secretary-General for Sierra Leone was instructed to append to his signature on behalf of the United Nations a disclaimer to the effect that the amnesty provision contained in article IX of the Agreement ("absolute and free pardon") shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. This reservation is recalled by the Security Council in a preambular paragraph of resolution 1315 (2000).

24. In the negotiations on the Statute of the Special Court, the Government of Sierra Leone concurred with the position of the United Nations and agreed to the inclusion of an amnesty clause which would read as follows:

> "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."

With the denial of legal effect to the amnesty granted at Lomé, to the extent of its illegality under international law, the obstacle to the determination of a beginning date of the temporal jurisdiction of the Court within the pre-Lomé period has been removed.

2. Beginning date of the temporal jurisdiction

25. It is generally accepted that the decade-long civil war in Sierra Leone dates back to 1991, when on 23 March of that year forces of the Revolutionary United Front (RUF) entered Sierra Leone from Liberia and launched a rebellion to overthrow the one-party military rule of the All People's Congress (APC). In determining a beginning date of the temporal jurisdiction of the Special Court within the period since

23 March 1991, the Secretary-General has been guided by the following considerations: (a) the temporal jurisdiction should be reasonably limited in time so that the Prosecutor is not overburdened and the Court overloaded; (b) the beginning date should correspond to an event or a new phase in the conflict without necessarily having any political connotations; and (c) it should encompass the most serious crimes committed by persons of all political and military groups and in all geographical areas of the country. A temporal jurisdiction limited in any of these respects would rightly be perceived as a selective or discriminatory justice.

26. Imposing a temporal jurisdiction on the Special Court reaching back to 1991 would create a heavy burden for the prosecution and the Court. The following alternative dates were therefore considered as realistic options:

(a) *30 November 1996* — the conclusion of the Abidjan Peace Agreement, the first comprehensive Peace Agreement between the Government of Sierra Leone and RUF. Soon after its signature the Peace Agreement had collapsed and large-scale hostilities had resumed;

(b) *25 May 1997* — the date of the coup d'état orchestrated by the Armed Forces Revolutionary Council (AFRC) against the Government that was democratically elected in early 1996. The period which ensued was characterized by serious violations of international humanitarian law, including, in particular, mass rape and abduction of women, forced recruitment of children and summary executions;

(c) *6 January 1999* — the date on which RUF/AFRC launched a military operation to take control of Freetown. The first three-week period of full control by these entities over Freetown marked the most intensified, systematic and widespread violations of human rights and international humanitarian law against the civilian population. During its retreat in February 1999, RUF abducted hundreds of young people, particularly young women used as forced labourers, fighting forces, human shields and sexual slaves.

27. In considering the three options for the beginning date of the temporal jurisdiction of the Court, the parties have concluded that the choice of 30 November 1996 would have the benefit of putting the Sierra Leone conflict in perspective without unnecessarily extending the temporal jurisdiction of the Special Court. It would also ensure that the most serious crimes committed by all parties and armed groups would be encompassed within its jurisdiction. The choice of 25 May 1997 would have all these advantages, with the disadvantage of having a political connotation, implying, wrongly, that the prosecution of those responsible for the most serious violations of international humanitarian law is aimed at punishment for their participation in the coup d'état. The last option marks in many ways the peak of the campaign of systematic and widespread crimes against the civilian population, as experienced mostly by the inhabitants of Freetown. If the temporal jurisdiction of the Court were to be limited to that period only, it would exclude all crimes committed before that period in the rural areas and the countryside. In view of the perceived advantages of the first option and the disadvantages associated with the other options, the date of 30 November 1996 was selected as the beginning date of the temporal jurisdiction of the Special Court, a decision in which the government negotiators have actively concurred.

28. As the armed conflict in various parts of the territory of Sierra Leone is still ongoing, it was decided that the temporal jurisdiction of the Special Court should be left open-ended. The lifespan of the Special Court, however, as distinguished from its temporal jurisdiction, will be determined by a subsequent agreement between the parties upon the completion of its judicial activities, an indication of the capacity acquired by the local courts to assume the prosecution of the remaining cases, or the unavailability of resources. In setting an end to the operation of the Court, the Agreement would also determine all matters relating to enforcement of sentences, pardon or commutation, transfer of pending cases to the local courts and the disposition of the financial and other assets of the Special Court.

C. Personal jurisdiction

1. Persons "most responsible"

29. In its resolution 1315 (2000), the Security Council recommended that the personal jurisdiction of the Special Court should extend to those "who bear the greatest responsibility for the commission of the crimes", which is understood as an indication of a limitation on the number of accused by reference to

their command authority and the gravity and scale of the crime. I propose, however, that the more general term "persons most responsible" should be used.

30. While those "most responsible" obviously include the political or military leadership, others in command authority down the chain of command may also be regarded "most responsible" judging by the severity of the crime or its massive scale. "Most responsible", therefore, denotes both a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime. It must be seen, however, not as a test criterion or a distinct jurisdictional threshold, but as a guidance to the Prosecutor in the adoption of a prosecution strategy and in making decisions to prosecute in individual cases.

31. Within the meaning attributed to it in the present Statute, the term "most responsible" would not necessarily exclude children between 15 and 18 years of age. While it is inconceivable that children could be in a political or military leadership position (although in Sierra Leone the rank of "Brigadier" was often granted to children as young as 11 years), the gravity and seriousness of the crimes they have allegedly committed would allow for their inclusion within the jurisdiction of the Court.

2. Individual criminal responsibility at 15 years of age

32. The possible prosecution of children for crimes against humanity and war crimes presents a difficult moral dilemma. More than in any other conflict where children have been used as combatants, in Sierra Leone, child combatants were initially abducted, forcibly recruited, sexually abused, reduced to slavery of all kinds and trained, often under the influence of drugs, to kill, maim and burn. Though feared by many for their brutality, most if not all of these children have been subjected to a process of psychological and physical abuse and duress which has transformed them from victims into perpetrators.

33. The solution to this terrible dilemma with respect to the Special Court[5] could be found in a number of options: (a) determining a minimum age of 18 and exempting all persons under that age from accountability and individual criminal responsibility; (b) having children between 15 to 18 years of age, both victims and perpetrators, recount their story before the Truth and Reconciliation Commission or similar mechanisms, none of which is as yet functional; and (c) having them go through the judicial process of accountability without punishment, in a court of law providing all internationally recognized guarantees of juvenile justice.

34. The question of child prosecution was discussed at length with the Government of Sierra Leone both in New York and in Freetown. It was raised with all the interlocutors of the United Nations team: the members of the judiciary, members of the legal profession and the Ombudsman, and was vigorously debated with members of civil society, non-governmental organizations and institutions actively engaged in child-care and rehabilitation programmes.

35. The Government of Sierra Leone and representatives of Sierra Leone civil society clearly wish to see a process of judicial accountability for child combatants presumed responsible for the crimes falling within the jurisdiction of the Court. It was said that the people of Sierra Leone would not look kindly upon a court which failed to bring to justice children who committed crimes of that nature and spared them the judicial process of accountability. The international non-governmental organizations responsible for child-care and rehabilitation programmes, together with some of their national counterparts, however, were unanimous in their objection to any kind of judicial accountability for children below 18 years of age for fear that such a process would place at risk the entire rehabilitation programme so painstakingly achieved. While the extent to which this view represents the majority view of the people of Sierra Leone is debatable, it nevertheless underscores the importance of the child rehabilitation programme and the need to ensure that in the prosecution of children presumed responsible, the rehabilitation process of scores of other children is not endangered.

36. Given these highly diverging opinions, it is not easy to strike a balance between the interests at stake. I am mindful of the Security Council's recommendation that only those who bear "the greatest responsibility" should be prosecuted. However, in view of the most horrific aspects of the child combatancy in Sierra Leone, the employment of this term would not necessarily exclude persons of young age from the jurisdiction of the Court. I therefore thought that it would be most prudent to demonstrate to the Security Council for its consideration how provisions on

prosecution of persons below the age of 18 — "children" within the definition of the Convention on the Rights of the Child — before an international jurisdiction could be formulated.[6] Therefore, in order to meet the concerns expressed by, in particular, those responsible for child care and rehabilitation programmes, article 15, paragraph 5, of the Statute contains the following provision:

> "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."

37. Furthermore, the Statute of the Special Court, in article 7 and throughout the text, contains internationally recognized standards of juvenile justice and guarantees that juvenile offenders are treated in dignity and with a sense of worth. Accordingly, the overall composition of the judges should reflect their experiences in a variety of fields, including in juvenile justice (article 13, para. 1); the Office of the Prosecutor should be staffed with persons experienced in gender-related crimes and juvenile justice (article 15, para. 4). In a trial of a juvenile offender, the Special Court should, to the extent possible, order the immediate release of the accused, constitute a "Juvenile Chamber", order the separation of the trial of a juvenile from that of an adult, and provide all legal and other assistance and order protective measures to ensure the privacy of the juvenile. The penalty of imprisonment is excluded in the case of a juvenile offender, and a number of alternative options of correctional or educational nature are provided for instead.

38. Consequently, if the Council, also weighing in the moral-educational message to the present and next generation of children in Sierra Leone, comes to the conclusion that persons under the age of 18 should be eligible for prosecution, the statutory provisions elaborated will strike an appropriate balance between all conflicting interests and provide the necessary guarantees of juvenile justice. It should also be stressed that, ultimately, it will be for the Prosecutor to decide if, all things considered, action should be taken against a juvenile offender in any individual case.

IV. Organizational structure of the Special Court

39. Organizationally, the Special Court has been conceived as a self-contained entity, consisting of three organs: the Chambers (two Trial Chambers and an Appeals Chamber), the Prosecutor's Office and the Registry. In the establishment of ad hoc international tribunals or special courts operating as separate institutions, independently of the relevant national legal system, it has proved to be necessary to comprise within one and the same entity all three organs. Like the two International Tribunals, the Special Court for Sierra Leone is established outside the national court system, and the inclusion of the Appeals Chamber within the same Court was thus the obvious choice.

A. The Chambers

40. In its resolution 1315 (2000), the Security Council requested that the question of the advisability, feasibility and appropriateness of sharing the Appeals Chamber of the International Tribunals for the Former Yugoslavia and for Rwanda should be addressed. In analysing this option from the legal and practical viewpoints, I have concluded that the sharing of a single Appeals Chamber between jurisdictions as diverse as the two International Tribunals and the Special Court for Sierra Leone is legally unsound and practically not feasible, without incurring unacceptably high administrative and financial costs.

41. While in theory the establishment of an overarching Appeals Chamber as the ultimate judicial authority in matters of interpretation and application of international humanitarian law offers a guarantee of developing a coherent body of law, in practice, the same result may be achieved by linking the jurisprudence of the Special Court to that of the International Tribunals, without imposing on the shared Appeals Chamber the financial and administrative constraints of a formal institutional link. Article 20, paragraph 3, of the Statute accordingly provides that the judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the Yugoslav and the Rwanda Tribunals; article 14, paragraph 1, of the Statute provides that the Rules of Procedure and Evidence of the Rwanda Tribunal shall be applicable mutatis mutandis to the proceedings before the Special Court.

42. The sharing of one Appeals chamber between all three jurisdictions would strain the capacity of the already heavily burdened Appeals Chamber of the two Tribunals in ways which could either bring about the collapse of the appeals system as a whole, or delay beyond acceptable human rights standards the detention of accused pending the hearing of appeals from either or all jurisdictions. On the assumption that all judgements and sentencing decisions of the Trial Chambers of the Special Court will be appealed, as they have been in the cases of the two International Tribunals, and that the number of accused will be roughly the same as in each of the International Tribunals, the Appeals Chamber would be required to add to its current workload a gradual increase of approximately one third.

43. Faced with an exponential growth in the number of appeals lodged on judgements and interlocutory appeals in relation to an increasing number of accused and decisions rendered, the existing workload of the Appeals Chamber sitting in appeals from six Trial Chambers of the two ad hoc Tribunals is constantly growing. Based on current and anticipated growth in workload, existing trends[7] and the projected pace of three to six appeals on judgements every year, the Appeals Chamber has requested additional resources in funds and personnel. With the addition of two Trial Chambers of the Special Court, making a total of eight Trial Chambers for one Appeals Chamber, the burden on the Yugoslav and Rwanda Appeals Chamber would be untenable, and the Special Court would be deprived of an effective and viable appeals process.

44. The financial costs which would be entailed for the Appeals Chamber when sitting on appeals from the Special Court will have to be borne by the regular budget, regardless of the financial mechanism established for the Special Court itself. These financial costs would include also costs of translation into French, which is one of the working languages of the Appeals Chamber of the International Tribunals; the working language of the Special Court will be English.

45. In his letter to the Legal Counsel in response to the request for comments on the eventuality of sharing the Appeals Chamber of the two international Tribunals with the Special Court, the President of the International Tribunal for the Former Yugoslavia wrote:

> "With regard to paragraph 7 of Security Council resolution 1315 (2000), while the sharing of the Appeals Chamber of [the two International Tribunals] with that of the Special Court would bear the significant advantage of ensuring a better standardization of international humanitarian law, it appeared that the disadvantages of this option — excessive increase of the Appeals Chambers' workload, problems arising from the mixing of sources of law, problems caused by the increase in travelling by the judges of the Appeals Chambers and difficulties caused by mixing the different judges of the three tribunals — outweigh its benefits."[8]

46. For these reasons, the parties came to the conclusion that the Special Court should have two Trial Chambers, each with three judges, and an Appeals Chamber with five judges. Article 12, paragraph 4, provides for extra judges to sit on the bench in cases where protracted proceedings can be foreseen and it is necessary to make certain that the proceedings do not have to be discontinued in case one of the ordinary judges is unable to continue hearing the case.

B. The Prosecutor

47. An international prosecutor will be appointed by the Secretary-General to lead the investigations and prosecutions, with a Sierra Leonean Deputy. The appointment of an international prosecutor will guarantee that the Prosecutor is, and is seen to be, independent, objective and impartial.

C. The Registrar

48. The Registrar will service the Chambers and the Office of the Prosecutor and will have the responsibility for the financial management and external relations of the Court. The Registrar will be appointed by the Secretary-General as a staff member of the United Nations.

V. Enforcement of sentences

49. The possibility of serving prison sentences in third States is provided for in article 22 of the Statute. While imprisonment shall normally be served in Sierra Leone, particular circumstances, such as the security

risk entailed in the continued imprisonment of some of the convicted persons on Sierra Leonean territory, may require their relocation to a third State.

50. Enforcement of sentences in third countries will be based on an agreement between the Special Court[9] and the State of enforcement. In seeking indications of the willingness of States to accept convicted persons, priority should be given to those which have already concluded similar agreements with either of the International Tribunals, as an indication that their prison facilities meet the minimum standards of conditions of detention. Although an agreement for the enforcement of sentences will be concluded between the Court and the State of enforcement, the wishes of the Government of Sierra Leone should be respected. In that connection, preference was expressed for such locations to be identified in an East African State.

VI. An alternative host country

51. In paragraph 7 of resolution 1315 (2000), the Security Council requested that the question of a possible alternative host State be addressed, should it be necessary to convene the Special Court outside its seat in Sierra Leone, if circumstances so required. As the efforts of the United Nations Secretariat, the Government of Sierra Leone and other interested Member States are currently focused on the establishment of the Special Court in Sierra Leone, it is proposed that the question of the alternative seat should be addressed in phases. An important element in proceeding with this issue is also the way in which the Security Council addresses the present report, that is, if a Chapter VII element is included.

52. In the first phase, criteria for the choice of the alternative seat should be determined and a range of potential host countries identified. An agreement, in principle, should be sought both from the Government of Sierra Leone for the transfer of the Special Court to the State of the alternative seat, and from the authorities of the latter, for the relocation of the seat to its territory.

53. In the second phase, a technical assessment team would be sent to identify adequate premises in the third State or States. Once identified, the three parties, namely, the United Nations, the Government of Sierra Leone and the Government of the alternative seat, would conclude a Framework Agreement, or "an agreement to agree" for the transfer of the seat when circumstances so required. The Agreement would stipulate the nature of the circumstances which would require the transfer of the seat and an undertaking to conclude in such an eventuality a Headquarters Agreement. Such a principled Agreement would facilitate the transfer of the seat on an emergency basis and enable the conclusion of a Headquarters Agreement soon thereafter.

54. In the choice of an alternative seat for the Special Court, the following considerations should be taken into account: the proximity to the place where the crimes were committed, and easy access to victims, witnesses and accused. Such proximity and easy access will greatly facilitate the work of the Prosecutor, who will continue to conduct his investigations in the territory of Sierra Leone.[10] During the negotiations, the Government expressed a preference for a West African alternative seat, in an English-speaking country sharing a common-law legal system.

VII. Practical arrangements for the operation of the Special Court

55. The Agreement and the Statute of the Special Court establish the legal and institutional framework of the Court and the mutual obligations of the parties with regard, in particular, to appointments to the Chambers, the Office of the Prosecutor and the Registry and, the provision of premises. However, the practical arrangements for the establishment and operation of the Special Court remain outside the scope of the Agreement in the sense that they depend on contributions of personnel, equipment, services and funds from Member States and intergovernmental and non-governmental organizations. It is somewhat anomalous, therefore, that the parties which establish the Special Court, in practice, are dependent for the implementation of their treaty obligations on States and international organizations which are not parties to the Agreement or otherwise bound by its provisions.

56. Proceeding from the premise that voluntary contributions would constitute the financial mechanism of the Special Court, the Security Council requested the Secretary-General to include in the report recommendations regarding the amount of voluntary contributions, as appropriate, of funds, equipment and services to the Special Court, contributions in

personnel, the kind of advice and expertise expected of the two ad hoc Tribunals, and the type of support and technical assistance to be provided by UNAMSIL. In considering the estimated requirements of the Special Court in all of these respects, it must be borne in mind that at the current stage, the Government of Sierra Leone is unable to contribute in any significant way to the operational costs of the Special Court, other than in the provision of premises, which would require substantial refurbishment, and the appointment of personnel, some of whom may not even be Sierra Leonean nationals. The requirements set out below should therefore be understood for all practical purposes as requirements that have to be met through contributions from sources other than the Government of Sierra Leone.

A. Estimated requirements of the Special Court for the first operational phase

1. Personnel and equipment

57. The personnel requirements of the Special Court for the initial operational phase[11] are estimated to include:

(a) Eight Trial Chamber judges (3 sitting judges and 1 alternate judge in each Chamber) and 6 Appeals Chamber judges (5 sitting judges and 1 alternate judge), 1 law clerk, 2 support staff for each Chamber and 1 security guard detailed to each judge (14);

(b) A Prosecutor and a Deputy Prosecutor, 20 investigators, 20 prosecutors and 26 support staff;

(c) A Registrar, a Deputy Registrar, 27 administrative support staff and 40 security officers;

(d) Four staff in the Victims and Witnesses Unit;

(e) One correction officer and 12 security officers in the detention facilities.

58. Based on the United Nations scale of salaries for a one-year period, the personnel requirements along with the corresponding equipment and vehicles are estimated on a very preliminary basis to be US$ 22 million. The calculation of the personnel requirements is premised on the assumption that all persons appointed (whether by the United Nations or the Government of Sierra Leone) will be paid from United Nations sources.

59. In seeking qualified personnel from States Members of the United Nations, the importance of obtaining such personnel from members of the Commonwealth, sharing the same language and common-law legal system, has been recognized. The Office of Legal Affairs has therefore approached the Commonwealth Secretariat with a request to identify possible candidates for the positions of judges, prosecutors, Registrar, investigators and administrative support staff. How many of the Commonwealth countries would be in a position to voluntarily contribute such personnel with their salaries and emoluments is an open question. A request similar to that which has been made to the Commonwealth will also be made to the Economic Community of West African States (ECOWAS).

2. Premises

60. The second most significant component of the requirements of the Court for the first operational phase is the cost of premises. During its visit to Freetown, the United Nations team visited a number of facilities and buildings which the Government believes may accommodate the Special Court and its detention facilities: the High Court of Sierra Leone, the Miatta Conference Centre and an adjacent hotel, the Presidential Lodge, the Central Prison (Pademba Road Prison), and the New England Prison. In evaluating their state of operation, the team concluded that none of the facilities offered were suitable or could be made operational without substantial investment. The use of the existing High Court would incur the least expenditure (estimated at $1.5 million); but would considerably disrupt the ordinary schedule of the Court and eventually bring it to a halt. Since it is located in central Freetown, the use of the High Court would pose, in addition, serious security risks. The use of the Conference Centre, the most secure site visited, would require large-scale renovation, estimated at $5.8 million. The Presidential Lodge was ruled out on security grounds.

61. In the light of the above, the team has considered the option of constructing a prefabricated, self-contained compound on government land. This option would have the advantage of an easy expansion paced with the growth of the Special Court, a salvage value at the completion of the activities of the Court, the prospect of a donation in kind and construction at no

rental costs. The estimated cost of this option is $2.9 million.

62. The two detention facilities visited by the team were found to be inadequate in their current state. The Central Prison (Pademba Road Prison) was ruled out for lack of space and security reasons. The New England Prison would be a possible option at an estimated renovation cost of $600,000.

63. The estimated cost requirements of personnel and premises set out in the present report cover the two most significant components of its prospective budget for the first operational stage. Not included in the present report are the general operational costs of the Special Court and of the detention facilities; costs of prosecutorial and investigative activities; conference services, including the employment of court translators from and into English, Krio and other tribal languages; and defence counsel, to name but a few.

B. Expertise and advice from the two International Tribunals

64. The kind of advice and expertise which the two International Tribunals may be expected to share with the Special Court for Sierra Leone could take the form of any or all of the following: consultations among judges of both jurisdictions on matters of mutual interest; training of prosecutors, investigators and administrative support staff of the Special Court in The Hague, Kigali and Arusha, and training of such personnel on the spot by a team of prosecutors, investigators and administrators from both Tribunals; advice on the requirements for a Court library and assistance in its establishment, and sharing of information, documents, judgements and other relevant legal material on a continuous basis.

65. Both International Tribunals have expressed willingness to share their experience in all of these respects with the Special Court. They have accordingly offered to convene regular meetings with the judges of the Special Court to assist in adopting and formulating Rules of Procedure based on experience acquired in the practice of both Tribunals; to train personnel of the Special Court in The Hague and Arusha to enable them to acquire practical knowledge of the operation of an international tribunal; and when necessary, to temporarily deploy experienced staff, including a librarian, to the Special Court. In addition, the International Tribunal for the Former Yugoslavia has offered to provide to the Special Court legal material in the form of CD-ROMs containing motions, decisions, judgements, court orders and the like. The transmission of such material to the Special Court in the period pending the establishment of a full-fledged library would be of great assistance.

C. Support and technical assistance from UNAMSIL

66. The support and technical assistance of UNAMSIL in providing security, logistics, administrative support and temporary accommodation would be necessary in the first operational phase of the Special Court. In the precarious security situation now prevailing in Sierra Leone and given the state of the national security forces, UNAMSIL represents the only credible force capable of providing adequate security to the personnel and the premises of the Special Court. The specificities of the security measures required would have to be elaborated by the United Nations, the Government of Sierra Leone and UNAMSIL, it being understood, however, that any such additional tasks entrusted to UNAMSIL would have to be approved by the Security Council and reflected in a revised mandate with a commensurate increase in financial, staff and other resources.

67. UNAMSIL's administrative support could be provided in the areas of finance, personnel and procurement. Utilizing the existing administrative support in UNAMSIL, including, when feasible, shared facilities and communication systems, would greatly facilitate the start-up phase of the Special Court and reduce the overall resource requirements. In that connection, limited space at the headquarters of UNAMSIL could be made available for the temporary accommodation of the Office of the Prosecutor, pending the establishment or refurbishment of a site for the duration of the Special Court.

VIII. Financial mechanism of the Special Court

68. In paragraph 8 (c) of resolution 1315 (2000), the Security Council requested the Secretary-General to include recommendations on "the amount of voluntary contributions, as appropriate, of funds, equipment and

services to the special court, including through the offer of expert personnel that may be needed from States, intergovernmental organizations and non-governmental organizations". It would thus seem that the intention of the Council is that a Special Court for Sierra Leone would be financed from voluntary contributions. Implicit in the Security Council resolution, therefore, given the paucity of resources available to the Government of Sierra Leone, was the intention that most if not all operational costs of the Special Court would be borne by States Members of the Organization in the form of voluntary contributions.

69. The experience gained in the operation of the two ad hoc International Tribunals provides an indication of the scope, costs and long-term duration of the judicial activities of an international jurisdiction of this kind. While the Special Court differs from the two Tribunals in its nature and legal status, the similarity in the kind of crimes committed, the temporal, territorial and personal scope of jurisdiction, the number of accused, the organizational structure of the Court and the Rules of Procedure and Evidence suggest a similar scope and duration of operation and a similar need for a viable and sustainable financial mechanism.

70. A financial mechanism based entirely on voluntary contributions will not provide the assured and continuous source of funding which would be required to appoint the judges, the Prosecutor and the Registrar, to contract the services of all administrative and support staff and to purchase the necessary equipment. The risks associated with the establishment of an operation of this kind with insufficient funds, or without long-term assurances of continuous availability of funds, are very high, in terms of both moral responsibility and loss of credibility of the Organization, and its exposure to legal liability. In entering into contractual commitments which the Special Court and, vicariously, the Organization might not be able to honour, the United Nations would expose itself to unlimited third-party liability. A special court based on voluntary contributions would be neither viable nor sustainable.

71. In my view, the only realistic solution is financing through assessed contributions. This would produce a viable and sustainable financial mechanism affording secure and continuous funding. It is understood, however, that the financing of the Special Court through assessed contributions of the Member States would for all practical purposes transform a treaty-based court into a United Nations organ governed in its financial and administrative activities by the relevant United Nations financial and staff regulations and rules.

72. The Security Council may wish to consider an alternative solution, based on the concept of a "national jurisdiction" with international assistance, which would rely on the existing — however inadequate — Sierra Leonean court system, both in terms of premises (for the Court and the detention facilities) and administrative support. The judges, prosecutors, investigators and administrative support staff would be contributed by interested States. The legal basis for the special "national" court would be a national law, patterned on the Statute as agreed between the United Nations and the Government of Sierra Leone (the international crimes being automatically incorporated into the Sierra Leonean common-law system). Since the mandate of the Secretary-General is to recommend measures consistent with resolution 1315 (2000), the present report does not elaborate further on this alternative other than to merely note its existence.

IX. Conclusion

73. At the request of the Security Council, the present report sets out the legal framework and practical arrangements for the establishment of a Special Court for Sierra Leone. It describes the requirements of the Special Court in terms of funds, personnel and services and underscores the acute need for a viable financial mechanism to sustain it for the duration of its lifespan. It concludes that assessed contributions is the only viable and sustainable financial mechanism of the Special Court.

74. As the Security Council itself has recognized, in the past circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace in that country. In reviewing the present report and considering what further action must be taken, the Council should bear in mind the expectations that have been created and the state of urgency that permeates all discussions of the problem of impunity in Sierra Leone.

Notes

[1] At the request of the Government, reference in the Statute and the Agreement to "Sierra Leonean judges" was replaced by "judges appointed by the Government of Sierra Leone". This would allow the Government flexibility of choice between Sierra Leonean and non-Sierra Leonean nationals and broaden the range of potential candidates from within and outside Sierra Leone.

[2] In the case of the Tribunals for the Former Yugoslavia and for Rwanda, the non-inclusion in any position of nationals of the country most directly affected was considered a condition for the impartiality, objectivity and neutrality of the Tribunal.

[3] This method may not be advisable, since the Court would be manned by a substantial number of staff and financed through voluntary contributions in the amount of millions of dollars every year.

[4] Article 6, paragraph 5, of the 1977 Protocol II Additional to the Geneva Conventions and Relating to the Protection of Non-international Armed Conflicts provides that:

> "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."

[5] The jurisdiction of the national courts of Sierra Leone is not limited by the Statute, except in cases where they have to defer to the Special Court.

[6] While there is no international law standard for the minimum age for criminal responsibility, the ICC Statute excludes from the jurisdiction of the Court persons under the age of 18. In so doing, however, it was not the intention of its drafters to establish, in general, a minimum age for individual criminal responsibility. Premised on the notion of complementarity between national courts and ICC, it was intended that persons under 18 presumed responsible for the crimes for which the ICC had jurisdiction would be brought before their national courts, if the national law in question provides for such jurisdiction over minors.

[7] The Appeals Chamber of the International Tribunal for the Former Yugoslavia has so far disposed of a total of 5 appeals from judgements and 44 interlocutory appeals; and the Appeals Chamber of the Rwanda Tribunal of only 1 judgement on the merits with 28 interlocutory appeals.

[8] Letter addressed to Mr. Hans Corell, Under-Secretary-General, The Legal Counsel, from Judge Claude Jorda, President of the International Criminal Tribunal for the Former Yugoslavia, dated 29 August 2000.

[9] Article 10 of the Agreement between the United Nations and the Government endows the Special Court with a treaty-making power "to enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Court".

[10] Criteria for the choice of the seat of the Rwanda Tribunal were drawn up by the Security Council in its resolution 955 (1994). The Security Council decided that the seat of the International Tribunal shall be determined by the Council "having regard to considerations of justice and fairness as well as administrative efficiency, including access to witnesses, and economy".

[11] It is important to stress that this estimate should be regarded as an illustration of a possible scenario. Not until the Registrar and the Prosecutor are in place will it be possible to make detailed and precise estimates.

Annex

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

Whereas the Security Council, in its resolution 1315 (2000) of 14 August 2000, expressed deep concern at the very serious crimes committed within the territory of Sierra Leone against the people of Sierra Leone and United Nations and associated personnel and at the prevailing situation of impunity;

Whereas by the said resolution, the Security Council requested the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court to prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law;

Whereas the Secretary-General of the United Nations (hereinafter "the Secretary-General") and the Government of Sierra Leone (hereinafter "the Government") have held such negotiations for the establishment of a Special Court for Sierra Leone (hereinafter "the Special Court");

Now therefore the United Nations and the Government of Sierra Leone have agreed as follows:

Article 1
Establishment of the Special Court

1. There is hereby established a Special Court for Sierra Leone to prosecute persons most responsible for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

2. The Special Court shall function in accordance with the Statute of the Special Court for Sierra Leone. The Statute is annexed to this Agreement and forms an integral part thereof.

Article 2
Composition of the Special Court and appointment of judges

1. The Special Court shall be composed of two Trial Chambers and an Appeals Chamber.

2. The Chambers shall be composed of eleven independent judges who shall serve as follows:

(a) Three judges shall serve in each of the Trial Chambers, of whom one shall be appointed by the Government of Sierra Leone, and two judges appointed by the Secretary-General upon nominations forwarded by States, and in particular the member States of the Economic Community of West African States and the Commonwealth, at the invitation of the Secretary-General;

(b) Five judges shall serve in the Appeals Chamber, of whom two shall be appointed by the Government of Sierra Leone and three judges shall be appointed by

the Secretary-General upon nominations forwarded by States, and in particular the member States of the Economic Community of West African States and the Commonwealth, at the invitation of the Secretary-General.

3. The Government of Sierra Leone and the Secretary-General shall consult on the appointment of judges.

4. Judges shall be appointed for a four-year term and shall be eligible for reappointment.

5. In addition to the judges sitting in the Chambers and present at every stage of the proceedings, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate an alternate judge appointed by either the Government of Sierra Leone or the Secretary-General to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting.

Article 3
Appointment of a Prosecutor and a Deputy Prosecutor

1. The Secretary-General, after consultation with the Government of Sierra Leone, shall appoint a Prosecutor for a four-year term. The Prosecutor shall be eligible for reappointment.

2. The Government of Sierra Leone, in consultation with the Secretary-General and the Prosecutor, shall appoint a Sierra Leonean Deputy Prosecutor to assist the Prosecutor in the conduct of the investigations and prosecutions.

3. The Prosecutor and the Deputy Prosecutor shall be of high moral character and possess the highest level of professional competence and extensive experience in the conduct of investigations and prosecution of criminal cases. The Prosecutor and the Deputy Prosecutor shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.

4. The Prosecutor shall be assisted by such Sierra Leonean and international staff as may be required to perform the functions assigned to him or her effectively and efficiently.

Article 4
Appointment of a Registrar

1. The Secretary-General, in consultation with the President of the Special Court, shall appoint a Registrar who shall be responsible for the servicing of the Chambers and the Office of the Prosecutor, and for the recruitment and administration of all support staff. He or she shall also administer the financial and staff resources of the Special Court.

2. The Registrar shall be a staff member of the United Nations. He or she shall serve a four-year term and shall be eligible for reappointment.

Article 5
Premises

The Government shall provide the premises for the Special Court and such utilities, facilities and other services as may be necessary for its operation.

Article 6
Expenses of the Special Court[a]

The expenses of the Special Court shall ...

Article 7
Inviolability of premises, archives and all other documents

1. The premises of the Special Court shall be inviolable. The competent authorities shall take whatever action may be necessary to ensure that the Special Court shall not be dispossessed of all or any part of the premises of the Court without its express consent.

2. The property, funds and assets of the Special Court, wherever located and by whomsoever held, shall be immune from search, seizure, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

3. The archives of the Court, and in general all documents and materials made available, belonging to or used by it, wherever located and by whomsoever held, shall be inviolable.

Article 8
Funds, assets and other property

1. The Special Court, its funds, assets and other property, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process, except insofar as in any particular case the Court has expressly waived its immunity. It is understood, however, that no waiver of immunity shall extend to any measure of execution.

2. Without being restricted by financial controls, regulations or moratoriums of any kind, the Special Court:

(a) May hold and use funds, gold or negotiable instruments of any kind and maintain and operate accounts in any currency and convert any currency held by it into any other currency;

(b) Shall be free to transfer its funds, gold or currency from one country to another, or within Sierra Leone, to the United Nations or any other agency.

Article 9
Seat of the Special Court

The Special Court shall have its seat in Sierra Leone. The Court may meet away from its seat if it considers it necessary for the efficient exercise of its functions, and may be relocated outside Sierra Leone, if circumstances so require, and subject to the conclusion of a Headquarters Agreement between the Secretary-General of the United Nations and the Government of Sierra Leone, on the one hand, and the Government of the alternative seat, on the other.

[a] The formulation of this article is dependent on a decision on the financial mechanism of the Special Court.

Article 10
Juridical capacity

The Special Court shall possess the juridical capacity necessary to:

(a) Contract;

(b) Acquire and dispose of movable and immovable property;

(c) Institute legal proceedings;

(d) Enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Court.

Article 11
Privileges and immunities of the judges, the Prosecutor and the Registrar

1. The judges, the Prosecutor and the Registrar, together with their families forming part of their household, shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the 1961 Vienna Convention on Diplomatic Relations. They shall, in particular, enjoy:

(a) Personal inviolability, including immunity from arrest or detention;

(b) Immunity from criminal, civil and administrative jurisdiction in conformity with the Vienna Convention;

(c) Inviolability for all papers and documents;

(d) Exemption, as appropriate, from immigration restrictions and other alien registrations;

(e) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic agents by the Vienna Convention;

(f) Exemption from taxation in Sierra Leone on their salaries, emoluments and allowances.

2. Privileges and immunities are accorded to the judges, the Prosecutor and the Registrar in the interest of the Special Court and not for the personal benefit of the individuals themselves. The right and the duty to waive the immunity, in any case where it can be waived without prejudice to the purpose for which it is accorded, shall lie with the Secretary-General, in consultation with the President.

Article 12
Privileges and immunities of international and Sierra Leonean personnel

1. Sierra Leonean and international personnel of the Special Court shall be accorded:

(a) Immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue to be accorded after termination of employment with the Special Court;

(b) Immunity from taxation on salaries, allowances and emoluments paid to them.

2. International personnel shall, in addition thereto, be accorded:

(a) Immunity from immigration restriction;

(b) The right to import free of duties and taxes, except for payment for services, their furniture and effects at the time of first taking up their official duties in Sierra Leone.

3. The privileges and immunities are granted to the officials of the Special Court in the interest of the Court and not for their personal benefit. The right and the duty to waive the immunity in any particular case where it can be waived without prejudice to the purpose for which it is accorded shall lie with the Registrar of the Court.

Article 13
Counsel

1. The Government shall ensure that the counsel of a suspect or an accused who has been admitted as such by the Special Court shall not be subjected to any measure which may affect the free and independent exercise of his or her functions.

2. In particular, the counsel shall be accorded:

(a) Immunity from personal arrest or detention and from seizure of personal baggage;

(b) Inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused;

(c) Immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed in his or her capacity as counsel. Such immunity shall continue to be accorded after termination of his or her functions as a counsel of a suspect or accused.

Article 14
Witnesses and experts

Witnesses and experts appearing from outside Sierra Leone on a summons or a request of the judges or the Prosecutor shall not be prosecuted, detained or subjected to any restriction on their liberty by the Sierra Leonean authorities. They shall not be subjected to any measure which may affect the free and independent exercise of their functions.

Article 15
Security, safety and protection of persons referred to in this Agreement

Recognizing the responsibility of the Government under international law to ensure the security, safety and protection of persons referred to in this Agreement and its present incapacity to do so pending the restructuring and rebuilding of its security forces, it is agreed that the United Nations Mission in Sierra Leone shall provide the necessary security to premises and personnel of the Special Court, subject to an appropriate mandate by the Security Council and within its capabilities.

Article 16
Cooperation with the Special Court

1. The Government shall cooperate with all organs of the Special Court at all stages of the proceedings. It shall, in particular, facilitate access to the Prosecutor to sites, persons and relevant documents required for the investigation.

2. The Government shall comply without undue delay with any request for assistance by the Special Court or an order issued by the Chambers, including, but not limited to:

(a) Identification and location of persons;

(b) Service of documents;

(c) Arrest or detention of persons;

(d) Transfer of an indictee to the Court.

Article 17
Working language

The official working language of the Special Court shall be English.

Article 18
Practical arrangements

1. With a view to achieving efficiency and cost-effectiveness in the operation of the Special Court, a phased-in approach shall be adopted for its establishment in accordance with the chronological order of the legal process.

2. In the first phase of the operation of the Special Court, judges, the Prosecutor and the Registrar will be appointed along with investigative and prosecutorial staff. The process of investigations and prosecutions and the trial process of those already in custody shall then be initiated. While the judges of the Appeals Chamber shall serve whenever the Appeals Chamber is seized of a matter, they shall take office shortly before the trial process has been completed.

Article 19
Settlement of disputes

Any dispute between the Parties concerning the interpretation or application of this Agreement shall be settled by negotiation, or by any other mutually agreed-upon mode of settlement.

Article 20
Entry into force

The present Agreement shall enter into force on the day after both Parties have notified each other in writing that the legal instruments for entry into force have been complied with.

DONE at [place] on [day, month] 2000 in two copies in the English language.

For the United Nations

For the Government of Sierra Leone

Enclosure

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

The Special Court shall have the power to prosecute persons most responsible for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

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) Abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of 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 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 jurisdiction over persons who were 15 years of age at the time of the alleged commission of the crime.

2. At all stages of the proceedings, including investigation, prosecution and adjudication, an accused below the age of 18 (hereinafter "a juvenile offender") 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.

3. In a trial of a juvenile offender, the Special Court shall:

(a) Consider, as a priority, the release of the juvenile, unless his or her safety and security requires that the juvenile offender be placed under close supervision or in a remand home; detention pending trial shall be used as a measure of last resort;

(b) Constitute a "Juvenile Chamber" composed of at least one sitting judge and one alternate judge possessing the required qualifications and experience in juvenile justice;

(c) Order the separation of his or her trial, if jointly accused with adults;

(d) Provide the juvenile with the legal, social and any other assistance in the preparation and presentation of his or her defence, including the participation in legal proceedings of the juvenile offender's parent or legal guardian;

(e) Provide protective measures to ensure the privacy of the juvenile; such measures shall include, but not be limited to, the protection of the juvenile's identity, or the conduct of in camera proceedings;

(f) In the disposition of his or her case, 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 and 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 two 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 eleven independent judges, who shall serve as follows:

(a) Three judges shall serve in each of the Trial Chambers, 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 Chambers, 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. In addition to the judges sitting in the Chambers and present at every stage of the proceedings, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate an alternate judge appointed by either the Government of Sierra Leone or the Secretary-General, 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 four-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 most responsible 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 four-year term and shall be eligible for reappointment. 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 prosecution 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 four-year term and be eligible for reappointment.

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 a 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 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.

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LEGAL GROUNDS OF JURISDICTION

15.1 INTRODUCTION

To bring the alleged authors of international crimes to book, States need to have not only laws, statutes, or some sort of judge-made legal regulation punishing those crimes, but also legal provisions authorizing courts to prosecute and punish the alleged perpetrators. These legal provisions normally empower State courts to take proceedings if the offence, its alleged author, or its victim have some sort of link with the State. Indeed, traditionally, States bring alleged perpetrators of international crimes to trial before their courts on the basis of one of three principles: *territoriality* (the offence has been perpetrated on the State's territory), *passive nationality* (the victim is a national of the prosecuting State), or *active nationality* (the perpetrator is a national of the prosecuting State). In contrast, the principle of *protection of national interests* whereby courts possess jurisdiction over crimes committed abroad by nationals or foreigners when the crimes jeopardize or imperil the State's national interests (for instance, counterfeiting the national currency, planning attacks on the State's security, etc.) is normally not used with respect to international crimes proper, on obvious grounds (States still tend to consider these crimes as not directly relevant to, or affecting, their national interests whenever a national or territorial link is lacking).

Recently the *universality principle* has emerged, whereby any State is empowered to bring to justice alleged authors of international crimes (in some cases, subject to their being present on the territory of the prosecuting State).

15.2 THE PRINCIPLE OF TERRITORIALITY

The basic principle is that a crime committed in a State's territory is justiciable in that State. In the celebrated *Lotus* case, the Permanent Court of International Justice stated in 1927 that 'in all systems of law the principle of the territorial character of criminal law is fundamental', although it also added that 'the territoriality of criminal law . . . is not an absolute principle of international law and by no means coincides with territorial sovereignty' (at 20). The Canadian Supreme Court held in *United States* v. *Burns*

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that 'individuals who choose to leave Canada leave behind Canadian law and procedures and must generally accept the local law, procedures and punishments which the foreign state applies to its own residents' (§72). Similarly a US court stated in *Rivard* v. *United States*, that '[a]ll the nations of the world recognize the principle that a man who outside of a country wilfully puts in motion a force to take effect in it is answerable at the place where the evil is done' (at 887).

The latter legal proposition is a corollary of the principle of territoriality: *even where a crime is committed outside the territory*, if its *effects* will be felt *in* the territory, then it is amenable to the State's jurisdiction (for example, if, standing outside the territory, I shoot a pistol which kills someone in the territory; or if I manufacture drugs outside the territory and then smuggle them into the territory of the State. In both cases, I can be judged in the State where the effects of the crimes were felt, even though I committed the prohibited acts outside the territory).

The principle is grounded on ideological and political reasons: the need to affirm territorial sovereignty, which evolved in the age of reason and was linked to the consolidation of modern States. This need led States to replace the previous principle of 'personality of laws' (everybody is governed by his national law, wherever he resides) with that of territoriality (what matters is the law of the place where an act is performed).

Montesquieu, Voltaire, Rousseau, and Beccaria insisted on the importance of territoriality in criminal law. The French Revolution confirmed it in the decree of 3–7 September 1792 ('foreigners charged with offences in their homeland may only be tried under the laws of their own country and by their own judges'; consequently, 'no foreigner will be retained on the galleys of France for crimes committed outside French territory'). In 1764 Beccaria, more than any other, developed the theory of territoriality. In his opinion, the adoption of this principle was warranted on two grounds. First of all, as State laws vary, one should only be punished in the place where one has infringed the law. Secondly, it is only just that a crime, which constitutes a violation of the social contract, be punished in the place where the contract was breached.[1]

The principle has numerous advantages. First, the *locus delicti commissi* (the place where the offence has allegedly been committed) is usually the place where it is easiest to collect evidence. It is therefore considered the *forum conveniens*, or the appropriate place of trial, as was restated in *Eichmann* (at 302–3). Secondly, it normally is the place where the rights of the accused are best safeguarded, for—if he is not a foreigner

[1] In his *Crimes and Punishments*, Beccaria wrote that 'There are those who think, that an act of cruelty committed, for example, at Constantinople, may be punished at Paris; for this abstracted reason, that he who offends humanity, should have enemies in all mankind, and be the object of universal execration; as if the judges were to be the knights errant of human nature in general, rather than guardians of particular conventions between men. The place of punishment can certainly be no other, than that where the crime was committed; for the necessity of punishing an individual for the general good subsists there, and there only.' C. Beccaria, *An Essay on Crimes and Punishments*, translated from the Italian, 4th edn (London: F. Newberry, 1775), repr. (Brooklyn Village: Branden Press Inc., 1983), at 64. (For the original text, which differs slightly, see C. Beccaria, *Dei delitti e delle pene*, edited by F. Venturi (Turin: G. Einaudi, 1965), at 71–2.)

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fleetingly residing there—he is expected to know the law of the territory, hence he is likely to know the criminal law in force there as well as his rights as a defendant in a criminal trial. In addition, unless he is a non-resident foreigner, he knows and speaks the language in which the trial unfolds. Thirdly—and this applies in particular to international crimes, whose gravity may have serious repercussions on the society within which the crime has been committed—if the prosecution and punishment occur on the territory where the crime was perpetrated, it is more likely for the cathartic process of criminal trials to have effect: the victims and their families relive their tragedies, the whole society becomes aware of what has happened and is thus put in a position of better coming to terms with, hence of psychologically overcoming, past crimes. Moreover, the judges, jury, and advocates, being members of the community where the crimes took place, are aware of local feelings about the crimes and conscious of the press and public's close scrutiny of their administration of justice; they are thus broadly accountable to the community for the manner in which they dispense justice. Finally, by administering justice over crimes perpetrated in the territory, the territorial State affirms its authority over attacks on peace and security within its bounds; by the same token it helps to deter the commission of future offences.[2]

However, in the case of international crimes, there may be a major obstacle to the territoriality principle: these crimes are often committed by State officials or with their complicity or acquiescence: for example, war crimes committed by servicemen, or torture perpetrated by police officers, or genocide carried out with the tacit approval of State authorities. It follows that State judicial authorities may be reluctant to prosecute State agents or to institute proceedings against private individuals that might eventually involve State organs.

Whenever the territoriality principle is applicable, two problems may arise. First, what should be meant by 'territory' subject to the sovereignty of a State? Here one must turn to the international rules delimiting State territory, with the consequence that offences perpetrated in a State's territorial waters or on its ships or aircraft on the high seas are considered committed on the territory of that State. Similarly, territory comprises space under the control or 'under the jurisdiction' of a State, such as for example territory occupied following an international armed conflict. By contrast, crimes perpetrated in a State's embassy abroad are not carried out on national territory but abroad (hence the contrary view of the Spanish *Audiencia nacional* in the case of the *Guatemalans* (at 130), whereby crimes committed in the Spanish embassy in Guatemala were regarded as perpetrated in Spain, was wrong).

[2] In *Sawonjuk* the British Court of Appeal (Criminal Division) stated that: 'The criminal jurisdiction of the English courts is, generally speaking, territorial. Until enactment of the War Crimes Act 1991 [under which, proceedings may be brought in the UK "against a person in the United Kingdom irrespective of his nationality at the time of the alleged offence" for war crimes committed during the Second World War "in a place which at the time was part of Germany or under German occupation"] the appellant could not be tried here for an offence of murder or manslaughter committed in Byelorussia since he has never been a British subject and the exception made by Section 9 of the Offences against the Person Act 1861 to the ordinary rule of territoriality was confined to offences of murder or manslaughter committed outside the United Kingdom by British subjects (at 4).

The second problem relates to the determination of the *locus commissi delicti* in the case of complex crimes: when the crime is planned in a country and committed in another country, or the crime is committed in a country but takes its effects in another, which is the territory where trial proceedings may be instituted? The tendency of national legal systems is to give priority to the place of commission or to the place where the effects of the crime materialize. Many States have jurisdiction if *one of the elements of the offence* is committed in the State's territory even if other elements occur abroad. It would seem that there are no international rules on this issue, nor may one infer from national legal systems a uniform regulation of the matter.

Problems specific to international criminal law may arise when the alleged perpetrator of a crime is a State official enjoying immunity from prosecution under national legislation (for instance, the Head of State, the head or a senior member of the government, or a member of parliament). Clearly, if this is the case, national courts are barred from instituting criminal proceedings against the accused, because the latter enjoys personal immunity (*ratione personae*). It may also be that the alleged perpetrator, whatever his official status, is covered by an amnesty law. In this case, again, the national authorities of the State where the amnesty was granted may be precluded from taking judicial action. By contrast, a foreign court, assuming it has jurisdiction over the crime, may consider that it does not have to recognize the amnesty, particularly if this law turns out to be in conflict with international rules of *jus cogens*, that is peremptory norms of international law.[3] Thus, whereas national jurisdiction based on the territoriality principle may sometimes fail, other grounds of jurisdiction invoked by foreign courts may prove workable and lead to the prosecution of the alleged culprit.

Among the international treaties providing for grounds of jurisdiction over international crimes, the Convention on Genocide of 1948 should be mentioned. In Article VI it stipulates that persons accused of genocide must be brought to trial before the competent courts of the State where the act has been performed (or before an International Criminal Court, if and when it is established and assuming it has jurisdiction over the crimes in question). This rule, however, has never been applied, except in Rwanda, where national courts prosecuted alleged authors of acts of genocide committed in 1994 alongside the international prosecutions brought before the ICTR. This was only possible due to the rare circumstance that the victims of the genocide, the Tutsi, had seized power in Rwanda (the Tutsi-led party having in 1994 deposed the Hutu-led government that planned and waged the genocide), and were therefore strongly intent on bringing prosecutions for genocide, not least since the fact of the genocide legitimized the minority Tutsis' hold on power.

[3] In England courts are under no obligation to recognize an amnesty granted by another State, irrespective of whether the alleged violation breaches peremptory norms. Since an amnesty is not a judgment, the principle of *autrefois acquit/autrefois convict*—the English equivalent of the *non bis in idem* principle—does not apply. This arose in *Pinochet*—he had been granted an amnesty—but the English courts considered that irrelevant.

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15.3 THE PRINCIPLE OF ACTIVE NATIONALITY

Formally the principle of active nationality is implemented in one of two forms. In some States, courts have jurisdiction over certain criminal offences committed by their nationals abroad. This is so, whether or not those offences are criminal under the law of the territorial State, that is, the State in which the conduct constituting the offences under the law of the State of nationality were committed. In this case the underlying motivation is the will of a State that its nationals comply with its law, whether at home or abroad, regardless of what is provided for in the foreign State when the crime is committed. In other countries jurisdiction over crimes committed by nationals abroad is subordinated to the crime being punishable under the law of the territorial State as well (this, for instance, holds true for Egypt). In this case the essential rationale behind the principle is the desire—or constitutional prohibition in many cases—of the State of nationality not to extradite its nationals to the State where the crime has been perpetrated. Hence the law of the State of active nationality must provide for the possibility of trying the accused in that State, so that he does not escape justice altogether. Indeed, it is striking that countries such as the UK, which have no constitutional or other prohibition on the extradition of their nationals, normally do not provide for active nationality as a basis for jurisdiction.[4]

All this holds true, generally speaking, for criminal offences. As for international crimes, States that uphold this ground of jurisdiction do so in order to bow to international dictates, that is to make international law effective by complying with its commands. Thus, they normally do not require that the offence be also punishable by the territorial State, as it is sufficient for the offence to be regarded as an international crime by international rules (be they customary or treaty provisions).

This principle is normally upheld with regard to war crimes, as well as such crimes as torture. Many States, particularly under the pressure arising from the conclusion of treaties setting out international crimes, have passed legislation providing for jurisdiction based on nationality. For instance, in the UK, as a result of the International Criminal Court Act 2001, designed to implement the Statute of the ICC, courts possess jurisdiction over all crimes envisaged in the Court's Statute and committed by British nationals either at home or abroad. The active nationality principle is also laid down in a number of international treaties, which include the 1984 Convention against Torture (Article 5(1)) and various treaties against terrorism.[5]

[4] Nonetheless, as stated above, the courts in England and Wales have jurisdiction over murder and manslaughter committed abroad on the basis of the active nationality principle. See Offences against the Person Act 1861, s. 9. The same is true of High Treason under the Treason Act 1351. These exceptions can be explained on the basis of the gravity of the crimes in question.

[5] See for instance the 1973 Convention on internationally protected persons (Article 6(1)(b)), the 1979 Convention on the taking of hostages (Article 6(2)(e)), the 1980 Convention on the protection of nuclear material (Article 8(1)(b)), the 1988 Convention and Protocol on the security of maritime navigation (Article 6(1)(c)), the 1994 Convention on the Safety of UN and Associated Personnel (Article 10(1)(b)), the 1998

A problem that may arise where jurisdiction is exercised on the basis of the active nationality principle concerns the moment at which the alleged perpetrator must possess the nationality of the prosecuting State: is it when the crime is perpetrated, or when criminal proceedings are instituted? It would seem that most States tend to accept that the nationality may be possessed at either moment, thus broadening the jurisdiction of the State and better ensuring the punishment of international crimes. Other States (for instance, Egypt) require instead that the person be a national of the State at the time of commission of the crime.

One may also notice a tendency of States to broaden this ground by including residents (this applies for instance to the UK with regard to war crimes committed during the Second World War as well as the crimes envisaged in the Statute of the ICC; to Brazil with regard to genocide) or stateless persons residing on the territory of the prosecuting State (this for instance applies to Italy and the Russian Federation).

Some States have passed legislation concerning crimes perpetrated during the Second World War, for the purpose of punishing persons who, whatever their nationality at the time of commission of crimes, have subsequently acquired their nationality, possibly with the hope of sheltering behind their newly acquired nationality.[6]

15.4 THE PRINCIPLE OF PASSIVE NATIONALITY

By virtue of the principle of passive nationality States may exercise jurisdiction over crimes committed abroad against their own nationals. Plainly, the principle is grounded both on: (i) the *need to protect nationals living or residing abroad* and (ii) a substantial *mistrust* in the exercise of jurisdiction by the foreign territorial State.

Normally States invoking this ground of jurisdiction also provide that, whenever the accused is abroad, a 'double incrimination' is required for prosecuting a crime, namely that the offence be considered as such both in the territorial State and in the State of the victim. 'Double criminality' is usually considered a procedural requirement of extradition: to extradite from State X to State Y, the crimes in question must be a crime in both States. Normally, where passive nationality is exercised, the State will have to seek extradition of the perpetrator as he will be abroad. Of course, that is not always the case. If the perpetrator, for example a Chilean accused of murdering a Spaniard, is in the State exercising jurisdiction, e.g. Spain, then Spain will be able to

Convention on terrorist bombing (Article 6(1)(c)), the 1999 Convention on the financing of terrorism (Article 7(1)(c)). See also the 2000 Convention Against Transnational Organized Crime (Article 15(2)(b)).

[6] Thus, §§1091 and 2342 of the US Code so provide with regard to genocide and war crimes. In the UK a law was passed in 1991 (the War Crimes Act) whereby proceedings may be brought for war crimes committed during the Second World War against persons who, whatever their nationality at the time of the alleged offence, are British citizens or residents as from 8 March 1990. (This cut-off date was chosen to prevent persons evading the Act by changing their nationality or residence.) Other States such as Australia and Canada have passed similar laws.

proceed against him without going through extradition proceedings and therefore without having to worry about 'double criminality'.

Outside extradition law the requirement at issue is intended to avoid prosecuting a person for an act that is not considered a criminal offence by the State where it has been performed; in other words, the rationale for this requirement may be found in the general principle of legality (*nullum crimen sine lege*) which is common to all national legal systems, in addition to being a general principle of international criminal law (see 7.3). However, as far as international crimes are concerned, this requirement is replaced by the requirement that the offence be considered as an international crime by international law, whatever the content of the legal regulation in the territorial State. In this connection, the decision of the Supreme Court of Argentina delivered in *Priebke* on 2 November 1995, concerning the extradition to Italy of a German national who had subsequently acquired Argentinian nationality, is pertinent: the Court explicitly held that as the offence of which the defendant stood accused, namely a war crime, was internationally regarded as an international crime, this sufficed for the purpose of the double incrimination principle.[7]

There has been frequent resort to this ground of jurisdiction to prosecute war crimes, particularly after the cessation of hostilities and by the victor State against the vanquished (former) enemies. (Notable departures based on the active nationality principle are the trials instituted in 1902 by US Courts Martial against American servicemen who had fought in the Philippines, the Leipzig trials against Germans, imposed upon Germany by the Allies, and the various trials before US Courts Martial for crimes committed in Vietnam.)

More recently courts have relied upon this jurisdictional ground with regard to crimes against humanity and torture. Significant in this respect are some cases tried *in absentia*: *Astiz*, a case brought before French courts (an Argentinian officer had tortured two French nuns in Argentina), as well as some cases brought before Italian courts against Argentinian officers for crimes allegedly perpetrated against Italians (or Argentinians also having Italian nationality) in Argentina.[8] Furthermore, this ground of jurisdiction has been laid down in national legislation with regard to terrorism, for instance in the United States (see §§2331 and 2332 of the Federal Criminal Code), in France (Articles 113–17 of the Criminal Code), and in Belgium. It is also stipulated in a number of international conventions against terrorism[9] and in the 1984 Convention against Torture (Article 5(1)).

Resort to the passive nationality principle is, however, particularly incongruous in the case of international crimes such as for instance those against humanity, and torture. By definition, these are crimes that injure humanity, that is, our sense of

[7] Fallos CSJN 318:2148, opinion of Judges Nazareno and O'Connor, §77; opinion of Judge Bossert, §91.

[8] See for instance *Suarez Mosón and others*, at 8–15.

[9] For example, the 1973 Convention on internationally protected persons, the 1979 Convention on hostage-taking, the 1988 Convention and Protocol on maritime safety, the 1994 Convention on the protection of UN agents, the 1997 Convention on terrorist attacks, the 1999 Convention on the financing of terrorism, and the 2000 Convention on transnational organized crime.

humanity, in other words our concept of respect for any human being, *regardless* of the nationality of the victims. As a consequence, their prosecution should not be based on the national link between the victim and the prosecuting State. This is indeed a narrow and nationalistic standard for bringing alleged criminals to justice, based on the interest of a State to prosecute those who have allegedly attacked one of its nationals. The prosecution of those crimes should instead reflect a universal concern for their punishment; it should consequently be based on such legal grounds as territoriality, universality, or active nationality.

It follows that, as far as such crimes as those against humanity, torture, and genocide are concerned, the passive nationality principle should only be relied upon as a *fall-back*, whenever no other State (neither the territorial State, nor the State of which the alleged criminal is a national, nor other States acting upon the universality principle) is willing or able to administer international criminal justice. Perhaps this is the reason why in international conventions such as that on torture this ground of jurisdiction, unlike those just mentioned, is envisaged not as an obligation of contracting States but simply as an *authorization* to prosecute (see Article 5(1)(c) of the 1984 Convention against torture).

Conversely, the ground of jurisdiction under discussion may prove appropriate for such offences as war crimes or terrorism as a discrete offence, where the need to protect national interests and concerns acquires greater relevance.

15.5 THE UNIVERSALITY PRINCIPLE

Under the principle of universality any State is empowered to bring to trial persons accused of international crimes, regardless of the place of commission of the crime, or the nationality of the author or of the victim.

The principle was first proclaimed in customary international law in the seventeenth century, with regard to piracy. Any State was authorized to arrest and bring to justice persons suspected of engaging in piracy, whatever their nationality and the place of commission of the crime. The rationale behind this exceptional authorization to States to depart from the classic principles of territoriality or nationality was the need to fight jointly against a form of criminality that affected all States. Universal jurisdiction was therefore based on a *joint concern of all States*. Each State knew that by bringing to justice suspected pirates it was acting to protect at the same time its own interests and those of other States.

Subsequently the same jurisdictional ground was included in the 1949 Geneva Conventions on war victims, the 1984 Convention against Torture, and a string of international treaties on terrorism. The rationale for universal jurisdiction in these cases differed, however, from that invoked for piracy. States were not empowered to exercise jurisdiction for the purpose of protecting a joint interest. They were authorized to prosecute and punish, on behalf of the whole international community, persons responsible for a special class of war crimes (grave breaches of the 1949 Geneva

conventions), torture or terrorism, with a view to safeguarding *universal* values. For instance, contracting States were authorized by the 1984 Convention to bring to justice persons who had engaged in torture abroad, in particular in their own country against their countrymen. The purpose was not to prevent those persons from equally perpetrating torture against nationals of the prosecuting State (in which case one would have been faced with the protection of a joint interest). The purpose was rather that of not leaving the crime of torture unpunished, were the territorial State to refrain from putting the alleged torturer in the dock. Contracting States were thus authorized to act as 'universal' guardians against attacks on human dignity taking the form of torture.

In short, the crimes over which such jurisdiction may be exercised are of such a gravity and magnitude that they warrant their universal prosecution and repression, as the Supreme Court of Israel eloquently held in *Eichmann* as long ago as 1962. (Subsequently the Spanish Constitutional Court, in a judgment of 10 February 1997,[10] and the Spanish national criminal court (*Audiencia nacional*) in an order of 4 November 1998[11] set out this view.) Thus, any State is authorized to substitute itself for the natural judicial forum, namely the territorial or national State, should neither of them bring proceedings against the alleged author of an international crime.

Under the strong influence and pressure of these international rules, States have begun to lay down the principle of universal jurisdiction in their national legislation: in this connection mention may be made of Spain and Belgium, as well as Germany and Austria.

15.5.1 TWO DIFFERENT VERSIONS OF UNIVERSALITY

The universality principle has been upheld in two different versions, both predicated on the notion that the judge asserting universal jurisdiction so acts in order to substitute for the defaulting territorial or national State: the narrow notion (conditional universal jurisdiction) and the broad notion (absolute universal durisdiction).

A. The narrow notion (conditional universal jurisdiction)

According to the more widespread version, the narrow notion, only the State where the accused is in custody may prosecute him or her (the so-called *forum deprehensionis*,

[10] See the Judgment of 10 February 1997, in the *Panamanian Ship* case, at 6, Legal Ground no. 3A. The Court held that the Spanish legislator had intended 'to attribute universal scope to the Spanish jurisdiction over those specific crimes [mentioned in Article 23 of the 1985 Law on Judicial Power], on account both of the gravity of these crimes and the need for international protection'.

[11] Order (*auto*) of 4 November 1998, in *don Adolfo Francisco (Scilingo)*, at 3, Legal Ground no. 2. The Court held that it was contrary to the spirit of the Genocide Convention to interpret Article 6 of this Convention (which provides that the accused may be tried either by a territorially competent court or by an international court) to the effect that such provision would limit the jurisdiction of States. This interpretation would run counter to the fact that genocide is 'regarded as a crime of extreme gravity in the whole world and affects directly the international community, indeed all humanity, as is intended by the same Convention'.

or jurisdiction of the place where the accused is apprehended). Thus, the presence of the accused on the territory is a *condition for the existence of jurisdiction.*

This class of jurisdiction is accepted, at the level of customary international law, with regard to piracy.[12] At the level of treaty law it has been upheld with regard to *grave breaches* of the 1949 Geneva Conventions and the First Additional Protocol of 1977, *torture* (under Article 7 of the 1984 Torture Convention), as well as *terrorism* (see the various UN-sponsored treaties on this matter).[13] These treaties, however, do not confine themselves to granting the power to prosecute and try the accused. They also *oblige* States to do so, or alternatively to extradite the defendant to a State concerned (the principle of *aut prosequi aut dedere*).

This version of the universality principle is also applied in the national legislation of some States, such as Austria, Germany, and Switzerland.[14] In France, courts have applied Article 2 of the law of 2 January 1995 implementing the Statute of the ICTY to the effect that, for the application of the relevant provision of the Geneva Conventions on grave breaches, it was required that the offender be on French territory.[15]

B. The broad notion of universality (absolute universal jurisdiction)

Under a different version of the universality principle, a State may prosecute persons accused of international crimes regardless of their *nationality*, the place of commission of the crime, the nationality of the victim, and even of *whether or not the accused is in custody or at any rate present in the forum State.* However, as many legal systems do not permit trials *in absentia*, the presence of the accused on the territory is then a condition for the initiation of trial proceedings. Clearly, this conception of universality allows national authorities to commence criminal investigations of persons suspected

[12] See A. Cassese, 'When may Senior State Officials be Tried for International Crimes? Some comments on the *Congo* v. *Belgium* Case,' 13 EJIL (2002), at 857–8.

[13] See for instance Article 7 of the Hague Convention for the suppression of unlawful seizure of aircraft of 1970; Article 7 of the Montreal Convention on the suppression of unlawful acts against the safety of civil aviation (sabotage), of 1971; Article 8 of the 1979 Convention against the taking of hostages; Article 7 of the 1988 Convention for the suppression of unlawful acts against the safety of maritime navigation.

[14] Article 65.1.2 of the Austrian Penal Code provides that Austrian criminal law may apply in respect of offences committed abroad, so long as the acts are also punishable in the place where they were performed, and provided that the offender, if a foreigner, is in Austria and may not be extradited to another State (see to this effect *Cvjetković*, at 5–6). In Germany, Article 6.9 of the Penal Code provides that German criminal law shall apply to offences committed by non-nationals abroad if such offences are made punishable by an international treaty binding upon Germany. Article 7(2).2 of the same Penal Code allows for prosecution of foreigners apprehended in Germany for crimes perpetrated abroad, if they are not extradited (either because a request for extradition was never made, or was refused, or because extradition is not feasible). Articles 108 and 109 of the Swiss Military Penal Code provide for universal jurisdiction over violations of international humanitarian law and the laws and customs of war. Article 6 *bis* of the Swiss Criminal Code makes the Code applicable to crimes committed abroad, (i) whenever Switzerland is obliged to pursue such crimes under an international treaty, and provided that (ii) the act is also punishable in the State where it was committed, and (iii) the perpetrator is in Switzerland and is not extradited. See the *G.* case, at 7 and *Niyonteze*, at 35–41.

[15] See *Javor and others* Cass. Crim. 26 March 1996, in *Bull.* No. 132 at 380–3. See also *Munyeshyaka*, where the French Court of Cassation rightly reversed (at 6–7) a decision of the Nimes Court of Appeal denying French jurisdiction in spite of the presence of the accused in France (1085–9).

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of serious international crimes, and gather evidence about these alleged crimes, as soon as such authorities are seized with information concerning an alleged criminal offence. They may thus exercise criminal jurisdiction over such persons, without requiring that the person first be present, even temporarily, in the country. As stressed above, such exercise of jurisdiction is premised on the failure of the territorial or national State to take proceedings, and should therefore not be activated whenever one of those States initiates proceedings. (In this connection, it may be interesting to recall that in Spain, a ruling (*auto*) by the *Audiencia nacional* dated 13 December 2000 in the case of the *Guatemalan Generals* rejected a claim to the exercise of universal jurisdiction by Spanish courts on the basis that the complaints against the accused persons (Guatemalan Generals) could be investigated and tried in Guatemala (at 145). Thus the *Audiencia* interpreted Spanish law to the effect that Spanish jurisdiction is subsidiary, and can only be exercised in case of failure by a State to try serious crimes.)[16]

This principle is laid down in such national legislation as that of Spain and Belgium.[17] It is notable that Regulation no. 2000/15 of the United Nations Transitional Administration in East Timor (UNTAET) also applies this principle in Articles 2.1 and 2.2 with regard to such crimes as genocide, war crimes, crimes against humanity, and torture.

One might also construe Article 7.5 of the Italian Criminal Code (whereby Italian nationals or foreigners who commit abroad any crime 'for which either special legislative provisions or international treaties establish that Italian criminal law shall apply, may be punished under Italian law') to the effect that alleged authors of international crimes may be prosecuted even if they do not find themselves on Italian territory,

[16] The subsidiary nature of universality may also follow from international rules. Interestingly, in its decision of 5 November 1998 in *Pinochet*, the Spanish *Audiencia nacional* held that universal jurisdiction may have to yield to territorial jurisdiction whenever this is imposed by an international treaty. It stated that, because of the prevalence in Spanish law of treaties over national legislation, Article 6 of the Genocide Convention of 1948 (whereby persons accused of genocide must be tried by courts of the territorial State or by an 'international penal tribunal') entails that in Spain the exercise of other grounds of jurisdiction (including universality) is '*subsidiary* in nature', 'so that courts of a State should refrain from exercising jurisdiction over acts of genocide that are being tried by courts of the State where they occurred, or by an international criminal court' (at 3, second legal ground; emphasis added).

[17] In Spain, Article 23 of the 1985 Law on Judicial Power provides that Spanish courts have jurisdiction over crimes committed outside Spain when such crimes constitute genocide, terrorism, or other crimes which Spain is obliged to prosecute under international treaties. However, in Spain trials by default or *in absentia* are not allowed.

In Belgium, under a Law of 16 June 1993 Belgian courts have jurisdiction over grave breaches of the 1949 Geneva Conventions and 1977 Protocols, no matter where such offences are committed, by whom or against whom they are committed, and whether or not the offender is on Belgian territory. A law of 3 February 1999 added genocide and crimes against humanity to the international crimes over which Belgian courts possess universal jurisdiction. See the order of the Brussels Investigating Judge in *Pinochet* (at 281–8), as well as the *Rwandan* case (where however the accused was already in custody in Belgium), at 2–3.

It should however be noted that in a decision of 6 March 2002 in *Sharon and others* the *Chambre des mises en accusation* of the Brussels Court of Appeal held that Belgian legislation must be construed to the effect that it provides only for *conditional* universal jurisdiction (at 7–20).

provided that: (i) the crimes are envisaged in international treaties ratified by Italy and (ii) under these treaties Italian courts may exercise jurisdiction.[18]

Furthermore, the relevant Spanish case law is worthy of mention. (In addition to a judgment of the Constitutional Court,[19] the decisions of the *Audiencia nacional* in *Pinochet*,[20] *Scilingo*,[21] and *Fidel Castro*[22] should be recalled.) In addition, under the

[18] Recently some national judges attempted to place a broad interpretation on the notion of universal jurisdiction laid down in the Geneva Conventions and the First Additional Protocol of 1977. A French investigating judge unsuccessfully made this attempt on 9 May 1994 (Order of the *Juge d'instruction*, in *Javor and others*). (He intended to institute proceedings against Bosnian Serbs who were alleged to have committed grave breaches of the Geneva Conventions and who found themselves on the territory of Bosnia and Herzegovina.)

See the cases discussed in R. Maison, 'Les premiers cas d'application des dispositions pénales des Conventions de Genève par les juridictions internes', 6 EJIL (1995), 260 ff.

[19] See the judgment of 10 February 1997 (no. 1997/56) in the *Panamanian ship* case. The ship of the accused (flying Panama's flag) had been chased and seized on the high seas for drug trafficking; the accused had been prosecuted before Spanish courts for one of the crimes over which the Law of 1985 granted universal jurisdiction to those courts. In its lengthy decision, the Constitutional Court took the opportunity to state in an *obiter dictum* that Article 23, para. 4 of the 1985 Law, granting universal jurisdiction, was in keeping with the Constitution: the Spanish legislator had 'conferred a universal scope (*un alcance universal*) on the Spanish jurisdiction over those crimes, corresponding to their gravity and to the need for international protection' (Legal Ground no. 3A). Spanish text on CD-Rom of Spanish legislation and case law: EL DERECHO, 2002, Constitutional decisions.

[20] See, in particular, the Order (*auto*) of 5 November 1998 (no. 1998/22605). In this order the Spanish National High Court (*Audiencia nacional*) confirmed that national courts have jurisdiction over genocide and terrorism committed in Chile (see Legal Grounds nos 3 and 4; as for torture, where the Court held that Spanish jurisdiction was based on Article 23(4)(g), on the strength of the 1984 Torture Convention, see Legal Ground no. 7). It should be noted that the Court concluded that 'Spain has jurisdiction to judge the acts (*conocer de los hechos*), based on the principle of universal prosecution of certain crimes . . . enshrined in our domestic law. It also has a legitimate interest (*interés legítimo*) in exercising that jurisdiction as more than fifty Spaniards were killed or made to disappear in Chile, victims of the repression reported in the orders' (Legal Ground no. 9). In other words, as is apparent from both the words reported and the entire text of the decision, Spanish jurisdiction was not grounded on passive nationality; the presence of Spaniards among the victims of the alleged crimes only amounted to a 'legitimate interest' of Spain in the exercise of universal jurisdiction. This order was confirmed by the decision of the *Audiencia nacional* of 24 September 1999 (no. 1999/28720). There, the Court reiterated that the Spanish Court had jurisdiction over the crimes attributed to Pinochet, namely genocide, terrorism, and torture (Legal Grounds nos 1 and 10–12), and also stated that Pinochet could not invoke the immunities pertaining to Heads of State, for he no longer held this status (Legal Ground no. 3). For the (Spanish) text of the order and the subsequent decision, see the Spanish case law on CD-Rom, EL DERECHO, 2002, Criminal jurisprudence, as well as on-line: **www.derechos.org/nizkor/espana.**

[21] See the Order (*auto*) of 4 November 1998 (no. 1998/22604), very similar in its tenor to that of 5 November referred to *supra*.

[22] See Order (*auto*) of 4 March 1999 (no. 1999/2723). The *Audiencia nacional* held that the Spanish Court could not exercise its criminal jurisdiction, as provided for in Article 23 of the Law on the Judicial Power, for the crimes attributed to Fidel Castro. He was an incumbent head of state, and therefore the provisions of Article 23 could not be applied to him because they were not applicable to heads of state, ambassadors, etc. in office, who thus enjoyed immunity from prosecution on the strength of international rules to which Article 21(2) of the same Law referred (this provision envisages an exception to the exercise of Spanish jurisdiction in the case of 'immunity from jurisdiction or execution provided for in rules of public international law'). See Legal Grounds nos 1–4. The Court also stated that its legal finding was not inconsistent with its ruling in *Pinochet*, because Pinochet was a former head of state, and hence no longer enjoyed immunity from jurisdiction (see Legal Ground no. 5). For the (Spanish) text of the order, see the CD-Rom, EL DERECHO, 2002, Criminal case law.

interpretation of the German Penal Code propounded by the German Supreme Court (*Bundesgerichtshof*) in a judgment of 21 February 2001 in *Sokolović*, the same principle should also apply in Germany, at least whenever the obligation to prosecute is provided for in an international treaty binding upon Germany.[23] One should also mention that in the course of the drafting of the Statute of the International Criminal Court, Germany forcefully expressed the view that international customary law at present authorizes universal jurisdiction over major international crimes.[24] In line with this view, Article 1 of the bill on international criminal law proposed by the German government and now pending before the German *Bundesrat* (Senate), namely the *Entwurf eines Gesetzes zur Einführung des Völkerstrafgesetzbuches*, provides that German law applies to all criminal offences against international law envisaged in the law (namely genocide, crimes against humanity, war crimes), even when the criminal conduct occurs abroad and does not show any link with Germany.[25]

What are the merits and the flaws of asserting absolute universal jurisdiction? This is a matter that deserves some consideration.

No one will fail to understand the generous ideal underpinning this system. Nonetheless, in my opinion various reasons militate against such absolute universal jurisdiction, at least if resorted to with regard to political or military leaders.[26]

First of all, the existence in some States of national laws granting absolute universal jurisdiction may prompt victims of atrocities to engage in so-called forum-shopping.

[23] The Court noted that in its decision of 29 November 1999, the Court of Appeal (*Oberlandsgericht Düsseldorf*), following the traditional German case law, had held that a factual link was required by law (*legitimierender Anknüpfungspunkt*) for a German court to exercise jurisdiction over crimes committed abroad by foreigners. (In the case at issue the offender was a Bosnian Serb accused of complicity in genocide perpetrated in Bosnia.) The Court of Appeal had found this link in the fact that the accused had lived and worked in Germany from 1969 to 1989 and had thereafter regularly returned to Germany to collect his pension and also to seek work. After recalling these findings by the Court of Appeal, the Supreme Court added: 'The Court however inclines, in any case under Article 6 para 9 of the German Criminal Code, not to hold as necessary these additional factual links that would warrant the exercise of jurisdiction . . . Indeed, when, by virtue of an obligation laid down in an international treaty, Germany prosecutes and punishes under German law an offence committed by a foreigner abroad, it is difficult to speak of an infringement of the principle of non-intervention' (judgment of 21 February 2001, 3 StR 372/00, still unreported, at pp. 19–20 of the typescript).

[24] In a document submitted in 1998 to the Preparatory Committee drafting the Statute, Germany stated the following: 'Under current international law, all States may exercise universal criminal jurisdiction concerning acts of genocide, crimes against humanity and war crimes, regardless of the nationality of the offender, the nationality of the victims, and the place where the crime was committed. This means that, in a given case of genocide, crime against humanity or war crimes, each and every state can exercise its own national criminal jurisdiction, regardless of whether the custodial State, territorial State or any other State has consented to the exercise of such jurisdiction beforehand. This is confirmed by extensive practice' (UN Doc. A/AC.249/1998/DP.2, 23 March 1998).

[25] 'Dieses Gesetz gilt für alle in ihm bezeichneten Straftaten gegen das Völkerrecht, für die in ihm bezeichneten Verbrechen auch dann, wenn die Tat im Ausland begangen wurde und keinen Bezug zum Inland aufweist' (see Bundesrat, *Drucksache 29/02*, 18 January 2002, *Gesetzentwurf der Bundesregierung*, at 3; German text on-line at www.bmj.bund.de/images/10185.pdf). See the precisions made in the Commentary, at 29).

[26] See also the critical remarks by J. Verhoeven, 'Vers un ordre répressif universel? Quelques observations', 45 AFDI (1999), 62–3.

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In other words, it may attract such victims and induce them to file complaints against alleged perpetrators.[27]

Secondly, if the accused never enters the country where the court is located, or is not extradited to that country, a situation that appears most likely, the judge will end up investigating hundreds of complaints about which he can do nothing.

Thirdly, a judge who decides to go ahead with the trial regardless of the absence of the accused, conducting proceedings *in absentia*, is likely to be criticized for violating the fundamental rights of the accused. Moreover, the absence of the accused, normally linked to the fact that the State of nationality refuses to extradite, could worsen the problem of establishing the facts because neither the accused nor the State in question will co-operate in the search for evidence.

Fourthly, the power of national judges to issue arrest warrants against foreign State officials may lend itself to abuse if the power is not exercised with caution and is not predicated on two basic conditions: that (i) compelling evidence is available against the accused, and (ii) the person charged with international crimes does not enjoy, or no longer enjoys, personal immunities (this holds true for Heads of State, prime ministers, some senior members of cabinet, and diplomatic agents). Whenever the necessary prudence is not used, the exercise of universal jurisdiction may easily lead to international disputes. This for instance happened in the aforementioned case of the Congolese former foreign minister against whom a Belgian investigating judge had issued an arrest warrant. The Congo filed an application with the International Court of Justice, claiming that the arrest warrant ran counter to the principle of sovereign equality of States and the rules on diplomatic immunity attached to such a State official (see *infra*, 15.6). Thus, a case pertaining to the criminal responsibility of individuals became the subject of an interstate dispute. In other words, the case was moved from an inter-individual level to that of State-to-State relations. This is contrary to the very logic of international criminal justice.

A further possible criticism is that, if all countries put a system modelled on Belgian (or Spanish) law into practice, the risk of inconsistent rulings would be great and no one would know how to establish priorities between competing courts.

Finally, given the number of diplomatically and politically high-profile cases which would be brought before the courts, the judge would eventually become entangled in roles normally played by the political authorities,[28] with consequent danger of infringing the sound principle of separation of powers. [29]

[27] On this issue see in particular J. F. Flauss, 'Droit des immunités et protection internationale des droits de l'homme', *Revue suisse de droit international et de droit européen* (2000), at 304.

[28] Take the *Pinochet* case: it would seem difficult to prove that Pinochet committed *genocide* in Chile, whereas it would seem that he can be accused of gross violations of human rights including torture; the fact that he was accused of genocide in Spain shows the sort of charges that can be put together, primarily for the purpose of taking into account the Spanish legislation (which provides for universal jurisdiction in the absence of a treaty only for genocide and terrorism).

Arguably these political matters should be left to politicians, legislatures, etc., and not brought before judges.

[29] It is, however, a fact that US courts have for many years asserted universal jurisdiction by default,

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Should one conclude that unqualified universal jurisdiction should always be discarded? In fact, there are cases where it may prove fitting: when adopted for international crimes perpetrated by *minor defendants*. Often the person accused of international crimes does not hold a high position in government. Universal jurisdiction may be envisaged for cases involving *low-ranking* military officers or other minor State agents, or even *civilians*, culpable of alleged crimes such as torture, war crimes, crimes against humanity, and so on. With regard to such persons, one is at a loss to see why, if the national or territorial State fails to take proceedings, another State should not be entitled to prosecute and try them in the interests of the whole international community. With regard to these persons, the initiation of criminal proceedings in their absence, the gathering of evidence, and the issue of an arrest warrant would have the advantage of making their subsequent arrest and trial possible. Normally these persons are not well known, and their travels abroad do not make news, unlike those of foreign ministers or Heads of State or military leaders. Hence the only way of bringing them to trial is to issue arrest warrants so that at some stage they are apprehended and handed over to the competent State.

However, let us not be unmindful of the pitfalls of the universality principle. In essence, the search for and collection of evidence may prove extremely difficult, for most of the evidence may be found in the State where the crimes were committed, and the national authorities may not be forthcoming and co-operative, especially if the crimes were committed on behalf of or at the behest of those authorities. Admittedly, the same drawback also occurs with regard to the passive nationality principle: the State of nationality of the alleged perpetrator of the offence is often reluctant to hand over the relevant evidence to the State of nationality of the victim (whereas when the active nationality principle is resorted to the reverse is true, because the State of the victim is normally all too glad to co-operate in the prosecution of the perpetrator). It would seem however, that in the case of universal jurisdiction the danger or likelihood of lack of judicial co-operation by the foreign State is much greater. States tend to dislike the exercise of extraterritorial jurisdiction when even the link constituted by the presence in the forum State of the perpetrator or the victim is lacking. Hence, whenever faced with such a situation, they tend not to co-operate.

Admittedly in *civil* proceedings, over serious violations of international law perpetrated by foreigners abroad (see the Alien Tort Claims Statute and the *Filartiga-Peña Irala* case. See, e.g., L. F. Damrosch, 'Enforcing International Law through Non-Forcible Measures', 269 *HR* (1997), 161–7). Although civil jurisdiction is less obtrusive than criminal jurisdiction, when it is exercised over foreigners who possess official status (for instance, high-ranking State officials), it nevertheless amounts to interference with the internal organization of foreign States. Whether or not this trend of US courts is objectionable as a matter of policy, or on legal grounds, it is a fact that it has not been challenged, or in other words has been acquiesced in, by other States. This implicit acceptance through non-contestation would seem to evidence the generally shared legal conviction that, where there are serious and blatant breaches of universal values, national courts are authorized to take action, subject to fulfilment of some fundamental requirements, such as ensuring a fair trial. (Admittedly there is a conspicuous difference between civil and criminal suits: in civil suits only money is at stake whereas in a criminal trial, the accused may be deprived of his liberty for a long time. So States may be prepared to tolerate civil suits of this nature, but shrink from allowing criminal trials.)

15.6 OBJECTIONS TO UNIVERSALITY

The notion of universality has been subjected to two criticisms. The first is that State courts would interfere in the internal affairs of another State, in violation of a fundamental principle of international relations. For example, Chile put forward this argument in a memorandum to the UK on the possible extradition of General Pinochet to Spain.

It is clear that here we are witnessing a confrontation between two different conceptions of the international community. The first is an archaic conception, under which non-interference in the internal affairs of other States constitutes an essential pillar of international relations. The second is a modern view, based on the need to further universal values; it implies that national judges are authorized to circumvent, if not remove, the shield of sovereignty.

A Spanish court, the *Audiencia nacional*, in two recent cases (*don Alfonso Francisco (Scilingo)* (at Legal ground no. 10) and *don Augusto (Pinochet)* (at Legal ground no. 9)) as well as the German Federal High Court (in the *Sokolović* case) (at 20), have already rejected this objection, without however giving reasons. It would nevertheless appear that they considered that courts, when they stand in, under either international law or national legislation, for a defaulting foreign State and hand down decisions relating to crimes committed by foreigners against foreigners abroad, protect fundamental values recognized by the whole international community.

A second objection is that national courts would hinder international diplomatic relations, whenever the suspect or the accused is a State agent in office, all the more so when he is a high representative such as a Head of State or government, a foreign affairs minister, etc. In this connection, the case of *Fidel Castro*[31] is relevant, for in that case a Spanish court propounded a balanced and legally apposite solution to this intricate matter. The case dealt with charges laid against an incumbent Head of State, Fidel Castro; the Spanish court ruled that, as long as he was in office, Fidel Castro could not be prosecuted in Spain, not even for international crimes envisaged under the Spanish law of 1985.

The same objection against the exercise of universal jurisdiction was raised by the Congo against Belgium before the International Court of Justice, in the *Case*

[31] See Order (*auto*) of 4 March 1999 (no. 1999/2723). The *Audiencia nacional* held that the Spanish Court could not exercise its criminal jurisdiction, as provided for in Article 23 of the Law on the Judicial Power, over the crimes attributed to Fidel Castro. Since Castro was an incumbent Head of State, the provisions of Article 23 could not be applied to him. This was because they were not applicable to Heads of State, ambassadors, etc. in office, who thus enjoyed immunity from prosecution on the strength of international rules to which Article 21(2) of the same Law referred. (This provision envisages an exception to the exercise of Spanish jurisdiction in the case of 'immunity from jurisdiction or execution provided for in rules of public international law'.) See Legal Grounds nos 1–4. The Court also stated that its legal finding was not inconsistent with its ruling in *Pinochet*, because Pinochet was a *former* Head of State, and hence no longer enjoyed immunity from jurisdiction (see Legal Ground no. 5). For the (Spanish) text of the order, see the CD-Rom, EL DERECHO, 2002, Criminal case law.

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... the Arrest Warrant of 11 April 2000. A Belgian investigating judge, at the ... Tribunal de Première Instance, had issued an international arrest warrant ... the foreign minister of the Democratic Republic of Congo for grave breaches ... Geneva Conventions and crimes against humanity. The crimes of which the ... minister was accused, following complaints by Congolese and Belgian ... had allegedly been committed on Congolese territory against Congolese ... The accused was not on Belgian territory when the arrest warrant was ... thus Belgium was not even the *forum deprehensionis*.[52] In its judgment of 14 ... 2002, the Court made an important contribution to a clarification of the law ... one ought correctly to term) *personal* immunities (including inviolability) of ... ministers. This is an area where State practice and case law are lacking. To ... its legal findings, the Court did not, therefore, have to establish the possible ... of customary law. Rather, it logically inferred from the rationale behind the ... on personal immunities of senior State officials, such as Heads of State or ... (or diplomatic agents), that such immunities must perforce prevent any ... to the 'effective performance' of their functions. They therefore bar any ... interference with the official activity of foreign ministers. It follows that an ... foreign minister is immune from jurisdiction, even when on a private visit ... when acting in a private capacity while holding office. Clearly, not only the arrest ... prosecution of a foreign minister while on a private visit abroad, but also the ... issuance of an arrest warrant, may seriously hamper or jeopardize the conduct ... international affairs of the State for which that person acts as a foreign minister.

15.7 IS THE EXERCISE OF UNIVERSAL JURISDICTION ALLOWED BY CUSTOMARY INTERNATIONAL LAW?

It would appear that the first case in which a person accused of crimes against humanity was tried in a State with which he had no formal links was *Eichmann* (although it could be argued that most of the surviving victims, and the relatives of victims, of Eichmann's offences were in Israel). It is extremely significant that no State concerned protested against that trial: neither the two German States nor the countries on whose territory the acts of genocide planned or organized by Eichmann had been perpetrated, nor the States of which the victims of genocide were nationals. Thus, States did not challenge the principle enunciated in 1962 by the Supreme Court of Israel whereby 'the peculiarly universal character of these crimes [against humanity] vests in every State the authority to try and punish anyone who participated in their commission' (at 287). The Court concluded as follows:

[52] See the relevant documents submitted by the parties in the case brought before the ICJ by Congo versus Belgium in *Case Concerning the Arrest Warrant of 11 April 2000.* (Those documents are summarized in the oral pleadings: see the verbatim records of the Court's sittings of 21 and 23 November 2000, www.icj-cij.org.)

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Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universality of jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant. (At 304.)

This proposition was taken up by US courts in *Yunis* (at 903) and in two decisions in *Demjanuk* (at 27–43 and 23–7) and, in *Pinochet*, by Lords Browne-Wilkinson and Millet. Lord Browne-Wilkinson stated that 'the *jus cogens* nature of the international crime of torture justifies States in taking universal jurisdiction over torture wherever committed' (837–8). Lord Millet stated that 'crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe *jus cogens*. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order' (at 911–12). These propositions were taken up and restated by an Argentinian judge in *Simon Julio, Del Cerro Juan Antonio* (at 55–6).

As we shall see, some States have, at least recently, passed legislation applying the universality principle, and their courts have begun to apply this principle. The acceptance by States of the exercise of 'universal' jurisdiction by Israel, as well as the most recent practice of some States, and the authoritative opinions of some judges of the International Court of Justice in the aforementioned *Case Concerning the Arrest Warrant of 11 April 2000*[33] would seem to be in line with the *Lotus* principle (whereby

[33] In their Joint Separate Opinion, Judges Higgins, Kooijmans, and Buergenthal set out a series of conditions for the exercise of absolute universal jurisdiction. These conditions are as follows: (i) the State intending to prosecute a person must first 'offer to the national state of the prospective accused person the opportunity itself to act upon the charges concerned'; (ii) the charges may only be laid by a prosecutor or investigating judge who is fully independent of the government; (iii) the prosecution must be initiated at the request of the persons concerned, for instance at the behest of the victims or their relatives; (iv) criminal jurisdiction is exercised over offences that are regarded by the international community as the most heinous crimes; (v) jurisdiction is not exercised as long as the prospective accused is a foreign minister (Head of State, or diplomatic agent) in office; after he leaves office, it may be exercised over 'private acts' (see paras 59–60 and 79–85).

Some of the conditions may however give rise to objection. For instance, one fails to see why, in the first of the five conditions set out by the three judges, it is required that 'the national state of the prospective accused' be 'offered' the opportunity to act upon the charges. Why should one leave aside the territorial State (normally the *forum conveniens*) or the State of which the victim is a national? In addition, why should one envisage that the State exercising universal jurisdiction 'offer' to another State the chance to prosecute the suspect? To make such an offer would involve shifting the whole matter from the judiciary to foreign ministries and might imply making a bilateral agreement. It would be easier to require that the court intending to exercise jurisdiction should first establish whether courts of the territorial or national State have (deliberately) failed to prosecute the suspect at issue; only then should a court proceed to assert universal jurisdiction.

It is submitted that also the fifth condition should be couched differently, to take account of the existence of the customary rule referred to in the text above, and which is intended to remove functional immunity in the case of international crimes.

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States are authorized to prosecute extraterritorial offences provided that by so doing they do not breach a prohibitive rule of international law).[4]

15.8 TRENDS IN THE EXERCISE OF NATIONAL CRIMINAL JURISDICTION

15.8.1 THE PROSECUTION AND PUNISHMENT OF WAR CRIMES

The merits and shortcomings of the penal repression of international crimes may be best assessed if considered in the light of the fundamental distinction drawn by Röling, with regard to war crimes, between 'individual' and 'system' criminality.[5] The former encompasses war crimes committed by combatants on their own initiative and for 'selfish' reasons (rape, looting, murder, and so on). The latter refers to war crimes perpetrated on a large scale, chiefly to advance the war effort or for ideological reasons, at the request or at least with the encouragement or toleration of the government authorities (killing civilians to spread terror, refusing quarter, using prohibited weapons, engaging in torture of captured enemies to obtain information, and so on). It also refers to other classes of international crimes, the perpetration of which by single individuals presupposes the complicity, participation, toleration, or acquiescence of State authorities, or which is even effected by State agents themselves. I am referring to crimes against humanity, genocide, or egregious forms of terrorism.

[4] On 2 August 1926 a collision occurred between the French mail steamer *Lotus* and the Turkish collier *Boz-Kourt* on the high seas off Mytilene. The *Boz-Kourt*, which was cut in two, sank, and eight Turkish nationals who were on board perished. The French steamer, after having done everything possible to succour the shipwrecked persons, continued on its course to Constantinople. There the French officer who was at the time of the collision officer of the watch on board the *Lotus* was arrested and brought to trial (under the passive nationality principle, together with the Turkish captain of the *Boz-Kourt*, on a charge of manslaughter. The French Government brought the case before the Permanent Court of International Law, claiming that the institution of criminal proceedings against the French national was inconsistent with the principles of international law, and contending in particular that the Turkish courts, in order to have jurisdiction, would have to point to some title of jurisdiction recognized by international law in favour of Turkey. No such title existed, according to France, as its view international law did not allow a State to take proceedings with regard to offences committed by foreigners abroad, simply by reason of the nationality of the victim (the principle of passive nationality): in the case at issue the offence would have to be regarded as having been committed on board the French vessel, and therefore subject to the French exclusive jurisdiction. The Court dismissed the French claim and held, albeit by the President's casting vote, in favour of Turkey (at 32). It first set out the principle whereby 'far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable' (at 19). The Court then asked itself whether under international law there was a principle which would have prohibited Turkey, in the circumstances of the case at issue, from prosecuting the French officer (at 21) and answered in the negative (22–34).

[5] E. V. A. Röling, 'The Significance of the Laws of War', in A. Cassese (ed.), *Current Problems of International Law* (Milan: Giuffrè, 1975), at 137–9.

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Normally 'individual criminality' is repressed by the culprit's national authorities. (Army commanders do not like this sort of misbehaviour, for it is bad for the morale of the troops and makes for a hostile enemy population.) By contrast, 'system criminality' as a rule is only repressed by international tribunals or by the courts of the adversary. There are, of course, exceptions, such as some cases of war crimes committed by US armed forces in the Philippines in 1900–1, the crimes against the Armenians repressed, in a few instances, by courts of the Ottoman Empire in 1919–20, or, in more recent times, the *Calley* case, 'a typical example of system criminality', in which the prosecution of Calley was urged upon the US authorities by American and foreign public opinion (but, revealingly, Calley received a very light sentence, which he served under house arrest, and was then pardoned by President Nixon; this seems to bear out that his acts were part of 'system criminality' as they were to a large extent tolerated or condoned by the US government).

By and large, repression of 'individual criminality' is a more frequent occurrence than that of 'system criminality', for the simple reason that the latter involves an appraisal and condemnation of a whole system of government, of misbehaviour involving the highest authorities of a country.

Apart from this distinction, one may however note that, in the case of *war crimes*, in time of war belligerents endeavour as far as possible to refrain from trying enemy combatants for fear of retaliation. Once the war is over, victor States tend to prosecute and punish crimes committed by the enemy forces against nationals of those victor States (on the passive nationality principle), whereas the contrary is not true. (There are however exceptions, such as the aforementioned criminal proceedings instituted in 1902 before US Courts Martial for crimes committed by American troops in the Philippines). Victor States often pass legislation granting amnesty to their own armed forces with regard to any war crime they may have perpetrated. After the First World War, once it proved impossible to set up an international tribunal for the punishment of German authors of war crimes, Germany was obliged to punish German military people accused by the Allies of war crimes. The Leipzig Supreme Court took upon itself the task of so doing, in 1921. In some cases Allied courts brought to trial Germans accused of war crimes, but no such court prosecuted and tried nationals of the Allies. Similarly, after the Second World War, in addition to establishing the two ad hoc International Tribunals (for the principal German and Japanese war criminals), the Allies passed Control Council Laws authorizing (in fact, obliging) German courts to try Germans. Various Allied courts also tried Germans. In Italy courts tried Germans and Italians who had collaborated with them, whereas partisans were granted amnesty. (Subsequently the amnesty was extended to Fascists and collaborators.) Similarly, in France in 1944 a law was passed granting amnesty to the French members of the Resistance, whereas trials were authorized for both the enemy and the French who had collaborated with Germans.

Recently war crimes have been tried under special national legislation, such as that enacted in the UK, Canada, or Australia, relating to a specific set of crimes, namely those committed by Nazis during the Second World War (see, for instance, the

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Sawoniuk case, brought before British courts:[36] the accused, a Polish-Byelorussian resident of the UK, was convicted of murder of unknown Jewish women in a village of Byelorussia occupied by the Germans; at 506–9).

It must be added that, strikingly, for about forty years the innovative and forward-looking repressive system instituted by the 1949 Geneva Conventions concerning the universal jurisdiction of any State party over grave breaches of the Conventions has remained unapplied. Only after the establishment of the ICTY and the ICTR have States commenced to resort to it. Thus, German, Danish, and Swiss courts have made use of universal jurisdiction by prosecuting and trying persons who allegedly perpetrated grave breaches in the former Yugoslavia.[37]

These cases, however, still constitute exceptions. As a rule States have confined themselves to taking criminal proceedings based on the more *traditional* grounds of jurisdiction. In practice they have instituted proceedings only against alleged authors of crimes committed on their *territory* or against their nationals (or persons living on their territory and having acquired their nationality).

It should be added that many States still tend to claim *exclusive* jurisdiction over their nationals when they commit war crimes at home or abroad. Thus for instance, in the USA the territoriality principle is widely accepted for criminal offences.[38] However, when it comes to prosecuting US military personnel, the USA refuses to accept foreign jurisdiction, either by entering into agreements with foreign States to the effect that the national jurisdiction of the accused prevails (this also applies to NATO agreements) or by refraining from participating in such international treaties as the Statute of the ICC.

15.8.2 THE PROSECUTION AND PUNISHMENT OF OTHER INTERNATIONAL CRIMES

As far as crimes against humanity and genocide are concerned, once trials of such crimes committed during the Second World War were over, in practice no or very little use has been made of the relevant international rules. In relatively recent times French courts tried Germans or French collaborators accused of having committed crimes against humanity during the Second World War (see the *Barbie*, *Papon*, and *Touvier* cases). In contrast, they have declined to exercise criminal jurisdiction over crimes against humanity committed by the French in Indochina in 1952–4, on legalistic grounds (chiefly a wrong interpretation of a resolution of the UN General

[36] [2000] *Crim. LR*, at 506–9.

[37] See the *Djajić* and *Jorgić* cases in Germany, the *Sarić* case in Denmark, *Javor* and *Munyeshuyka* in France, and the *G.* case in Switzerland.

[38] In *Yapp* v. *Reno* and in *Extradition of Charles Philip Smith*, US courts pointed out that 'When an American citizen commits a crime in a foreign country, he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country prescribe for its own people, unless a different mode be provided by treaty stipulations between that country and the United States' (at 1565 and 965).

Assembly and of the French law that referred to it: see the *Boudarel* case). Genocide has been brought before Israeli courts in *Eichmann* (based on the principle of universal jurisdiction, which however *in fact* largely coincided with that of passive nationality). German courts have pronounced upon genocide in a few cases, all relating to crimes committed by Serbs in the former Yugoslavia (see *Djajić*, *Jorgić*, and *Sokolović*, already referred to above). Courts in Rwanda are now trying alleged perpetrators of genocide.[39]

Torture as a discrete crime has been the subject of important proceedings in *Pinochet*, based on various grounds of jurisdiction (that of the custodial State, for British courts; the principle of universality in conjunction with that of passive nationality, for Spanish courts). However, for all its theoretical and principled significance, this case has not led to a proper trial, not even in Chile. (See the decision of the Court of Appeal of Santiago of 5 June 2000 in *Pinochet*.)

15.8.3 CONCLUDING REMARKS

In sum, national courts are still loath to bring to justice persons accused of international crimes. The fact that very often such crimes are perpetrated by State agents, or with their support, tolerance, or acquiescence, accounts for the hesitation or reluctance of courts to bring to book nationals accused of such crimes. Furthermore, when it is foreigners who allegedly perpetrate those crimes, the fear of meddling in the domestic affairs of other States holds national courts back. Generally speaking, these courts are still dominated by nationalistic, short-term interests. They are still far from realizing community concerns. Few national judges share the sense that it is necessary to vindicate and judicially to enforce respect for fundamental values, wherever they may have been breached.

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INTERNATIONAL AND COMPARATIVE CRIMINAL LAW SERIES

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M. CHERIF BASSIOUNI

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[2. If the law as it appeared at the commission of the crime is amended prior to the final judgement in the case, the most lenient law shall be applied.][166]

ZUTPHEN DRAFT

Article 16[A *bis*][167]

Non-retroactivity

1. Provided that this Statute is applicable in accordance with article 15[A], a person shall not be criminally responsible under this Statute for conduct committed prior to its entry into force.

[2. If the law as it appeared at the commission of the crime is amended prior to the final judgement in the case, the most lenient law shall be applied.][168]

~~Other proposals that may also relate to, inter alia, issues concerning trigger mechanism and other jurisdictional questions respectively, and which will be debated by the Preparatory Committee at a later session~~

~~[When a State becomes a party to this Statute after its entry into force, the Court has jurisdiction only in respect of acts committed by its nationals or on its territory or against its nationals after the deposit by that State of its instrument of ratification or accession. A non-party State may, however, by an express declaration deposited with the Registrar of the Court, agree that the Court has jurisdiction in respect of the acts that it specifies in the declaration.~~

~~The Court has no jurisdiction in respect of crimes for which, even if they have been committed after the entry into force of this Statute, the Security Council, acting under Chapter VII of the Charter of the United Nations, has decided before the entry into force of this Statute to establish an ad hoc international criminal tribunal. The Security Council may, however, decide otherwise.]~~

~~[The present Statute shall apply only to acts committed in the territory of a State party to the present Statute or by the nationals of a State party to the present Statute or against the nationals of a State party to the present Statute.]~~

N.B.: Other proposals under paragraph 2 could be deleted because the issues with which they dealt are covered under articles 7[21 bis] (Preconditions to the exercise of jurisdiction), 8[21 ter] (Temporal jurisdiction) and 9[22] (Acceptance of the jurisdiction of the Court).

[166] This provision raises issues relating to non-retroactivity, amendment of the Statute and penalties. Accordingly, further consideration of this issue is required.

[167] Ibid., pp. 19-20.

[168] This provision raises issues relating to non-retroactivity, amendment of the statute and penalties. Accordingly, further consideration of this issue is required.

DECISIONS TAKEN BY THE PREPARATORY COMMITTEE AT ITS SESSION HELD 11 TO 21 FEBRUARY 1997

Article A *bis*

Non-retroactivity

1. Provided that this Statute is applicable in accordance with article A, a person shall not be criminally responsible under this Statute for conduct committed prior to its entry into force.

[2. If the law as it appeared at the commission of the crime is amended prior to the final judgement in the case, the most lenient law shall be applied.]

Other proposals that may also relate to, inter alia, issues concerning trigger mechanism and other jurisdictional questions respectively, and which will be debated by the Preparatory Committee at a later session

[When a State becomes a party to this Statute after its entry into force, the Court has jurisdiction only in respect of acts committed by its nationals or on its territory or against its nationals after the deposit by that State of its instrument of ratification or accession. A non-party State may, however, by an express declaration deposited with the Registrar of the Court, agree that the Court has jurisdiction in respect of the acts that it specifies in the declaration.

The Court has no jurisdiction in respect of crimes for which, even if they have been committed after the entry into force of this Statute, the Security Council, acting under Chapter VII of the Charter of the United Nations, has decided before the entry into force of this Statute to establish an ad hoc international criminal tribunal. The Security Council may, however, decide otherwise.]

[The present Statute shall apply only to acts committed in the territory of a State party to the present Statute or by the nationals of a State party to the present Statute or against the nationals of a State party to the present Statute.]

AD HOC COMMITTEE

28. Some delegations favoured the inclusion of a provision on the non-retroactivity of the statute, bearing in mind article 28 of the 1969 Vienna Convention on the Law of Treaties.

ARTICLE 25
INDIVIDUAL CRIMINAL RESPONSIBILITY

ROME STATUTE

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.

Text Transmitted by Drafting Committee to Committee of the Whole

Article 23

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.

1998 Preparatory Committee

Article 23

Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to the present Statute.
2. A person who commits a crime under this Statute is individually responsible and liable for punishment.

[3. Criminal responsibility is individual and cannot go beyond the person and the person's possessions.][169]

4. The fact that the present Statute provides criminal responsibility for individuals does not affect the responsibility of States under international law.

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[169] This proposal deals mainly with the limits of civil liability and should be further discussed in connection with penalties, forfeiture and compensation to victims of crimes.

[5. The Court shall also have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives.

6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.][170]

NB: In the context of paragraphs 5 and 6, see also articles 76 (Penalties applicable to legal persons) and 99 (Enforcement of fines and forfeiture measures).

7. [Subject to the provisions of articles 25, 28 and 29,] a person is criminally responsible and liable for punishment for a crime defined [in article 5] [in this Statute] if that person:

(a) commits such a crime, whether as an individual, jointly with another, or through another person regardless of whether that person is criminally responsible;

(b) orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

[(c) fails to prevent or repress the commission of such a crime in the circumstances set out in article 25;]

(d) [with [intent] [knowledge] to facilitate the commission of such a crime,] aids, abets or otherwise assists in the commission [or attempted commission] of that crime, including providing the means for its commission;[171]

(e) either:

(i) [Intentionally] [participates in planning] [plans] to commit such a crime which in fact occurs or is attempted; or

[(ii) Agrees with another person or persons that such a crime be committed and an overt act in furtherance of the agreement is committed by any of these persons that manifests their intent [and such a crime in fact occurs or is attempted];][172] [173]

(f) [directly and publicly] incites the commission of [such a crime] [genocide] [which in fact occurs], [with the intent that such crime be committed];

(g)[174] [with the intent to commit such a crime,] attempts to commit that crime by taking action that commences its execution by means of a substantial step, but that crime does not occur because of circumstances independent of the person's intentions.[175]

*NB: This article should be re-examined as to the references to the mental element in view of article 29 (*Mens rea *(mental elements)).*

[Article 28

Actus reus (act and/or omission)

1. Conduct for which a person may be criminally responsible and liable for punishment as a crime can constitute either an act or an omission, or a combination thereof.

2. Unless otherwise provided and for the purposes of paragraph 1, a person may be criminally responsible and liable for punishment for an omission where the person [could] [has the ability], [without unreasonable risk of danger to him/herself or others,] but intentionally [with the intention to facilitate a crime] or knowingly fails to avoid the result of an offence where:

(a) the omission is specified in the definition of the crime under this Statute; or

(b) in the circumstances, [the result of the omission corresponds to the result of a crime committed by means of an act] [the degree of unlawfulness realized by such omission corresponds to the degree of unlawfulness to be realized by the commission of such act], and the person is [either] under a pre-existing [legal] obligation under this Statute to avoid the result of such crime [or creates a particular risk or danger that subsequently leads to the commission of such crime].

[3. A person is only criminally responsible under this Statute for committing a crime if the harm required for the commission of the crime is caused by and [accountable] [attributable] to his or her act or omission.]]

[170] There is a deep divergence of views as to the advisability of including criminal responsibility of legal persons in the Statute. Many delegations are strongly opposed, whereas some strongly favour its inclusion. Others have an open mind. Some delegations hold the view that providing for only the civil or administrative responsibility/liability of legal persons could provide a middle ground. This avenue, however, has not been thoroughly discussed. Some delegations, who favour the inclusion of legal persons, hold the view that this expression should be extended to organizations lacking legal status.

[171] It was pointed out that the commentary to the ILC Draft Code of Crimes against the Peace and Security of Mankind (Official Records of the General Assembly Fifty-first Session, Supplement No. 10 and corrigendum (A/51/10 and Corr.1, p. 24, para. (12))) implicitly also includes aiding, abetting or assisting ex post facto. This presumption was questioned in the context of the International Criminal Court. If aiding, etc., ex post facto were deemed necessary to be criminalized, an explicit provision would be needed.

[172] In addition to the two types of conduct described in paragraph (e), there is a third type of criminal association that may be considered. One formulation of this third category would be to refer to the conduct of a person who "participates in an organization which aims at the realization of such a crime by engaging in an activity that furthers or promotes that realization".

[173] The inclusion of this subparagraph gave rise to divergent views.

[174] Questions pertaining to voluntary abandonment or repentance should be further discussed in connection with grounds for excluding criminal responsibility.

[175] A view was expressed that it would be preferable that issues connected with attempt be taken up in a separate article rather than in the framework of individual responsibility. In that view, the article on individual responsibility should only refer to the way in which the person takes part in the commission of a crime, regardless of whether it deals with a completed crime or an attempted crime.

ZUTPHEN DRAFT

Article 17[B a.to d.][176]

Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to the present Statute.

2. A person who commits a crime under this Statute is individually responsible and liable for punishment.

[3. Criminal responsibility is individual and cannot go beyond the person and the person's possessions.][177]

4. The fact that the present Statute provides criminal responsibility for individuals does not affect the responsibility of States under international law.

[5. The Court shall also have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives.

6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.][178]

N.B.: In the context of paragraphs 5 and 6, see also articles 69[47 bis] (Penalties applicable to legal persons) and 88[59 ter] (Enforcement of fines and forfeiture measures).

7. [Subject to the provisions of articles 19[C], 22[G] and 23[H],] a person is criminally responsible and liable for punishment for a crime defined [in article 5[20]] [in this Statute] if that person:

(a) commits such a crime, whether as an individual, jointly with another, or through another person regardless of whether that person is criminally responsible;

(b) orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

[(c) fails to prevent or repress the commission of such a crime in the circumstances set out in article 19[C];]

[176] A/AC.249/1997/L.5, pp. 20-22.

[177] This proposal deals mainly with the limits of civil liability and should be further discussed in connection with penalties, forfeiture and compensation to victims of crimes.

[178] There is a deep divergence of views as to the advisability of including criminal responsibility of legal persons in the Statute. Many delegations are strongly opposed, whereas some strongly favour its inclusion. Others have an open mind. Some delegations hold the view that providing for only the civil or administrative responsibility/liability of legal persons could provide a middle ground. This avenue, however, has not been thoroughly discussed. Some delegations, who favour the inclusion of legal persons, hold the view that this expression should be extended to organizations lacking legal status.

(d) [with [intent] [knowledge] to facilitate the commission of such a crime,] aids, abets or otherwise assists in the commission [or attempted commission] of that crime, including providing the means for its commission;[179]

(e) either:

(i) [intentionally] [participates in planning] [plans] to commit such a crime which in fact occurs or is attempted; or

[(ii) agrees with another person or persons that such a crime be committed and an overt act in furtherance of the agreement is committed by any of these persons that manifests their intent [and such a crime in fact occurs or is attempted];[180]][181]

(f) [directly and publicly] incites the commission of [such a crime] [genocide] [which in fact occurs], [with the intent that such crime be committed];

(g)[182] [with the intent to commit such a crime,] attempts to commit that crime by taking action that commences its execution by means of a substantial step, but that crime does not occur because of circumstances independent of the person's intentions.[183]

N.B.: This article should be reexamined as to the references to the mental element in view of article 23[H] (Mens rea (mental elements)).

DECISIONS TAKEN BY THE PREPARATORY COMMITTEE AT ITS SESSION HELD 11 TO 21 FEBRUARY 1997

Article B a.

Individual criminal responsibility

a. *Personal jurisdiction*

1. The Court shall have jurisdiction over natural persons pursuant to the present Statute.

[179] It was pointed out that the commentary to the ILC Draft Code of Crimes (A/51/10, p. 24, para. (12)) implicitly also includes aiding, abetting or assisting *ex post facto*. This presumption was questioned in the context of the ICC. If aiding, etc., *ex post facto* were deemed necessary to be criminalized, an explicit provision would be needed.

[180] In addition to the two types of conduct described in para. (e), there is a third type of criminal association that may be considered. One formulation of this third category would be to refer to the conduct of a person who "participates in an organization which aims at the realization of such a crime by engaging in an activity that furthers or promotes that realization".

[181] The inclusion of this subparagraph gave rise to divergent views.

[182] Questions pertaining to voluntary abandonment or repentance should be further discussed in connection with grounds for excluding criminal responsibility.

[183] Questions pertaining to voluntary abandonment or repentance should be further discussed in connection with grounds for excluding criminal responsibility.

2. A person who commits a crime under this Statute is individually responsible and liable for punishment.

[3. Criminal responsibility is individual and cannot go beyond the person and the person's possessions.]

4. The fact that the present Statute provides criminal responsibility for individuals does not affect the responsibility of States under international law.

[5. The Court shall also have jurisdiction over juridical persons, with the exception of States, when the crimes committed were committed on behalf of such juridical persons or by their agencies or representatives.

6. The criminal responsibility of juridical persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.]

Article B b., c. and d.

Individual criminal responsibility

[Subject to the provisions of articles C, G and H,] a person is criminally responsible and liable for punishment for a crime defined [in article 20] [in this Statute] if that person:

(a) commits such a crime, whether as an individual, jointly with another, or through another person regardless of whether that person is criminally responsible;

(b) orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

[(c) fails to prevent or repress the commission of such a crime in the circumstances set out in article __ [referring to command/superior responsibility];]

(d) [with [intent] [knowledge] to facilitate the commission of such a crime,] aids, abets or otherwise assists in the commission [or attempted commission] of that crime, including providing the means for its commission;

(e) either:

(i) [intentionally] [participates in planning] [plans] to commit such a crime which in fact occurs or is attempted; or

[(ii) agrees with another person or persons that such a crime be committed and an overt act in furtherance of the agreement is committed by any of these persons that manifests their intent [and such a crime in fact occurs or is attempted];]

(f) [directly and publicly] incites the commission of [such a crime] [genocide] [which in fact occurs], [with the intent that such crime be committed];

(g) [with the intent to commit such a crime,] attempts to commit that crime by taking action that commences its execution by means of a substantial step, but that crime does not occur because of circumstances independent of the person's intentions.

Article G

Actus reus (act and/or omission)

1. Conduct for which a person may be criminally responsible and liable for punishment as a crime can constitute either an act or an omission, or a combination thereof.

2. Unless otherwise provided and for the purposes of paragraph 1, a person may be criminally responsible and liable for punishment for an omission where the person [could] [has the ability], [without unreasonable risk of danger to him/herself or others,] but intentionally [with the intention to facilitate a crime] or knowingly fails to avoid the result of an offence where:

(a) The omission is specified in the definition of the crime under this Statute; or

(b) In the circumstances, [the result of the omission corresponds to the result of a crime committed by means of an act] [the degree of unlawfulness realized by such omission corresponds to the degree of unlawfulness to be realized by the commission of such act], and the person is [either] under a pre-existing [legal] obligation under this Statute[184] to avoid the result of such crime [or creates a particular risk or danger that subsequently leads to the commission of such crime].[185]

[3. A person is only criminally responsible under this Statute for committing a crime if the harm required for the commission of the crime is caused by and [accountable] [attributable] to his or her act or omission.][186][187]

1996 Preparatory Committee

Article B

Individual criminal responsibility

a. *Personal jurisdiction*

Proposal 1

1. The International Tribunal shall have jurisdiction over [natural] persons pursuant to the provisions of the present statute.

2. A person who commits a crime under this statute is individually responsible and liable for punishment.

[2 *bis*. Criminal responsibility is individual and cannot go beyond the person and his/her possessions.]

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[184] Some delegations questioned whether the source of this obligation is wider than the Statute.

[185] Some delegations had concerns about including this clause which referred to the creation of a risk. Other delegations thought that, in the context of the offences of the Statute, breach of an obligation under the Statute to avoid the result of a crime was sufficient.

[186] Some delegations thought that a provision on causation was not necessary.

[187] These brackets reflect the view expressed that, although much progress has been made on thedefinition of omission, the question of whether omission should be inserted in the Statute depends upon the final drafting of this article.

3. The fact that the present Statute provides criminal responsibility for individuals does not [prejudice] [affect] the responsibility of States under international law.

Proposal 2

Physical persons and juridical persons

1. The Court shall be competent to take cognizance of the criminal responsibility of:

(a) Physical persons;

(b) Juridical persons, with the exception of States, when the crimes committed were committed on behalf of such juridical persons or by their agencies or representatives.

2. The criminal responsibility of juridical persons shall not exclude the criminal responsibility of physical persons who are perpetrators of or accomplices in the same crimes.

3. These provisions shall be without prejudice to the responsibility of States with respect to international law.

Note

Some delegations indicated that the expression "juridical persons" should extend to organizations lacking a legal status.

Some delegations expressed doubts about including the criminal responsibility of juridical persons into the Statute.

It was proposed as an alternative the possibility of referring to the "responsibility" of the juridical persons without including the word "criminal".

b. *Principle of criminal responsibility Criminal responsibility of principals*

1. A person is criminally responsible as a principal and is liable for punishment for a crime under this Statute if the person, with the mental element required for the crime:

(a) Commits the conduct specified in the description (definition) of the crime;

(b) Causes the consequences, if any, specified in that description (definition); and

(c) Does so in the circumstances, if any, specified in that description (definition).

2. Where two or more persons jointly commit a crime under this Statute with a common intent to commit such crime, each person shall be criminally responsible and liable to be punished as a principal.

[3. A person shall be deemed to be a principal where that person commits the crime through an innocent agent who is not aware of the criminal nature of the act committed, such as a minor, a person of defective mental capacity or a person acting under mistake of fact or otherwise acting without *mens rea*.]

[*Note*. This article establishes the general principle regarding the liability of principal perpetrators of a crime. Further elaboration of the elements of this general principle, such as "mental element", "conduct" and causation, are elaborated in articles G and H

Other persons who participate in the commission of a crime under this Statute would be criminally responsible and liable for punishment in the manner provided in articles B (c), I and J [and C] of this draft general part.

A question was raised whether this article is required, and whether it would be sufficient merely to state that a person who commits a crime under the Statute is criminally responsible and liable for punishment? On the other hand, it was noted that specificity of the essential elements of the principle of criminal responsibility was important; it serves as a foundation for *many* of the other subsequent principles and avoids the need to elaborate defences within the Statute that merely constitute negations of the existence of essential mental or physical elements.

It was noted that the choice of using the word "description" or "definition" was dependent upon answering the question whether the definition of crimes would be solely within the Statute (in which case the term "definition" would be appropriate) or whether further elaboration of the elements of the definition of a crime in the Statute might be contained in an annex (in which case the term "description" might be appropriate given that this term could encompass both the statutory definition and the annexed elaboration of elements)].

c. *Participation/Complicity*

Proposal 1

Responsibility of other persons in the completed crimes of principals

[1. A person who [plans,] aids, abets or solicits the commission of a crime under this Statute is criminally responsible and liable for punishment in accordance with that person's own individual responsibility apart from the responsibility of other participants.]

[2. A person who plans the commission of a crime under this Statute, which is committed by that person or another person, is criminally responsible and liable for punishment [shall be liable to the same punishment as provided in this Statute for a person who commits such crime as a principal].]

[3. A person may only be criminally responsible for planning the commission of a crime where so provided in this Statute.]

14. A person solicits the commission of a crime if, with the purpose of encouraging another person [making another person decide] to commit [or participate in the commission of] a specific crime, the person commands, [orders], requests, counsels or incites the *other* person to engage [or participate] in the commission of such crime, and the other person commits a crime [or is otherwise criminally responsible for such crime] as a result of such solicitation.

5. A person who solicits the commission of a crime is criminally responsible and liable for punishment [shall be liable to the same punishment as provided in this Statute for a *person* who commits such crime as a principal].

6. A person aids or abets the commission of a crime if the person does anything for the purpose of facilitating the commission of such crime by another person.

7. A person who aids or abets the commission of a crime is criminally responsible and liable for punishment {shall be liable to [a reduced punishment] [to the same punishment as provided in this Statute for a person who commits such crime as a principal]}.

[*Note*. The importance of being able to punish the planners was recognized. Under this article, planners are punishable only if a principal actually committed a crime as a result of such planning or soliciting. An alternative way of addressing the situation of planners is through the concept of "conspiracy"; see article J and notes relating to "conspiracy", below.

It was questioned whether paragraph 1 was redundant and should be deleted in light of the specific paragraphs that followed, which describe in greater detail the forms of participation, responsibility and liability for punishment.

A question was raised whether a person who solicits another person to commit a crime should be responsible and liable not only if the other person commits the crime that was solicited but also for any other crime that the other person committed which the solicitor foresaw (or reasonably could foresee) would be committed as a result of the solicitation.

A question raised by the draft proposals is whether a person should be liable as a solicitor only if the person solicits another to be a principal perpetrator or whether the person should also be liable for soliciting another person to participate in its commission as an aider and abettor (i.e. "otherwise criminally responsible").

It was questioned whether the Statute (in a new and separate article?) should also criminalize and punish a person in the situation where that person solicits another person to commit or criminally participate in a crime, but the other person does not commit the crime.

It was also questioned whether the Statute (in a new and separate article?) should also criminalize and punish persons who aid and abet another person after the commission of a crime; (e.g. aiding a person to escape detection or arrest, or destroying or concealing evidence).

It was suggested that provisions concerning the quantum of sentence should not be included in the General Part, but be located elsewhere in the Statute.]

Proposal 2

Criminal solicitation

1. A person is guilty of criminal solicitation, if, with the purpose of making another person decide to commit an offence, he/she commands, encourages or requests another person to engage in specific criminal conduct, when such person did criminal conduct according to such solicitation.

2. The punishment of criminal solicitation shall be the same as that of principals which is provided for in this Statute.

Accessories

1. A person is guilty of accessories if he/she did a conduct that facilitates the commission of an offence.

2. The punishment of accessories shall be reduced.

Proposal 3

Perpetrator and accomplice

1. An accomplice in a crime shall be punished as the perpetrator.

2. An accomplice is a person who knowingly, through aid or assistance, facilitates the preparation or commission of a crime.

3. An accomplice is also a person who knowingly, by whatever means, plans, incites the commission, orders or assists and encourages the planning, preparation or commission of a crime.

d. *Combined proposal covering both: (b) principle of criminal responsibility and (c) participation/complicity*

1. The following shall be considered perpetrators or participants of the crimes defined in the present Statute:

(a) Those who agree or prepare its perpetration;
(b) Those who commit such crimes;
(c) Those who jointly commit such crimes;
(d) Those who commit such crimes by means of a third person;
(e) Those who order intentionally a third person to perpetrate such crimes;
(f) Those who assist intentionally others in the perpetration of such crimes;
(g) Those who intervene without prior agreement with other persons in the perpetration of such crimes, when it is not possible to determine the result that each one produced.

2. The persons mentioned above will be liable in proportion to their responsibility.

ARTICLE 26
EXCLUSION OF JURISDICTION OVER PERSONS UNDER EIGHTEEN

ROME STATUTE

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.

PRESBYTERIAN CHURCH OF SUDAN, et al., Petitioners, v. TALISMAN ENERGY, INC., Respondent.

No. 09-1262

SUPREME COURT OF THE UNITED STATES

2009 U.S. Briefs 1262; 2010 U.S. S. Ct. Briefs LEXIS 1825

May 19, 2010

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit.

Amicus Brief

COUNSEL: [**1] DAVID J. SCHEFFER, ESQ., CENTER FOR INTERNATIONAL HUMAN RIGHTS, NORTHWESTERN UNIVERSITY SCHOOL OF LAW, Chicago, Illinois, Amicus Curiae. [*i]

INTERESTS: [*1] **INTEREST OF THE AMICUS CURIAE** n1

n1 Counsel of record for all parties received notice at least 10 days prior to the due date of my intention to file this amicus brief; all counsel have consented to the filing of this brief; and the consent letters have been filed with the Clerk of the Court with this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae, made a monetary contribution to the preparation or submission of this brief.

David J. Scheffer is the Mayer Brown/Robert A. Helman Professor of Law and Director of the Center for International Human Rights at Northwestern University School of Law, where he teaches international human rights and criminal law and corporate human rights responsibility. He served as U.S. Ambassador-at-Large for War Crimes Issues (1997-2001) and counsel to the U.S. Permanent Representative to the United Nations (1993-1997). He was deeply engaged in the policy formulation, negotiations, and drafting of the constitutional documents governing the International Criminal Court. He led the U.S. delegation that negotiated the Rome Statute (Rome Statute of the International Criminal Court, adopted July 17, 1998, 2187 U.N.T.S. 90 (1998)), and its supplemental documents from 1997 to 2001. He was deputy head of the delegation from 1995 to 1997. On behalf of the U.S. Government, he negotiated the statutes of and coordinated support for the International Criminal Tribunals for the Former Yugoslavia and Rwanda, Special Court for Sierra Leone, and Extraordinary Chambers in the Courts of [*2] Cambodia. He exercised responsibility within the U.S. Government for the investigation and prosecution of atrocity crimes (namely, genocide, crimes against humanity, and war crimes) on a global basis. He has written extensively about the tribunals, including the International Criminal Court, and the negotiations leading to their creation.

1. 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.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

[**7]

This Court should grant certiorari in order to examine whether the mens rea standard for aiding and abetting under the Alien Tort Statute *(28 U.S.C. § 1350)* should be determined by reference to Article 25(3)(c) of the Rome Statute, which represents a negotiated formula uniquely crafted for the International Criminal Court, or whether it should be ascertained from an examination of customary international law, which has long applied the knowledge standard.

ARGUMENT

I. ARTICLE 25(3)(c) OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT DOES NOT REFLECT CUSTOMARY INTERNATIONAL LAW

The Second Circuit holds that the mens rea standard for aiding and abetting liability under the Alien Tort Statute must be a "norm of international character accepted by the civilized world and defined [*6] with a specificity comparable to the features of the 18th-century paradigms" recognized by this Court in *Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004).* Curiously, the Second Circuit looks to the Rome Statute of the International Criminal Court for definitive guidance by interpreting it as both adopting the purpose standard and embodying [**8] the customary international law standard of *Sosa* with respect to aiding and abetting liability. *The Presbyterian Church of Sudan et al. v. Talisman Energy, Inc., 582 F.3d 244, 258-259 (2d Cir. 2009).* The Second Circuit errs on all counts with these findings. Petitioners correctly point out that customary international law has long established a knowledge standard for aiding and abetting liability and that federal common law, which is informed by customary international law, should guide the courts in determining accessorial liability under the Alien Tort Statute. Petition for Writ of Certiorari, The Presbyterian Church of Sudan et al. v. Talisman Energy, Inc., No. 09-1262 at 19-26 (2d Cir. April 15, 2010).

While fully embracing such reasoning, this amicus brief explicates two narrow but essential points not fully addressed elsewhere. The first objective is to explain, in this Part I, why Article 25(3)(c) of the Rome Statute, which the Second Circuit relies upon for its finding of a purpose standard, should not be interpreted as customary international law. Nonetheless, even if the provision were to be firmly settled as customary international law in the view of [**9] the federal judiciary, the second objective of [*7] this amicus brief is to explain, in Part II, how the Second Circuit's interpretation of the wording of Article 25(3)(c) betrays both what transpired in the negotiations leading to the Rome Statute and how the mens rea standard for aiding and abetting is established under the treaty.

The Rome Statute is a negotiated treaty of considerable complexity designed to govern only the International Criminal Court. The Rome Statute was never intended, in its entirety, to reflect customary international law. Relatively few of the provisions of the Rome Statute merit that rigorous categorization and they do not include Article 25(3)(c). Nonetheless, the Second Circuit leaps to the conclusion that Article 25(3)(c) embodies customary international law.

LAW 279 (2d ed. 2008).

Beyond the general principles of law, another example of negotiated compromise language arises with Article 77, which establishes a maximum sentence of life imprisonment "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person." Arab and Caribbean delegations strongly objected to the absence of the death penalty in the Rome Statute and would never concede that Article 77 reflects the maximum degree of punishment permitted under customary international law. WILLIAM A. SCHABAS, AN [*11] INTRODUCTION TO THE [**14] INTERNATIONAL CRIMINAL COURT 316 n. 17 (3d ed. 2007). Indeed, the U.S. Government would not concede that point.

C. Article 25(3)(c) of the Rome Statute was not drafted to reflect customary international law

Similarly, Article 25(3)(c) of the Rome Statute was negotiated not to codify customary international law but to accommodate the numerous views of common law and civil law experts about how, precisely, to express the mens rea of the aider or abettor. Per Saland, the Swedish Chairman of the Working Group on the General Principles of Criminal Law for years prior to and throughout the Rome Conference, writes that Article 25

> posed great difficulties to negotiate in a number of ways. One problem was that experts from different legal systems took strongly held positions, based on their national laws, as to the exact content of the various concepts involved. They seemed to find it hard to understand that another legal system might approach the issue in another way: e.g., have a different concept, or give the same name to a concept but with a slightly different content. . . . The text was also burdened with references to the mental element (e.g., intent and knowledge) because [**15] agreement had not yet been reached as to the text of a separate article dealing with the mental element in general terms.

[*12] Per Saland, *International Criminal Law Principles, in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 189, 198 (Roy Lee ed., 1999).

As the lead U.S. negotiator, I do not recall hearing directly or being advised by my Justice Department team of negotiators of a single discussion prior to or during the Rome negotiations where the text of what laboriously became Article 25(3)(c) on aiding and abetting as a mode of participation was being settled as a matter of customary international law. It was a very contentious provision, with some delegations seeking explicit reference to intention, notwithstanding the important complication that the word "intention" has different meanings in different legal systems. In some countries, for example, passive intention is inferred from an actor's engaging in conduct with knowledge of some likely consequence of that conduct. Other delegations were wedded to the term "knowledge," believing that it better reflected the standard that was employed in their national practice and that had been endorsed [**16] in the jurisprudence of the Nuremberg and Tokyo International Military Tribunals and of the International Criminal Tribunals for the Former Yugoslavia and Rwanda.

Negotiators struggled to find compromise wording and ultimately settled on using neither "intent" nor "knowledge" but "purpose." Reaching this compromise was made easier, in the end, by the prior resolution of the final language of Article 30, an article that deals expressly with the issue of the mental element of crimes. Finalizing the language of [*13] Article 30 helped enormously, as it enabled negotiators to look to Article 30 for intent and knowledge standards while seeking an accommodation for Article 25(3)(c). However, if anyone had claimed we were writing customary international law on aiding and abetting liability in Article 25(3)(c), they would have been laughed out of the room.

Thus, the wording of Article 25(3)(c) was uniquely crafted for the International Criminal Court, and when read in conjunction with the mens rea standards set forth in Article 30 of the Rome Statute, leaves to the judges of the International Criminal Court the task of determining precisely the proper criteria for accessorial liability. [**17] Nothing discourages or prevents them from looking to the growing jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the Special Court for Sierra Leone, the Extraordinary Chambers in

explain the distinction [between aiding and abetting and perpetration] in another way, stating that when the accomplice 'shares' the intent of the principal perpetrator, he or she becomes a 'co-perpetrator.'" WILLIAM A. SCHABAS, THE U.N. INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE 307-08 (2006). Had the drafters of the Rome Statute meant to require an intent standard for aiding and abetting, they would have agreed to recast aiding and abetting more coherently as a co-perpetrator [*17] mode of liability. But they did not. Consequently, a national court would be mistaken to identify the Rome Statute as somehow confirming a shared intention standard and denying the knowledge standard. The final wording of Article 25(3)(c) negated neither the large body of precedents for a knowledge standard in aiding and abetting liability nor the common sense reality of how atrocity crimes are committed.

B. Article 25(3)(c) must be interpreted together with the general principle of law on mental element set forth in Article 30(2)(b) of the Rome Statute

Negotiators repeatedly stumbled over what eventually was consolidated in Article [**22] 30 of the Rome Statute regarding the required mental element for all of the atrocity crimes, including the mental element for accessorial liability for such crimes. There remained a lingering and significant problem prior to Rome among largely common law and civil law delegations about precisely how the mens rea for aiding and abetting should be worded. The Preparatory Committee draft in spring 1998, which was the initial working draft in Rome, reflected this continued indecision with its draft language for the aiding and abetting provision: "[With [intent] [knowledge] to facilitate the commission of such a crime,] aids, abets or otherwise assists . . ." *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June* -- [*18] *17 July 1998, Official Records, Volume III,* U.N. Doc. A/CONF.183/13 (Vol. III) (2002), at 31.

It was only after negotiators reached Rome in the summer of 1998 that they finally arrived at compromise language. We knew that Article 30 of the Rome Statute, which deals with the required mental element, would be the agreed formula for how both intent and knowledge would be described and [**23] applied as the mental element for criminal acts, "[u]nless otherwise provided." Rome Statute, art. 30(1). The latter proviso relates to explicit formulations of intent and knowledge for some of the atrocity crimes defined in Articles 6, 7, and 8, for command responsibility under Article 28, and for participants in a "common purpose" under Article 25(3)(d)(ii). WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 224-25 (3d ed. 2007). But the proviso's relevance, if any, to Article 25(3)(c) is far from clear and was never confirmed in the negotiations.

The final text of Article 30(2)(b) easily captures the mens rea requirement for aiding and abetting, namely, "[i]n relation to a consequence, that person means to cause that consequence *or* is aware that it will occur in the ordinary course of events." (emphasis added). At Rome, negotiators did not relegate aiding and abetting to the first prong of this formulation -- "means to cause that consequence" -- which would have injected a shared intention standard into aiding and abetting. Rather, the intent of the aider or abettor is logically discovered within the awareness of the "consequence," namely that he or [**24] she who aids or [*19] abets is someone who "is aware that [the consequence] will occur in the ordinary course of events." Rome Statute, art. 30(2)(b).

Article 25(3)(c)'s opening phrase, "For the purpose of facilitating the commission of such a crime," was agreed to in Rome during the final negotiations as an acceptable compromise phrase to resolve the inconclusive talks over whether to use the word "intent" or the word "knowledge" for this particular mode of participation. The "purpose" language stated the de minimus and obvious point, namely, that an aider or abettor purposely acts in a manner that has the consequence of facilitating the commission of a crime, but one must look to Article 30(2)(b) for guidance on how to frame the intent of the aider or abettor with respect to that consequence.

Donald Piragoff, lead Canadian Government negotiator on general principles of law throughout the years of negotiations culminating in Rome, writes about the relationship between aiding and abetting liability under Article 25(3)(c) and mental element requirements of Article 30(2):

INTERNATIONAL CRIMINAL COURT: A COMMENTARY, 767, 798-801, 900-02 (Antonio Cassese, et al. eds., 2002). Such a view, at the heart of the debate in Rome, would lead one to believe that the Rome Statute definitively establishes a whole new playing field for aiding and abetting [*23] that, at a minimum, would have to be uniquely [**29] tailored for the International Criminal Court and far removed from any claim of customary international law.

The Second Circuit succumbs to the notion that insertion of the word "purpose" in Article 25(3)(c) must really mean a purpose or shared intent standard for aiding and abetting, when in reality the phrase "purpose to facilitate" was a compromise usage of those words to avoid any agreement on precisely the issue of shared intent. In Rome there was no agreement to so limit aiding and abetting to such a narrow range of liability requiring the finding of a shared intent to commit the underlying crime. That theory may exist in the aspirations of certain academics determined to declare victory ex post facto at Rome, but it has no reality in either the Rome Statute or the Alien Tort Statute.

Professor Roger Clark, a principal negotiator advising Samoa before and during the Rome Conference, writes:

> Article 25 sometimes uses terms like "purpose" and "with the aim of" that may need to be read in the light of article 30. Speaking generally, one who does not personally "do" the deed, must know of it and intend to associate himself with it. . . . There was considerable debate throughout [**30] the process about the conjunctive "and" between intent and knowledge [in Article 30]. Some delegations, the French in particular, insisted [*24] that both were necessary. Others of us, especially from common law jurisdictions, believed that the appropriate mental element for each separate material element had to be considered on its own merits. Particularly for circumstance elements, as the term "circumstance" is used in article 30(3) (and some consequence ones), knowledge (in the sense of awareness) might well be enough, although intent might be required as to other relevant elements. The debate shed more heat than light. In part, the differences of perspective coincided with the ease with which some of us are prepared to see several different material elements combining with appropriate mental elements (plural) to form "the offence," where others tend to see the material element, a global "thing," and a single intent/knowledge mental element which gets attached to that thing.

Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences, 2 CRIM. L.F. 291, 302-303 (2001).* [**31] Only the judges of the International Criminal Court will sort this out when faced with a real case.

I believe, however, that when Article 25(3)(c) is interpreted by the judges of the International Criminal Court, they are more likely to discover the standard for aiding and abetting as it has developed in the jurisprudence of the international military tribunals at Nuremberg and Tokyo and the international [*25] and hybrid criminal tribunals or recent years, in state practice, and in the writings of leading scholars: a knowledge standard of substantial assistance and an intent standard arising from awareness that the criminal consequence will occur in the ordinary course of events. A fair reading of Articles 25(3)(c), 30(2)(b), and 30(3) of the Rome Statute achieves such a standard.

III. THIS COURT SHOULD GRANT CERTIORARI TO CONFIRM THAT LOWER COURTS CANNOT RELY UPON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT FOR A RULE OF CUSTOMARY INTERNATIONAL LAW ON AIDING AND ABETTING LIABILITY

The ambiguity that burdens the meaning of aiding and abetting liability under Article 25(3)(c) of the Rome Statute one day will be replaced with clarity, but only by the judges [**32] of the International Criminal Court when they deliberate on a relevant case. Even then their ruling will not necessarily be formulated to reflect customary international law. Neither the Second Circuit nor this Court can substitute itself for their judgment about the Rome Statute's meaning. Scholars only can speculate at this stage. What can be stated with certainty is that Article 25(3)(c) was a negotiated compromise during the Rome negotiations that achieved the utilitarian objective of ensuring that aiding and abetting liability can be prosecuted before the International Criminal [*26] Court, and that the provision was uniquely crafted for the Court and thus never negotiated as a rule of customary international law.

Otto Triffterer

Commentary on the Rome Statute of the International Criminal Court

-Observers' Notes, Article by Article-

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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.

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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 I (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); Ferrando Mantovani, *The General Principles of International Criminal Law: The viewpoint of a national criminal lawyer*, 1 J. INT'L CRIM.

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β) "For the purpose of facilitating"

23 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].

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"

24 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

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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, *c. 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* 221–4.

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. Bluskic*, 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 *C. 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 (37 I.L.M. 249 (1998)), article 2 para. 3 (c).

121 For example: Preparatory Committee Draft, article 23 para. 7 (e) (ii).

122 See, for example, V. Pella, *Memorandum*, 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. Katholnigg 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

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The mental element in the Rome Statute of the International Criminal Court: a commentary from a comparative criminal law perspective

Mohamed Elewa **Badar**

Subject: International law. **Other Related Subject:** Criminal law. Legal systems

Keywords: Civil law; Common law; Comparative law; International Criminal Court; International criminal law; Mens rea

Legislation cited: Statute of the International Criminal Court 1998 (United Nations) art.30

***473** For the first time in the sphere of international criminal law, and unlike the Nuremberg and Tokyo Charters or the Statutes of the Yugoslavia and Rwanda Tribunals, Article 30 of the Rome Statute of the International Criminal Court provides a general definition for the mental element required to trigger the criminal responsibility of individuals for serious violations of international humanitarian law. The first paragraph of Article 30 stresses that unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the *ratione materiae* of the International Criminal Court 'only if the material elements are committed with intent and knowledge'. The second paragraph identifies the exact meaning of intent, whereas the third paragraph defines the meaning of knowledge.

At first sight, it appears that the explicit words of Article 30 are sufficient to put an end to a long lasting debate regarding the *mens rea* enigma which has confronted the jurisprudence of the two *ad hoc* Tribunals for the last decade, but this is not true. Scholars disagree ***474** regarding the exact meaning of intent under Article 30. Some view Article 30 as encompassing the three categories of *dolus,* namely, *dolus directus* of the first and second degree and *dolus eventualis.* Others hold the opinion that the plain meaning of Article 30 is confined to *d olus directus* of the first degree (intent in *stricto sensu*) and *dolus directus* of the second degree (indirect or oblique intent).

At present, the only guidance given by the International Criminal Court (ICC) regarding the meaning of 'intent and knowledge' as set out in Article 30 is the decision rendered by Pre-Trial Chamber I (PTC I) of 29 January 2007 in the Lubanga case.1 There, the PTC I asserted that the cumulative reference to 'intent' and 'knowledge' as provided for in Article 30 requires the existence of a volitional element on the part of the accused, and that volitional element encompasses three degrees of *dolus,* namely, *dolus directus* of the first and second degrees and *dolus eventualis.*

This paper examines in depth the elements of culpability as set out in Article 30 from a comparative criminal law perspective as well as the relationship between Article 30 and other provisions of the ICC Statute in light of the Lubanga Decision on the Confirmation of Charges.2 The comparative study undertaken in this paper is significant since the codification of Article 30 - as with other provisions under the Statute - was conducted by several codifiers who brought their own legal cultural experience to the drafting of this provision.3 The paper con-

cludes with some suggestions regarding the *mens rea* standards which are deemed appropriate to trigger the criminal responsibility of individuals for serious violations of international humanitarian law.

I. ANATOMY OF ARTICLE 30 OF THE ICC STATUTE

1.1 *Elements Analysis - Mental Elements and their Objects*

In order to hold a person criminally responsible and liable for a crime within the jurisdiction of the ICC, it must be established that the ***475** material elements of the offence were committed with intent and knowledge. This is expressly mentioned in paragraph 1 of Article 30 of the ICC Statute:

1. 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.4

It is clear that the ICC Statute lacks a general provision regarding the definition of the *actus reus* or the material elements of the crime, and yet leaves the door open with respect to what should be understood by the phrase 'material elements' as it appears in Article 30(1). This deficiency, however, is remedied by paragraphs (2) and (3) of the same Article which set out the relationship between the mental elements and the material elements of an offence - expressly referred to as conduct, consequence and circumstance.5 In so doing, Article 30 sets itself aside from the broad notion of 'materials elements' as presented in the Model Penal Code or German literature.6 The significance of this provision is that it assigns different levels of mental element to each of the material elements of the crime in question. This is a remarkable shift from an ***476** 'offence analysis' approach to an 'element analysis' approach.7 Under 'offence analysis', crimes are defined in general terms; intentional crimes, reckless crimes and negligent crimes, whereas 'element analysis' in contrast, recognizes that a single crime definition may require a different culpable state of mind for each objective element of the offence. This approach is similar to the one adopted by the Model Penal Code, in 1962, by the American Law Institute.8 The Model Penal Code's approach is based on the view that, unless some element of mental culpability is proved with respect to each material element of the offence, no valid criminal conviction may be obtained.9 This is explicitly stated in § 2.02(4) of the Model Penal Code (MPC) which is entitled 'prescribed culpability requirement applies to all material elements'. Section 2.02(4) of the MPC reads as follows: 'When the law defining an offence prescribes the kind of culpability that is sufficient for the commission of an offence, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offence, unless a contrary purpose plainly appears.'10

Under the ICC Statute, 'element analysis', or the 'rule of *mens rea* coverage', has to be applied cautiously since culpability terms (a) are defined in Article 30; (b) are stated in the definition of particular crimes (genocide 'with intent to', war crimes of 'wilful killing') or; (c) are stated in the Elements of Crimes.11

1.2 *Different Culpability Terms Defined in Relation to Each Objective Element*

Article 30 of the ICC Statute - the default rule - assigns different levels of culpability to each of the material elements of the crimes under the subject matter jurisdiction of the Court. Unless otherwise ***477** provided, a person has intent in relation to conduct if 'that person means to engage in the conduct'.12 According to the same provision, a person is said to have intended a consequence not only if 'that person means to cause that consequence' but also if he 'is aware that it will occur in the ordinary course of events'.13 Surprisingly, Article 30 assigns two different culpable states of mind for the consequence element, namely intent and knowledge. Either of these culpable mental states is sufficient to cover the consequence element. Yet, a person who intentionally engages in a proscribed conduct with *awareness* that a consequence will occur in the ordinary course of events may incur criminal liability for any of the crimes within the *ratione materiae* of the Court (unless otherwise provided). Yet, one might argue that *dolus directus* of second degree or oblique intent is sufficient *mens rea* to trigger the criminal responsibility of individuals for serious violations of international humanitarian law under the ICC Statute.

As for the circumstance element - a material element which is related to the knowledge or awareness of a defen-

dant and not to his intention - the ICC Statute required a culpable state of knowledge (knowing standards). This means the defendant's awareness of the existence of a circumstance.14

Thus, the general rule under Article 30 is the full coverage of the material elements by the corresponding mental elements. Problems may arise regarding special types of material elements (I will name them quasi-material elements) which do not fall under the three categories of the materials elements mentioned above and accordingly may not be covered by the default rule of Article 30 - intent and/or knowledge. There are three different types of these quasimaterial elements. The first type is the quasi-material element of a 'legal character'. For instance, Article 8(2)(a) of the ICC Statute requires that a victim be a protected person under the Geneva Conventions of 1949. According to some commentators the default rule of Article 30 does not apply to such *factual* elements since this provision 'does not require proof that the accused knew the relevant law or that he or she correctly completed such a legal evaluation.'15 Yet, one might argue that Article 32(2) has no role to play in such ***478** situations. It is not clear, however, whether this is considered a mistake of law, or a mistake of fact or a combination of both - mistake of mixed fact and law.16 This issue will be examined later in detail when we discuss the relationship between Articles 30 and 32 of the ICC Statute.

The second type of quasi-material element involves a normative aspect or a value judgement.17 The requirement of '*serious* injury to body' as provided for in Article 7(1)(k) - crimes against humanity of other inhuman acts - and Article 8(2)(a)(iii) - grave breaches of the Geneva Conventions of wilfully causing great suffering, or serious injury to body or health - is an example of a quasi-material element which involve a value judgment. In such case, the prosecution is not entitled to demonstrate that the accused 'correctly completed a normative evaluation.'18 Otherwise, the accused's subjective opinion would be the sole determinative factor in finding whether a crime had been committed.19

The third category includes circumstantial elements; the widespread or systematic attack for crimes against humanity and the existence of an armed conflict for war crimes. This type of element was referred to during the negotiations of the Elements of Crimes as 'contextual elements'.20 If this element is to be considered a material element, it should as a rule - element analysis - be covered by a corresponding mental element. There is a consensus among scholars that such a contextual element is related to the broader context that renders the crime an international crime, and accordingly the default rule - intent and knowledge - does not apply to them.21

***479** II. DIFFERENT DEGREES OF MENTAL ELEMENTS UNDER ARTICLE 30

Article 30 is in line with the Latin maxim *actus non facit reum nisi mens sit rea.* This provision, however, goes further, assuring that the mental element consists of two components: a volitional component of intent and a cognitive component of knowledge. In so doing, Article 30 confirms the evolutionary developments of the law of *mens rea* under the jurisprudence of the *ad hoc* Tribunals which demand that, for the imposition of criminal responsibility for serious violations of international humanitarian law, both a cognitive and volitional component must be incorporated into the legal standard.22

2.1 *The Meaning of Intent*

Generally speaking, in criminal law the word 'intent' or the adjective 'intentionally' have traditionally not been limited to the narrow definition of purpose, aim, or design. According to common law tradition, a person is considered to intend the consequence not only if (i) his conscious objective is to cause that consequence, but also (ii) if he acts with knowledge that the consequence is virtually certain to occur as a result of his conduct.23 The term 'intent' as set out in Article 30 has two different meanings, depending upon whether the material element related to conduct or consequence. A person has intent in relation to conduct, if he 'means to engage in the conduct',24 whereas in relation to consequence, a person is said to have intent if 'that person means to cause that consequence' or 'is aware that it will occur in the ordinary course of events'.25

***480** 2.2 *Intent in Relation to Conduct*

Pursuant to Article 30(2)(a) of the ICC Statute, a person is said to have intent in relation to conduct if that per-

son means to engage in the conduct. This definition has two aspects. First, the relationship between intent and conduct as set out in Article 30(2)(a), 'seems closer to what common lawyers often think of the "volitional" part of an "act" (deliberately pulling a trigger as opposed to a reflex action, for example).'26 Yet, 'the conduct must be the result of a voluntary action on the part of the perpetrator.'27 Professor Roger Clark, however, noted that knowledge is not defined in relation to conduct and this 'may create some mischief later.'28 It is submitted that unless relevant circumstances are known that qualify the action as illegal it cannot be said that the person intends the conduct.29 Generally, the prosecution must prove that the defendant had knowledge of facts which would make the conduct illegal, but ordinarily is not required to prove the defendant's awareness of the legal consequences of the conduct (e.g. that the conduct was illegal).30

Second, with regard to conduct, the drafting history of the Rome Statute shows that there was a strong will to include within the Statute an article defining conduct as an act or omission.31 The Draft Statute prepared by the Preparatory Committee in 1996 included a provision headed '*Actus reus* ' (act and/or omission)32 which was modified at the February 1997 session and submitted to the Rome ***481** Conference.33 The term 'conduct' was defined under then Article 28 to 'constitute either an act or an omission, or a combination thereof'. The Rome Conference had difficulty reaching agreement on the circumstances in which a person can incur criminal responsibility for an omission. As a consequence, the entire provision was deleted from the Statute 'with the understanding that the question of when and if omissions might constitute or be equivalent to conduct would have to be resolved in future by the Court.'34

Professor Albin Eser holds the view that conduct, as laid down in paragraph 2(a) of Article 30, is only limited to positive action. According to Eser, cases of omissions within the Statute are not covered by the default rule of Article 30 (intent and knowledge), 'but would rather need special regulation according to the opening words of paragraph 1 (unless otherwise provided)'.35 Other commentators noted that

the very definitions of most of the crimes under the *Rome Statute* explicitly provide that they can be committed only by an act. Yet, there are some that can be said to provide room for such interpretation that encompasses omissions as well. Thus, such crime as wilful killing (article 8 para. 2(a)(i)) is capable of being interpreted in such way that includes faults of omission too. In that case it would cover, for instance, failure to feed prisoners of war or to provide medical care to wounded persons or to rescue shipwrecked persons belonging to a hostile armed forces.36

A recent decision, rendered by the ICC PTC I expressly referred to Article 30 as covering acts or omissions.37 In addition, the practice of the Yugoslavia and Rwanda Tribunals is consistent that 'committing', as set out in Articles 7(1)/6(1) of the ICTY/ICTR Statutes, respectively, 'covers physically perpetrating a crime or engendering a *culpable omission* in violation of criminal law'.38

***482** 2.3 *Intent in Relation to Consequence - the First Alternative of Intent*

Pursuant to Article 30(2)(b) of the ICC Statute, a person has intent in relation to consequence if he (i) 'means to cause that consequence' or (ii) 'is aware that it will occur in the ordinary course of events.' Thus, Article 30(2)(b) assigned two different degrees of intent in relation to the consequence element, namely direct intent or *dolus directus* of first degree and indirect intent or *dolus directus* of second degree. The issue whether *dolus eventualis* or subjective recklessness is sufficient to fall within the ambit of Article 30 is highly debatable and is subject to a detailed examination below.

These culpable mental states have to be assessed subjectively and not objectively, meaning that the prosecution must demonstrate that the perpetrator himself, and not a reasonable person in the same situation, was aware of the occurrence of the consequence in question. From a comparative criminal law perspective, the first degree of intent (direct intent/*dolus directus* of first degree) denotes the state of mind of a person who not only foresees but also wills the occurrence of a consequence. This is the actual meaning of intent in common law jurisdictions.

It is also equivalent to the Model Penal Code culpability term 'purposely'. Section 2.02 of the Model Penal Code considers a person acts 'purposely' with regard to a result if it is his conscious object to cause such result.39 In *United States* v. *Bailey et al.*, the Supreme ***483** Court ruled that a 'person who causes a particular

result is said to act purposefully if he consciously desires that result, whatever the likelihood of that result happening from his conduct.'40*Absicht,* or *dolus directus* of first degree, in German criminal law, is also identical to 'direct intent' as defined in Article 30(2)(b) of the ICC Statute. '*Absicht* ' is defined as a 'purpose bound will'.41 In this type of intent, the actor's will is directed finally towards the accomplishment of that result.42

In the Lubanga case,43 the first test ever of Article 30, PTC I of the ICC asserted that the reference to 'intention' and 'knowledge' in a conjunctive way requires the existence of a 'volitional element' on the part of the suspect.44 This 'volitional element' refers first to situations in which the suspect (i) knows that his acts or omissions will materialize the material elements of the crime at issue; and (ii) he undertakes these acts or omissions with the concrete intention to bring about the material elements of the crime. According to the PTC I, the above-mentioned scenario requires that the suspect possesses a level of intent which it called *dolus directus* of the first degree.45

It is worth stressing that 'direct intent', as defined in Article 30(2)(b) of the ICC Statute, is not identical to the 'special intent' required for particular crimes which in their definitions include the following terms: 'with intent to',46 'with the intent of affecting',47 and ***484** 'with the intention of'.48 The 'special intent' or *dolus specialis* required for these categories of crimes has no material element (consequence or result element) to cover, since the accomplishment of this consequence is not an ingredient element of the crime at issue.49

2.4 *Intent in Relation to Consequence - the Second Alternative of Intent*

Article 30(2)(b) of the ICC Statute assigns a second alternative of intent with regard to the consequence element, providing that even if the perpetrator does not intend the proscribed result to occur, he is considered to intend that result if he 'is aware that [the consequence] will occur in the ordinary course of events'. In the Lubanga case the PTC I asserted that Article 30 encompasses other aspects of *dolus,* namely *dolus directus* of the second degree.50 This type of *dolus* arises in situations in which the suspect, without having the actual intent to bring about the material elements of the crime at issue, is aware that such elements will be the necessary outcome of his actions or omissions.51 Yet, there are three important aspects of this second alternative of intent.

First, this degree of *mens rea* is akin to 'knowledge' or 'awareness' rather than 'intent *stricto sensu* '. This position is supported by the definition given to 'knowledge' in paragraph 3 of Article 30, '[f]or the purpose of this article, "knowledge" means awareness that ... a consequence will occur in the ordinary course of events.' The essence of the narrow distinction between acting intentionally and knowingly with regard to the consequence element is the presence or absence of a positive desire or purpose to cause that consequence. The plain meaning of Article 30(2) makes it clear that once the prosecution demonstrates that an accused, in carrying out his conduct, was aware that the proscribed consequence will occur, unless extraordinary circumstances intervened, he is said to have intended that consequence. Thus, a soldier who aims to destroy a building, while not wishing to kill civilians whom he knows are in the building, is said to ***485** intend the killing of the civilians (Article 8(2)(a)(i) of the ICC Statute) if the building is in fact destroyed and the civilians are killed.52

Secondly, the phrase 'aware that it will occur in the ordinary course of events' is subject to different interpretations. Does it require that the perpetrator foresees the occurrence of the consequence as certain? Or whether mere awareness of the probable occurrence of the consequence is sufficient? Professor Triffterer has suggested that since Article 30(2)(b) explicitly states 'will occur' and not 'might occur', it would not be enough to prove that the perpetrator is aware of the *probability* of the consequence and nevertheless carrying out the conduct which results in the proscribed consequence.53 Rather, the prosecution must demonstrate that the perpetrator foresees the consequence of his conduct as being *certain* unless extraordinary circumstances intervene.54 Interestingly, this second alternative of intent is identical to the Model Penal Code culpability term 'knowingly'. Pursuant to § 2.02(2)(b)(ii) of the Model Penal Code, a person acts knowingly with respect to a result if it is not his conscious objective, yet he is *practically certain* that his conduct will cause that result.55

It is also equivalent to the common law concept of 'oblique intent', which extends the meaning of intention to encompass foresight of a certainty.56 Professor Glanville Williams, who devoted special attention to the notion of 'oblique intention,' argued that the law should generally be the same where the defendant is aware that a consequence in the future is the certain result of what he does, though he does not intend or desire its occurrence.57

In cases of oblique intention, there are twin consequences of the conduct, *x* and *y* ; the actor wants *x* and is prepared to accept its unwanted twin *y*.58 Oblique intent, in the words of Glanville Williams, is 'a kind of ***486** knowledge or realization.'59 In *Regina* v. *Buzzanga and Durocher,* a case concerned with promoting hatred against the French Canadian public in Essex County, the Ontario Court of Appeal adopted William's notion of 'foresight of certainty' as a second alternative of intent:

as a general rule, a person who foresees that a consequence is certain or substantially certain to result from an act which he does in order to achieve some other purpose, intends that consequence. The actor's foresight of the certainty or moral certainty of the consequence resulting from his conduct compels a conclusion that if he, none the less, acted so as to produce it, then he decided to bring it about (albeit regretfully) in order to achieve his ultimate purpose. His intention encompasses the means as well as to his ultimate objective.60

It also resembles the German concept of *dolus directus* of the second degree in which the cognitive element (knowledge or awareness) dominates, whereas the volitional element is too weak. As the German Federal Supreme Court of Justice (*Bundesgerichtshof-BGH*) put it more clearly, a perpetrator who foresees a consequence of his conduct as certain is considered to act *wilfully* with regard to this consequence, even if he regrets its occurrence.61 Professor Albin Eser's thoughtful explanation as to the nature and meaning of the phrase 'aware that it will occur in the ordinary course of events' merits lengthy quotation:

Whatever may be meant by 'ordinary course of events', with regard to the awareness thereof this clause is obviously meant to cover *dolus directus in the second degree* in which the volitional component of intention seems to be substituted by the cognitive component in terms of the perpetrators being aware that the action will result in the prohibited consequence (though not desired) with certainty, as in the case of bombing a building inhabited by members of a persecuted ethnical group where some of them will unavoidably be killed, with the further inevitable consequence of ***487** destroying parts of this group. If in this case the genocidal act is considered as 'intentional' although the bomb planter may not have desired to kill any people or does not personally support the ethnical cleansing intentions of his superiors, this conclusion can be supported by attributional as well as evidentiary arguments: with regard to attributing consequences to the causer, it does not matter whether he was directly aiming at them or whether he, in pursuing a different goal, was prepared to let the prohibited result occur, thus using it as means to another end, as in the case where it is the military commander's first priority to destroy the building for strategic reasons while knowing with certainty that this goal could not be reached without killing innocent inhabitants. And from an evidentiary point of view, one could argue that, in acting though aware of the prohibited consequences, the perpetrator was indeed willing to accept them. This position is at least feasible so long as the perpetrator assumes that the prohibited consequences 'will' occur, as required by subparagraph (b).62

While some legal scholars view the second alternative of intent as excluding concepts of *dolus eventualis* or recklessness,63 others advocate the inclusion of recklessness and *dolus eventualis* in the legal standard of Article 30.64 As far as the drafting history is concerned, ***488** Professor Roger Clark noted that '*dolus eventualis* fell out of the written discourse before Rome. Recklessness, in the sense of subjectively taking a risk to which the actor's mind has been directed, was ultimately to vanish also from the Statute at Rome, with again only an implicit decision as to whether it was appropriate for assessing responsibility.'65 Before going further to examine whether recklessness and *dolus eventualis* fall under the realm of Article 30 of the ICC Statute it is desirable to discuss the meaning of these concepts under common and civil legal systems.

2.5 *Recklessness in Common Law Systems*

The law of England, as it currently stands, defines recklessness as the conscious taking of an unjustifiable risk. The term 'recklessly' is used to denote the subjective sate of mind of a person who foresees that his conduct may cause the prohibited result but nevertheless takes a deliberate and unjustifiable risk of bringing it about.66 A modern Canadian writer, Don Stuart, asserted that the proper test to be followed in such situations is to examine whether D, given his shortcomings and strengths, foresaw the consequence or circumstance. He concluded that whether D 'ought', 'could' or 'should' - as a reasonable person - have thought about the occurrence of the consequence or the existence of such circumstances is not the right test to be applied.67 In *Sansregret* v. *The Queen,*68 a case before the Supreme Court of Canada, the subjective approach for recklessness was authorita-

tively asserted as follows:

In accordance with well established principles for the determination of criminal liability, recklessness, to form a part of the criminal mens rea, must have an element of the subjective. It is found in the attitude of one who, aware that there is a danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is in other words, the conduct of one who sees ***489** the risk and who take the chance. It is in this sense that the term 'recklessness' is used in the criminal law and it is clearly distinct from the concept of civil negligence.69

The term recklessness, as used in the Model Penal Code, involves conscious risk creation, an element which differentiates it from acting either purposely or knowingly. It is a state of mind distinct from intent.70 The Code provides that a person acts 'recklessly' if (1) he 'consciously disregards a substantial and unjustified risk that the material element exits or will result from his conduct.'71 According to the Code, a risk is 'substantial and unjustifiable' if '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.'72 In *United States* v. *Albers,*73 it was held that a finding of recklessness may only be made when persons disregard a risk of harm of which they are aware.74 The requirement that the actor consciously disregard the risk is the most significant part of the definition of recklessness. It is this concept which differentiates a reckless actor from a negligent one.75

2.6 *Dolus Eventualis in Romano-Germanic Law Systems*

Dolus eventualis is a well known concept in most of the Romano-Germanic legal systems. This type of *dolus* is recognized under the Italian criminal law as *dolo eventuale.* Pursuant to Article 43 of the Italian *Codice Penale,* all serious crimes require proof of the mental element known as *dolo,* which means that the prohibited result must be both *preveduto* (foreseen) and *voluto* (wanted/willed). According to the Italian criminal law, a result may be *voluto* even though it is not desired, if, having contemplated the possibility of bringing it about by pursuing a course of conduct, the perpetrator is prepared to run the ***490** risk of doing so *dolo eventuale.* Even a small risk may be *voluto* if the accused has reconciled himself to, or accepted it as a part of the price he was prepared to pay to secure his objective.76

Dolus eventualis (*bedingter Vorsatz*) and especially its element of will are still a matter of dispute in German legal system. On the one hand, case law concerning this element is inconsistent. On the other hand, a considerable number of German legal scholars contend that *dolus eventualis* requires only an intellectual element, which most of them define as foresight of 'concrete possibility'.77 German literature, as well as courts, treated *dolus eventualis* differently according to different theories on the subject. The following will examine the "consent and approval theory". This theory is applied by German courts,78 and is usually referred to as the 'theory on consent and approval' (*Einwilligungs - und Billigungstheorie*).79 The majority of German legal scholars who ascribe to this theory use a slightly different definition for *dolus eventualis.* They are of the opinion that the offender must 'seriously consider' (*ernstnehmen*) the result's occurrence and must accept the fact that his conduct could fulfil the legal elements of the offence.80 Another way of putting the point is to say the offender must 'reconcile himself' (*sich abfinden*) with the prohibited result.81

This theory was implicitly adopted by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the Stakic case.82 In establishing the requisite *mens rea* for the crime of murder as a Violation of the Laws or Customs of War under Article 3 of the ICTY, the Yugoslavia Tribunal had the following understanding regarding the technical definition of *dolus eventualis* : 'if the actor engages in life-endangering behaviour, his killing becomes intentional if he "reconciles himself" or "makes peace" with the likelihood of ***491** death.'83 If, to the contrary, the offender is 'confident' (*vertrauen*) and has reason to believe that the result - though he foresees it as a possibility - will not occur, he lacks *dolus eventualis* and acts only negligently.84

In principle, and in order to avoid any uncertainties or ambiguities which may shadow the present discussion, we have to concede that *dolus eventualis,* like other types of *dolus,* namely *dolus directus* and *dolus indirectus,* should include the two components of intent: knowledge and wilfulness. Thus, if one of these components is missing, *dolus eventualis* no longer exists on the part of the perpetrator.85

2.7 *Dolus Eventualis, Recklessness and the Lubanga Decision*

As already mentioned, in the Lubanga case, PTC I of the ICC asserted that the reference to 'intention' and 'knowledge' in a conjunctive way, as set out in Article 30, requires the existence of a 'volitional element' on the part of the suspect.86 Aware that the jurisprudence of the two *ad hoc* Tribunals has recognised other degrees of culpable mental states than that of direct intent (*dolus directus* of the first degree) and indirect intent (*dolus directus* of the second degree),87 the ICC Pre-Trial Chamber went further, assuring that the volitional element mentioned above also encompasses other aspects of *dolus,* namely *dolus eventualis.*88 According to the Pre-Trial Chamber *dolus eventualis* applies in situations in which the suspect '(a) is aware of the risk that the objective elements of the crime *may* result from his or her actions or omissions, and (b) accepts such an outcome by reconciling himself or herself with it or consenting to it.'89 The Pre-Trial Chamber found it necessary to distinguish between two types of scenarios regarding the degree of probability of the occurrence of the consequence from which intent can be inferred:

Firstly, if the risk of bringing about the objective elements of the crime is *substantial* (that is, there is a likelihood that it "will occur in the ordinary course of events"), the ***492** fact that the suspect accepts the idea of bringing about the objective elements of the crime can be inferred from:

(i) the awareness by the suspect of the substantial likelihood that his or her actions or omissions would result in the realisation of the objective elements of the crime; and

(ii) the decision by the suspect to carry out his or her actions or omissions despite such awareness.

Secondly, if the risk of bringing about the objective elements of the crime is low, the suspect must have clearly or expressly accepted the idea that such objective elements may result from his or her actions or omissions.90

However, in situations where the suspect's mental state 'falls short of accepting that the objective elements of the crime may result from his or her actions or omissions, such a state of mind cannot qualify as a truly intentional realisation of the objective elements, and hence would not meet the "intent and knowledge" requirement embodied in article 30 of the Statute.'91

There are two important aspects of the PTC's clarification regarding the *mens rea* contours as set out in Article 30 of the ICC Statute. First, it appears that the Chamber adhered to the Romano-Germanic concept of intent which consists of two components, namely, *Wissen* and *Wollen* (Germany), *preveduto* and *voluto* (Italy), or *la conscience* and *la volonté* (France).92

***493** Second, by requiring the existence of a volitional element on the part of the accused - in the sense of accepting the consequence - the ICC Pre-Trial Chamber accepted the civil law concept of *dolus eventualis* and ruled out the common law recklessness, as the latter falls short of meeting the *mens rea* threshold as set out in Article 30.93

The Lubanga PTC I provided further clarification as to the reason of ruling out the notion of recklessness from the realm of Article 30 of the ICC Statute:

The concept of recklessness requires only that the perpetrator be aware of the existence of a risk that the objective elements of the crime may result from his or her actions or omissions, but does not require that he or she reconcile himself or herself with the result. In so far as recklessness does not require the suspect to reconcile himself or herself with the causation of the objective elements of the crime as a result of his or her actions or omissions, it is not part of the concept of intention.94

It is significant in this regard to recall Professor Antonio Cassese's concerns, almost eight years prior to the Lubanga decision, regarding the exclusion of the notion of recklessness by the drafters of the Rome Statute:

While it is no doubt meritorious to have defined these two notions [intent and knowledge in Article 30], it appears questionable to have excluded recklessness as a culpable *mens rea* under the Statute. One fails to see why, at least in the case of war crimes, this last mental element may not suffice for criminal responsibility to arise. Admittedly, in the case of genocide, crimes against humanity and aggression, the extreme gravity of the offence presuppose that it may only be perpetrated when ***494** intent and knowledge are present. However, for less serious crimes, such as war crimes, current international law must be taken to allow for recklessness: for example, it is admissible to convict a person who, when shelling a town, takes a high an unjustifiable risk that civilian will be killed - without, however, *intending,* that they be killed - with the result that the civilians are, in fact, thereby killed.95

Cassese continued his criticism regarding the exclusion of recklessness as a culpable mental element under the Rome Statute in the following words:

Hence, on this score the Rome Statute marks a step backwards with respect to *lex lata,* and possibly creates a loophole: persons responsible for war crimes, when they acted recklessly, may be brought to trial and convicted before national courts, while they would be acquitted by the ICC. It would seem that the draughtsmen have unduly expanded the shield they intended to provide to the military.96

However, it would be a profound mistake to draw from Cassese's hypothetical example that those persons will escape justice by claiming that their main aim was merely shelling a military objective and that they lack any intention regarding the killing of civilians. In such situations, those actors can incur criminal responsibility under the concept of *dolus eventualis* if the prosecution succeeds in demonstrating that in shelling the towns, it was probable that those civilians would be killed and that the actors accept such a result. Triffterer, for instance, has argued that the concepts of recklessness and *dolus eventualis* can be read within the text of Article 30 since the phrase 'will occur' as provided for in Article 30 of the ICC Statute may be interpreted to encompass situations in which 'the perpetrator is aware that a consequence might occur and nevertheless engages in taking action tending in that direction, thereby accepting its consequences'.97 Kai Ambos disagrees:

Certainly, reckless conduct cannot be the basis of responsibility since a corresponding provision was deleted. The same applies for the higher threshold of *dolus eventualis* : this is a kind of "conditional intent" by which a wide range of subjective attitudes towards the result are expressed and, thus, implies a higher threshold than recklessness. The perpetrator may be indifferent to the result or be "reconciled" with the harm as a possible cost of attaining his or her goal... However, [in such situations of *dolus eventualis*] the perpetrator is not, as required by Article 30(2)(b), aware that ***495** a certain result or consequence will occur in the ordinary course of events. He or she only thinks that the result is possible. Thus, the wording of Article 30 hardly leaves room for an interpretation which includes *dolus eventualis* within the concept of intent as a kind of "indirect intent."98

The exclusion of recklessness as a culpable mental element within the meaning of Article 30 runs in harmony with the basic principles of Islamic law (*Shari* 'a) that no one shall be held criminal responsible for *hudud* crimes (offences with fixed mandatory punishments) or *qisas* crimes (retaliation) unless he or she has wilfully or intentionally (*'amdan*) committed the crime at issue.99

2.8 *The Meaning of Knowledge*

Paragraph three of Article 30 provides two definitions of knowledge. The first applies to consequences, whereas the second pertains to attendant circumstances. Under the ICC Statute, the distinction between acting 'intentionally' and 'knowingly' is very narrow. Knowledge that a consequence 'will occur in the ordinary course of events' is a common element in both conceptions.'100 A result is 'knowingly' caused if the actor is aware that 'a consequence will occur in the ordinary course of events'.101 With 'attendant circumstances', one acts 'knowingly' if he is aware 'that a circumstance exists'.102

2.9 *Knowledge in Relation to the Circumstance Element*

Logically speaking, there is no offence which requires the prosecution to prove that the accused, in the true

sense, intends a particular circumstance to exist at the time he carries out his conduct. If the accused intends a circumstance to exist, it means that he hopes it exists or will exist. According to the ICC Statute, knowledge as to the circumstance element arises in various situations. It can relate to circumstances forming part of the definition of the crime, i.e. the requirement of knowledge of the widespread or systematic attack ***496** directed against any civilian population as provided for in the chapeau element of Article 7.103 The same can be said regarding the crime of rape, punishable as a crime against humanity104 or as a war crime,105 where the non-consent of the victim and the perpetrator's knowledge thereof is considered as constitutive element of the offence.106 The wording of Article 30 makes it clear that 'knowingly' refers to the actor's subjective state of mind and not the state of mind of a reasonable person.

Additionally, in defining 'knowledge' to mean the perpetrator's '*awareness* that a circumstance exists', Article 30(3) limits the meaning of knowledge to 'actual knowledge' as opposed to 'constructive knowledge'. Even knowledge of 'high probability' of the existence of a particular fact does not pass Article 30's culpability test.107 There is reason to question whether the doctrine of 'wilful blindness' or 'wilfully shutting one's eyes to the obvious' satisfies the *mens rea* threshold of Article 30(3). The answer can be in the affirmative if the doctrine is understood to apply only in situations where the perpetrator is virtually certain that the fact exists, or, as stated by Glanville Williams:

A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This and this alone, is wilful blindness.108

Any attempts to stretch the wilful blindness doctrine by accepting some lesser degree of knowledge instead of actual knowledge would ***497** blur the distinction between wilful blindness and recklessness. There are, however, exceptions to the application of the 'actual knowledge' standard with regard to the factual elements of particular crime. The Elements of Crimes of the 'war crime of using, conscripting or enlisting children' under the age of fifteen years into the national armed forces, or using them to participate actively in hostilities,109 allow for a lower level of knowledge than that of 'actual knowledge'.110 According to paragraph three of the Elements of Article 8(2)(b)(xxvi) the perpetrator can incur criminal responsibility if he 'knew' or 'should have known' that the child concerned was under the age of 15. Thus, the Elements of Crimes made it clear that 'constructive knowledge' is a sufficient *mens rea* standard with regard to the circumstance element of this crime. As a consequence, this crime falls into the realm of 'negligence crimes' where conviction depends upon proof that the perpetrator had 'reasonable cause' to believe or suspect some relevant fact, in the present case, that the child concerned was under the age of 15.

The vital point is that constructive knowledge differs from the two other degrees of knowledge, namely, actual knowledge and wilful blindness, in requiring neither awareness nor purposive avoidance of the means of learning the truth. Another way of putting the point is to say that the perpetrator may incur criminal liability for being negligent with regard to a circumstance when, as reasonable person, he ought to know that such 'circumstance exists or will exist and fails to do so, whether he has given thought to the question or not.'111

Another example of lowering the actual knowledge standard to reach the one of constructive knowledge appears at the third paragraph of the Elements of the "war crimes of improper use of a flag of truce"112 and the "war crime of improper use of a flag, insignia or ***498** uniform of the hostile party".113 According to the third paragraph common to both provisions, it is sufficient to hold the perpetrator criminally liable if he 'knew or should have known of the *prohibited nature* of such use.'114 The term 'prohibited nature' denotes the illegality of the conduct.

It is obvious that such a negligence standard is inconsistent with the *mens rea* threshold as set out in Article 30 of the Rome Statute - that all the materials elements of a crime be committed with intent and knowledge.

III. THE RELATIONSHIP BETWEEN ARTICLE 30 AND OTHER PROVISIONS OF THE ICC STATUTE

3.1 *Article 30 vis-à-vis the Culpability Requirements Stated in an Offence Definition*

(Cite as:)

As noted by Professor Schabas, several crimes within the subject matter jurisdiction of the ICC have their 'own built-in *mens rea* requirement.'115 The crime of genocide, punishable under Article 6 of the ICC Statute, is defined as a proscribed act committed 'with intent to destroy' a protected group.116 The chapeau element of crimes against humanity requires a subjective element of knowledge that the attack was carried out in a widespread or systematic manner against a civilian population.117 Extermination, a crime against humanity, 'includes the intentional infliction of conditions of life ... calculated to bring about the destruction of part of a population.'118 Several war crimes punishable as grave breaches of the 1949 Geneva Conventions, or serious violations of the laws and customs of war under Article 8 of the ICC Statute, have their own built-in *mens rea* such as the adjectives 'wilful', 'wilfully', 'wantonly', 'intentionally', or 'treacherously'.119

***499** The first question which arises is whether the *mens rea* threshold of Article 30 would automatically apply to cover the material elements of such offences, even if the crime at issue contains in its language a mental element. The second question is an outcome of the first. If the crime at issue required a lower or a higher threshold than the one provided for in Article 30, which threshold should then prevail? In other words, does Article 30 allow a departure from the *mens rea* standard laid down in it? Another difficulty appears in applying the rule of '*mens rea* coverage' to particular crimes which require a proof of 'special intent' (e.g. the intent to destroy a group in the crime of genocide). In such types of offences, this 'ulterior intent' has no material element to cover, since the actual destruction of a group is not an ingredient element of the offence.

'Unless otherwise provided', a proviso which is set out in the very beginning of the first paragraph of Article 30, appears to come as the Prince who redeems Cinderella from her poor circumstances. According to this proviso, ICC judges have to consider Article 30 as a default rule that is applied to all crimes and modes of participation in criminal conduct, as long as there are no specific rules on the mental element expressly stated in these provisions,120 and hence paving the road to the application of the *lex specialis* principle. Donald Piragoff, who was the first to comment on Article 30, has a different opinion regarding the relationship between Article 30 and particular crimes which requires that the material elements be 'intentional' or be committed 'intentionally'. He noted that given the general rule in Article 30, the inclusion of these adjectives in the definition of particular crimes 'is likely unnecessary surplusage'.121 He pointed out that '[t]he specific presence of these terms is likely a product of the negotiations process whereby certain delegations wished to make clear the intentional nature of the crimes before they agreed to their inclusion in article 7 and 8.'122 It was said that the only significance of ***500** Article 30 to these provisions is that it imports the element of knowledge into those definitions of crimes.123

But the subjective elements included in the definition of the crime against humanity of extermination are not merely redundant. Article 7(2)(b) of the ICC Statute defines extermination to include 'the intentional infliction of conditions of life ... *calculated* to bring about the destruction of part of a population.' The term 'calculated' as it appears in Article 7(2)(b) can be interpreted as requiring a higher threshold of *mens rea* than that provided for in the default rule of Article 30. It can be interpreted as requiring an element of premeditation, a subjective mental state which requires that the accused, at a minimum, held a deliberate plan to exterminate prior to the act causing the destruction of part of a population, rather than forming the intention simultaneously with the act.

By including the 'unless otherwise provided' in the provision of Article 30, the codifiers of the ICC Statute have achieved several goals. On the one hand, Article 30, for the first time in the sphere of international criminal law, sets a general requirement for international criminal liability which is based on intent and knowledge. On the other hand, 'unless otherwise provided' enables the Statute to absorb the corresponding rules of international humanitarian law (the definition of war crimes under Article 8) without having to modify the definitions of these crimes. It also enables the Statute to adopt *verbatim* the definition of the crime of genocide, as defined in the 1948 Genocide Convention, without having to change any of its subjective elements.

3.2 *Article 30 vis-à-vis the Elements of Crimes*

Article 30 of the ICC Statute has to be read together with several provisions set out in the ICC Statute. Article 21, which constitutes the first codification of the sources of international criminal law, establishes a hierarchy of applicable law to be applied by judges of the International Criminal Court.124 According to Article 21(1)(a) of

the ICC Statute, the Court shall apply in the first place (i) its Statute, (ii) Elements of Crimes and (iii) its Rules of Procedure and Evidence.125

*501 It is worth stressing that the general introduction to the Elements of Crimes126 which consists of ten paragraphs has great significance to the interpretation and the application of Article 30. Paragraph one of the general introduction reiterates the provision laid down in Article 9(1) of the ICC Statute and reaffirms that the Elements of Crimes 'shall assist the Court in the interpretation and application of articles 6, 7, and 8.'

Paragraph 2 states that '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.'

According to paragraph 3, 'existence of intent and knowledge can be inferred from relevant facts and circumstances.' Paragraph 4 provides that 'with respect to mental elements associated with elements involving value judgment, such as those using the terms "inhumane" or "severe", it is not necessary that the perpetrator personally completed a particular value judgment, unless otherwise indicated'.

Paragraph 2 of the general introduction will come into play in situations where the Elements of Crimes for particular crimes, provide for a lower threshold of *mens rea* (negligence standard) than that of Article 30. For instance, while Article 30(3) of the ICC Statute assigns a knowledge standard with regard to the circumstance element of the crime of genocide by 'forcibly transferring children of the group to another group' (the age of the victim concerned),127 the Elements of Crimes introduce a negligence standard (should have known) with regard to the same circumstance element of this offence. Addressing this point Professor Claus Kress had this to say:

It is impossible to reconcile this standard [negligence] with Article 30(1) [intent and knowledge] of the *ICC* Statute so that the question arises as to whether the deviation can be justified on the basis of the words "unless otherwise provided" in Article 30(1) of the *ICC* Statute. As there is no "colourable support" for the deviation in prior *502 case law the answer would appear to depend on whether the *ICC* Elements of Crimes can *by themselves* "provide otherwise". It is submitted that they cannot, though a sentence in the Elements' "General introduction" may be read to suggest the contrary.128

In Lubanga, the PTC I affirmed that the ICC Elements of Crimes can by themselves 'provide otherwise'.129 Lubanga was charged with conscripting and enlisting children under the age of fifteen years into armed forces, and using them to participate actively in hostilities, a crime punishable under articles 8 (2) (b) (xxvi) and 8 (2) (e) (vii) of the Statute. The third element of the Elements of Crimes assigns a negligent standard (should have known) with regard to the circumstance element (the age of the victim concerned) of these offences.130 Relying on the "unless otherwise provided" clause, the Pre-Trial Chamber considered this element of negligence, as set out in the Elements of Crimes of the above mentioned provisions, an exception to the 'intent and knowledge' standard provided in Article 30(1).131

As for the fifth element of the Elements of the Crimes for the crime under consideration, the Pre-Trial Chamber noted that this 'Element' requires only that 'the perpetrator was aware of the factual circumstances that established the existence of an armed conflict', without going as far as to require that the accused conclude, on the basis of a legal assessment of the said circumstances, that there was an armed conflict.'132 The same applies *mutatis mutandis* to the crime of genocide by forcibly transferring children. It would be sufficient to demonstrate that the perpetrator was negligent regarding the *503 circumstance element, namely the fact that the victims forcibly transferred were under the age of 18 years.133

One might wonder whether such a lower standard of culpability (negligence) is sufficient for crimes that have a very specific object. "Forcibly transferring children of the group to another group", "using, conscripting or enlisting children into armed forces" and "compelling a prisoner of war to serve in the forces of a hostile power" are crimes, the very definition of which explicitly state the object against which certain acts are directed (i.e. children and prisoners of war).134 One might suggest that in such categories of crimes which have a very specific object, knowledge, as opposed to mere negligence, has to be assigned to the circumstance element. There is

no provision in the Rome Statute which *obliges* the honourable judges of the ICC to apply the Elements of Crimes. The plain text of Article 9 states that these Elements of Crimes '*shall* assist the Court in the interpretation and application of articles 6, 7, and 8.' However, the application of these Elements might infringe upon one of the most fundamental rights of the accused, namely, the presumption of innocence. It is up to the honourable judges of the ICC to decide on that issue and not to adhere to the approach adopted by the Pre-Trial Chamber I in the Lubanga case.

Furthermore, the Elements of Crimes includes the following 'alien element' as an element of the crime of genocide: '[t]he conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.'135 If one considers this element as a 'circumstance element', it has to be covered by the default rule of Article 30 of the ICC Statute and, as consequence, the prosecution must prove that the perpetrator is aware that his proscribed conduct (i.e. of killing members of the group) 'took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.'136

***504** 3.3 *Article 30 vis-à-vis Individual Criminal Responsibility - Article 25*

Article 25 of the ICC Statute which is entitled 'individual criminal responsibility' provides for various forms of perpetration and participation in a criminal conduct. Sub-paragraph (a) of paragraph 3 refers to three forms of perpetration. Yet, under the ICC Statute a person shall incur criminal responsibility if he or she commits any of the crimes within the jurisdiction of the ICC 'whether as (i) an individual, (ii) jointly with another, or (iii) through another person, regardless of whether that other person is criminally responsible'.137

From a German criminal law perspective, element (i) speaks about *unmittelbarer Täter* (the direct perpetrator who physically carried out the material elements of the offence in person); element (ii) deals with *Mittäterschaft* (co-perpetration); and the third form of perpetration is concerned with *mittelbarer Täter* or *Hintermann* (indirect perpetrator, a person who acts through the agency of another). This latter form of perpetration was defined by the 1996 Preparatory Committee in the following words, '[a] person shall be deemed to be a principal where that person commits the crime through an innocent agent who is not aware of the criminal nature of the act committed, such as a minor, a person of defective mental capacity or person acting under mistake of fact or otherwise acting without *mens rea.* '138

3.3.1 *Co-perpetratorship*

The first test of the notion of co-perpetratorship as provided for in Article 25(3)(a) of the ICC Statute was made by Pre-Trial Chamber 1, in the Lubanga case.139 There the Chamber agreed with scholarly opinions that the concept of co-perpetration

is originally rooted in the idea that when the sum of the co-ordinated individual contributions of a plurality of persons results in the realisation of all the objective elements of a crime, any person making a contribution can be held vicariously responsible for the contributions of all the others and, as a result, can be considered as a principal to whole crime.140

***505** The Chamber noted that 'the definitional criterion of the concept of co-perpetration is linked to the distinguishing between principles and accessories to a crime where a criminal offence is committed by a plurality of persons.'141 The Chamber realised that there are three different approaches to differentiate between principals and accessories to a crime, namely: (1) the objective approach (only those who physically carry out one or more of the objective elements of the offence can be considered principles to the crime)142 ; (2) the subjective approach adopted by the two *ad hoc* Tribunals through the concept of joint criminal enterprise which places the focus on the state of mind in which the contribution to the crime was made;143 and (3) the third approach - the one adopted by the Pre-Trial Chamber for distinguishing between principals and accessories - which relies on the concept of 'control over the crime'.144

According to the Pre-Trial Chamber 'this approach involves an objective element, consisting of the appropriate

factual circumstances for exercising control over the crime, and a subjective element, consisting of the awareness of such circumstances.'145 The Chamber asserted that the main feature of this concept is that 'principals to a crime are not limited to those who physically carry out the objective element of the offence, but also include those, who, in spite of being ... [remote] from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will committed.'146 They are principals and not accomplices because they have, along with others, control over the offence by reason of essential tasks assigned to them.147

From a German criminal law perspective, the ICC Pre-Trial Chamber adhered to the notion of *Mittäterschaft* (co-perpetration) based on *funktionelle Tatherrschaft* (functional control over the crime). The Chamber, however, deviated from Professor Roxin's theory which restricted the notion of co-perpetration based on functional control over the crime for those who contribute to the commission of the crime at its execution stage.148 According to the ***506** Chamber, those who contribute at the preparatory stage as well as at the execution stage fall within the ambit of co-perpetration as set out in Article 25(a) of the ICC Statute as long as the following objective and subjective elements are met:

(i) the existence of an agreement or common plan between two or more persons (objective element)149 ;

(ii) co-ordinated essential contribution by each co-perpetrator resulting in the realisation of the objective elements of the crime (objective element)150 ;

(iii) the fulfilment of the subjective element of the crime in question by the coperpetrators including any requisite *dolus specialis* or ulterior intent for the type of crime involved151 ;

(iv) the co-perpetrators must all be mutually aware and mutually accept that implementing their common plan may result in the realisation of the objective elements of the crime;

(v) the co-perpetrator must be aware of the factual circumstances enabling him to jointly control the crime.152

As far as the subjective elements are concerned, element (iii) can be satisfied if the co-perpetrator acted with any of the following mental states *dolus directus* of the first degree, *dolus directus* of the second degree, or *dolus eventualis*. These *mens rea* standards - as already discussed above - satisfy the threshold of the mental element embodied in Article 30 of the ICC Statute. However, in situations where the definition of the crime requires a specific intent, such as the case of persecution as a crime against humanity or genocide, the prosecution has to demonstrate that each co-perpetrator possesses such a specific intent.153

Element (iv) requires proof of 'double intent' on the part of the co-perpetrators, namely, a 'cognitive component' and a 'volitional component'. As to the former, it must be shown that all co-perpetrators, at the time when they agreed to start the implementation of their common plan, were mutually *aware* of the risk that such implementation may result in the realisation of the objective elements of the crime.154 As for the volitional component, it has to be proved ***507** that all co-perpetrators 'mutually accept[ed] such a result by reconciling themselves with it or consenting to it.'155

The requirement of such a subjective element for the notion of co-perpetration based on joint control over the crime will inevitably stand against the application of any lower threshold than that of *dolus eventualis*. That is to say the negligence standard (should have known) assigned to the circumstance element (the age of the victim concerned) of the war crime of enlisting or conscripting children will not be applicable in the instant case.156

Element (v) is the third and last subjective element required for the notion of co-perpetration based on joint control of the crime. According to the Pre-Trial Chamber this element requires the accused to be aware

(i) that his or her role is essential to the implementation of the common plan, and hence in the commission of the crime, and

(ii) the he or she can - by reason of the essential nature of his or her task - frustrate the implementation of the

common plan, and hence the commission of the crime, be refusing to perform the task assigned to him or her.157

3.3.2 *Aiding and Abetting*

Sub-paragraph (c) of Article 25(3) of the ICC Statute assigns a high threshold of *mens rea* for the aiders and abettors, 'which goes beyond the ordinary *mens rea* requirement within the meaning of Article 30.'158 Accordingly, Article 25(3)(c) limits the accomplice liability to instances in which there exists the *purpose* of promoting or facilitating the commission of the offence. If that is the case, the prosecution must demonstrate that the aider and abettor's conscious objective is to facilitate the commission of the crime.

It is worth pointing out that the phrase 'for the purpose of facilitating', as it appears in the very beginning of sub-paragraph (c), is borrowed from § 2.06(3)(a) of the Model Penal Code. The issue, whether a lower culpable mental state than that required for the ***508** principal perpetrator should be assigned to the aider and abettor, was heavily criticised by the commentators of the Model Penal Code as 'incongruous and unjust'.159 They reaffirmed that 'the culpability level for the accomplice should be higher than that of the principal actor, because there is generally more ambiguity in the overt conduct engaged in by the accomplice, and thus a higher risk of convicting the innocent.'160

Reading Article 25(3)(c) together with Article 30, it was questioned whether the conjunctive formulation (intent and knowledge) provided in the latter provision runs directly counter to international jurisprudence that an aider and abettor 'need not share the same *mens rea* of the principal perpetrator (*e.g.* intent to kill), and that a "knowing participation in the commission of an offence" or awareness of the act of participation coupled with a conscious decision to participate" is sufficient.'161 The problem could be approached in two ways. The first approach is proposed by Piragoff in his commentary on Article 30 of the ICC Statute:

It is submitted that the conjunctive formulation has not altered this jurisprudence, but merely reflects the fact that aiding and abetting by an accused requires both knowledge of the crime being committed by the principal and some intentional conduct by the accused that constitutes the participation. Even if a strict literal reading of the conjunctive in paragraph 1 were made such that an accomplice must intend the consequence committed by the principal, the same interpretative result would occur. Article 30 para. 2(b) makes it clear that "intent" may be satisfied by an awareness that a consequence will occur in the ordinary course of events. This same type of awareness can also satisfy the mental element of "knowledge", as defined in Article 30 para. 3. Therefore, if both "intent" and "knowledge" are required on the part of an accomplice, these mental elements can be satisfied by such awareness. Therefore, article 30 confirms the existing international jurisprudence.162

The second approach relies on recent judgments delivered by the two *ad hoc* Tribunals in which the Appeals and Trial Chambers demand some sort of volitional element in addition to the knowledge requirement.163 Yet, in the *Oric* case, it was held that aiding and ***509** abetting must be intentional in the sense that 'the aider and abettor must have *double intent,* namely both with regard to the furthering effect of his own contribution and the intentional completion of the crime by the principal perpetrator.'164

As far as the objective elements of aiding and abetting are concerned, Schabas noted that Article 25(3)(c) 'does not provide any indication as to whether there is some quantitative degree of aiding and abetting required to constitute the *actus reus* of complicity.'165 In sum, while sub-paragraph (c) provides for relatively low objective requirements of aiding and abetting, it assigns a relatively high subjective threshold.166

3.3.3 *Common Purpose*

Unlike the Statutes of the two *ad hoc* Tribunals, the Rome Statute of the International Criminal Court makes explicit reference to the theory of 'group criminality' (common purpose). Sub-paragraph (d) of Article 25(3) of the ICC Statute introduces the concept of 'common purpose', as a punishable mode of criminal conduct in the following words:

In any other way contributes to the commission or attempted commission of such 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.167

The first words of Article 25(3)(d) have been subject to different interpretations. The words '[i]n any other way contributes to the commission or attempted commission of such crime' was viewed by Professor Albin Eser as well as the Lubanga PTC as providing for a ***510** 'residual form of accessory liability'.168 Aware that Article 25(3)(d) of the ICC Statute provides for secondary participation as opposed to perpetration, the ICC Prosecutor, in the Document Containing the Charges in the Lubanga case, submitted that 'common purpose' could properly be considered as a third applicable mode of criminal liability.'169 Yet if that is the case, 'common purpose' as provided for in Article 25(3)(d) will always be the last resort for the ICC Prosecutor and will not be his "darling notion" as in the case of joint criminal enterprise in the jurisprudence of the Yugoslavia and Rwanda Tribunals. Whether the International Criminal Court will adhere to such interpretation by its PTC I, or whether it will interpret "common purpose" in the same way as it is interpreted under the jurisprudence of the two *ad hoc* Tribunals, is yet to be ascertained.

It might be held that 'common purpose' as a mode of criminal participation under Article 25(3)(d) will be appropriate to apply in situations which Professor Cassese named 'liability for participation in an institutionalized common criminal plan'.170 He states:

Plainly, in an internment camp where inmates are severely ill-treated and even tortured, not only the head of the camp, but also his senior aides and those who physically inflict torture and other inhumane treatment are responsible. Also those who discharge administrative duties indispensable for the achievement of the camp's main goals (for example, to register the incoming inmates, record their death, give them medical treatment or provide them with food) may incur criminal liability. They bear this responsibility so long as they are aware of the serious abuses being perpetrated (knowledge) and willingly take part in the functioning of the institution. That they should be held responsible is only logical and natural; by fulfilling their administrative or other operational tasks, they contribute to the commission of crimes. Without their willing support, crimes could not be perpetrated. Thus, however marginal their role, they constitute an indispensable cog in the murdering machinery.171

As noted above, Article 21 of the ICC Statute establishes a hierarchy of applicable law to be applied by judges of the International Criminal Court. According to Article 21(1)(a) of the ICC Statute, the Court shall apply in the first place its Statute,172 and in the second ***511** place 'applicable treaties and the principles and rules of international law, including the established principles of international law of armed conflict.'173 It is undeniable that the International Criminal Court will resort to the symmetric jurisprudence of the Yugoslavia and Rwanda Tribunals in order to shape this mode of 'group criminality' under Article 25(3)(d). However, the ICC will encounter a legal dilemma if it adopts literally the three categories of joint criminal enterprise as developed in the case law of two *ad hoc* Tribunals.174 This difficulty stems from the fact that the subjective elements provided for in Article 25(3) sub-paragraphs (d)(i) (aim of furthering the criminal activity of the group) and (d)(ii) (knowledge of the intention of the group) will stand up against any application of the 'extended form' of joint criminal enterprise (JCE III).175

3.4 *Article 30 vis-à-vis Superior Responsibility - Article 28*

Article 28 of the ICC Statute sets forth two different levels of culpability regarding military and civilians commanders. As for the military commanders, or persons effectively acting as military commanders, Article 28(a)(i) of the ICC Statute assigns both actual knowledge (knew) or constructive knowledge (should have known).***512** The term 'should have known' which is akin to negligence - a type of legal fault not necessarily involving a mental state - differs from the language employed in Articles 7(3)/6(3) of the ICTY/ICTR Statutes. There, the term 'had reason to know' is set out as a second alternative of knowledge which has to be proved on the part of the commander. It appears that the drafters of the ICTY/ICTR Statutes unlike those of the ICC Statute have

carefully read the *travaux préparatoires* of Article 86 (then Art. 76 - Failure to Act) of Protocol 1 to the 1949 Geneva Conventions. During the preparatory work of the first Additional Protocol many delegations expressed their concerns regarding the inclusion of the phrase 'should have known' in then Article 76.176 Syria submitted an amendment suggesting the deletion of the phrase 'should have known'.177 This was endorsed by the delegation of Argentina who drew the working group's attention to the fact that 'penal responsibility should be interpreted in a very clear sense' and that the phrase 'should have known', as it appears in the ICRC draft, 'introduced a lack of clarity with regard to the conduct of superiors'.178 He concluded by saying that the phrase 'would be tantamount to reserving the responsibility for submitting proof, which would be incompatible with the presumption of innocence common to all Latin American legal systems'.179

At the Rome Conference, and as far as the requisite *mens rea* for command responsibility was concerned, the United States submitted a proposal in which it distinguished between the levels of culpability required for military commanders and civilian superiors:

An important feature in military command responsibility and one that was unique in a criminal context was the existence of *negligence* as a criterion of *knew or should have known* that the forces under his control were going to commit a criminal act. ... The negligence standard was not appropriate in a civilian context and was basically contrary to the usual principles of criminal law responsibility.180

***513** Israel supported the United States' proposal in principle, but suggested the insertion of the words 'or ought to have known' after 'knew' in subparagraph (b)(i) of article 25 as set out in the Preparatory Committee's 1998 draft statute.181 In the view of the Israeli delegate, this would establish 'the principle that a superior not only had actual knowledge but also what he would term "constructive"' knowledge, in other words, being equally responsible for failing to appreciate facts which he or she was in a position to know.'182

Recent jurisprudence of the Yugoslavia and Rwanda Tribunals has stressed that 'criminal negligence is not a basis of liability in the context of criminal responsibility.'183 These evolutionary developments in the law of command responsibility were endorsed by PTC I in Lubanga. In discussing the Elements of war crime of using, conscripting or enlisting children, the Pre-Trial Chamber considered the jurisprudence of the two *ad hoc* Tribunals and concluded that the expression 'had reason to know' is stricter than the one of 'should have known' because the former 'does not criminalize the military superior's lack of due diligence to comply with their duty to be informed of their subordinates' activities.'184 Rather the 'had reason to know' requirement 'can be met only if military superiors have, at the very minimum, specific information available to them to the need to start an investigation.'185 Accordingly, 'a superior will be criminally responsible through the principles of superior responsibility *only if information was available to him* which would have put him in notice of offences committed by subordinates.'186 Thus, one might discern that neglect of a duty to acquire such knowledge, does not feature in the provision of Article 28(1) as a separate offence, and a superior is not therefore liable under ***514** the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish.187

In light of the aforementioned, and reading Article 28(a) together with Article 30(3), it appears that while the first alternative of knowledge assigned to the military commander would meet the knowledge standard, the second alternative (should have known) would not. In such a situation the proviso 'unless otherwise provided' will come into play and the second alternative of Article 28(a) 'should have known' would prevail.

Paragraph 2 of Article 28 assigns a recklessness standard (consciously disregard information) with regard to the civilian superiors. This language is akin to the Model Penal Code § 2.02(2)(c). It is observed that the requirement that the actor *consciously disregard* the risk is the most significant part of the definition of recklessness under the Model Penal Code. It is this concept which differentiates a reckless actor from a negligent one.188 The negligent actor is a person who fails to perceive a risk that he ought to perceive. The reckless actor is a person who perceives or is conscious of the risk but disregards it.189 Hence, in many offences where the law provides that recklessness is the minimum level of culpability, negligence will not suffice. Accordingly, 'the distinction between 'conscious disregard' and 'failure to perceive' will often signify the difference between conviction and acquittal.'190

3.5 *Article 30 vis-à-vis Mistake of Law and Mistake of Fact*

Article 32 of the Rome Statute is the first provision ever in the sphere of international criminal law which expressly recognises mistakes either of fact or law as grounds of excluding criminal responsibility. It is worth noting that the Nuremberg and Tokyo Charters, as well as the Statutes of the two *ad hoc* Tribunals, lack a general provision on the subject.

Paragraph 1 of Article 32 recognises the well-established principle *ignorantia facti excusat.* It provides that 'a mistake of fact shall be ground for excluding criminal responsibility only if it negates the mental element required by the crime.'191 While the first sentence of the second paragraph of Article 32 reiterates the Latin maxim *ignorantia juris non excusta,* the second sentence of the same ***515** paragraph assures 'a mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element ...'192 In his commentary on Article 32 Triffterer had this to say:

The difference between mistake of fact and *mistake of law* is that *in principle* in the latter case the perpetrator is not mistaken about the existence of a (purely) material element of fact; therefore, mistakes about *legal* aspects of a crime *in general* do not touch the material elements or material prerequisites for justification or excuse.'193

On closer inspection, one might consider Article 32(1) to be superfluous as long as the default rule of Article 30(1) of the ICC Statute stands as a safeguard for excluding the criminal responsibility in situations where the material elements of a particular crime are not committed with intent and knowledge. But in situations where the factual or circumstantial elements of a particular crime are satisfied by a lower threshold than that of intent and knowledge (i.e. negligence) a defence of mistake of fact will not come into play. That is to say that all crimes within the subject matter jurisdiction of the International Criminal Court which in their elements contain the phrase 'should have known' (i.e. Elements of Crimes of article 8(2)(b)(xxvi) and 8(2)(e)(vii)) will stand against the defence of mistake of fact. This might be the reason why Lubanga refrained from claiming error regarding the age of the victim concerned, and instead raised the defence of mistake of law.

The first test of Article 32(2) - mistake of law - was conducted by the PTC I in the Lubanga case. There the Defence argued that Lubanga was unaware that voluntarily or forcibly recruiting children under the age of fifteen years entailed his criminal responsibility under the ICC Statute since the law was not 'accessible' or 'foreseeable' for Lubanga by that time.194 Schabas noted that 'although the argument was framed as one of retroactivity, it looks more like a claim of ignorance of the law.'195

The PTC I observed that 'the scope of a mistake of law within the meaning of Article 32(2) is relatively limited.'196 The Chamber went ***516** further asserting that in the absence of a plea under Article 33 of the ICC Statute, 'the defence of mistake of law can succeed under Article 32 of the Statute only if Thomas Lubanga Dyilo was unaware of a normative objective element of the crime as a result of not realising its social significance (its everyday meaning).'197 Professor Thomas Weigend disagreed with PTC I. His fruitful explanation on the subject merits lengthy quotation: 'Normative terms, such as 'conscripting or enlisting', by definition have no 'everyday meaning' that some one could 'realise'. To have the required intent, all the actor needs to understand is what the normative term in question signifies. In *casu,* if Lubanga knew that 'conscripting or enlisting', although referring to a body of military law that he may or may not have been aware of, covers all forms of accepting the military service of young persons, then he knew enough to commit the offence with intent.'198 He continued: 'All that Article 32(2) ICC Statute does is to equate the misconception of a normative element (such as 'conscripting or enlisting') of an offence with the misconception of a factual element (such as 'under the age of 15 years').' In either case, Weigend continued, 'the defendant cannot be convicted if he was unaware that his conduct met the definition of the offence, either because he thought that the young recruits were 16 years old (factual mistake) or that he did not 'conscript or enlist' anyone because these technical terms, in his mind, only covered forcible recruitment (normative mistake).199

IV. CONCLUSION

This study reveals the dominant character of the mental element - Article 30 - within the Statute of the International Criminal Court. Since its integration into the Rome Statute of the International Criminal Court, Article 30

has been subject to different interpretations by legal scholars and commentators. However, one of the major advantages of Article 30 is that it assigns different levels of culpability to each of the material element of the crimes under the subject matter jurisdiction of the Court - element analysis as opposed to offence analysis. Thus, the general rule under this provision is the full coverage of the material elements by the corresponding mental elements.

At present, the only decision rendered by the International Criminal Court on substantive issues, since its creation on 1 July ***517** 2002, shed some light on the meaning of intent (dolus) despite some shortcomings.200 As for the *mens rea* standards under Article 30 of the ICC Statute, the Lubanga PTC I interpreted that provision to include the three categories of *dolus,* namely *dolus directus* of the first and second degrees and *dolus eventualis.*

Our examination also reveals that there are exceptions regarding the application of the default rule of intent and knowledge to the crimes within the *ratione materiae* of the International Criminal Court. The *Lubanga* Pre-Trial Chamber has affirmed that the ICC Elements of Crimes can by themselves "provide otherwise". The Chamber considered that the fault element of negligence, as set out in the Elements of Crimes for particular offences, can be an exception to the intent and knowledge standard provided in Article 30(1) of the ICC Statute.201 In such situations, where conviction depends upon proof that the perpetrator had 'reasonable cause' to believe or suspect some relevant fact, the prosecution has not much to do and the burden of proof, arguably, will lie upon the defendant. Such practice will inevitably infringe one of the most fundamental rights of the accused, namely the presumption of innocence. One might recall paragraph 3 of Article 66 of the ICC Statute which stipulates: 'In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt'.202 Denying such a fundamental principle which is well founded in Islamic law nearly 1400 years ago is considered one step backward for the future of international criminal justice. The Prophet once said: 'eliminate the prescribed punishments whenever it is possible: and if you can manage a dismissal of a Muslim [the accused] do it. It is better for Imam [judge] to be mistaken in pardon than to be mistaken in penalty.'203 Islamic jurists (scholars) gave this rule a great importance, as it is corresponding to the spirit of the Islamic Shari'a regarding protection of a person from harm and observation of his interest.204

***518** At present, *mens rea* or the mental element - the most significant factor in determining criminal responsibility - is still one of the most complex areas of international criminal law, in most part because so many imprecise and vague terms have been used to define this fault element. Suffice to say that in many cases the conviction or acquittal of an accused appearing before the ICC will depend on the interpretation of Article 30 and its relationship with other provisions in the ICC Statute. At present, numerous judgments rendered by national and international courts have paved the way for a better understanding of the complex notion of *mens rea* in the sphere of international criminal law.205 It is now up to the International Criminal Court to illuminate it.

Lecturer in Law, Brunel Law School, Brunel University, London; Judge, Egyptian Ministry of Justice (2002-2007); Senior Public Prosecutor, Egyptian Ministry of Justice (1997-2002). PhD (Irish Centre for Human-NUI Galway, Ireland); LLM (Irish Centre for Human Rights-NUI Galway, Ireland); Dip. in International Legal Relations (Ain-Shams University, Cairo); LLB & Bachelors of Police Sciences (Cairo). My own thinking on this work has been significantly influenced by Roger Clark's influential article on *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences,* 12 CRIM L. FORUM 291 (2001). The author would like to thank Prof. William Schabas and Prof. Michael Bohlander for their valuable comments on an early draft of this work. Special thanks for Dr. Nora Karsten of the ICTY and Dr. Noelle Higgins of the Dublin City University for their comments on the final draft.

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1. *Prosecutor* v. *Thomas Lubanga Dyilo,* Case No. ICC-01/04-01/06-803, Décision sur la confirmation des charges, (*Lubanga* Décision sur la confirmation des charges), 29 January 2007.
2. *Ibid.*
3. For the drafting history of Article 30 of the ICC Statute see Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences,* 12 CRIM L. FORUM 291 (2001).
4. Rome Statute, Article 30.

5. See Erkin Gadirov and Roger Clark, *Article 9 - Elements of Crimes,* in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE, 505-529 (Otto Triffterer, ed., 2nd edn., 2008) at 513. As a result of the omission of the earlier draft of then Article 28 on *actus reus* 'causation' can hardly be seen as a requisite material element in the Statute (*ibid*). For more details on the element of causation *see ibid* at 521-522. See also Otto Triffterer, *Causality, as a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute* ?, 15 *LJIL* 179 (2002). See also Donald k. Piragoff and Darryl Robinson, *Article 30 - Mental Element,* in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE, 849 (Otto Triffterer, ed., 2nd edn., 2008) at 851-852.
6. Section 1.13(10) of the Model Penal Code. For more information on the Model Penal Code, *see* Herbert Wechsler, *Codification of the Criminal Law in the United States: The Model Penal Code,* 68 COLUM L. REV. 1425 (1968); Herbert Wechsler, *The Challenge of A Model Penal Code,* 65 HARV. L. REV. 1097 (1952). See also Jerome Hall, *The Proposal to Prepare a Model Penal Code,* 4 JOURNAL OF LEGAL STUDIES 91 (1951-1952). For the recent work by the American Law Institute on the MPC, *see* AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES, (The American Law Institute, 1985). As for the definition of material elements in the German literature particularly, what so called the theory on negative legal elements of the offence or '*Lehre von den negativen Tatbestandsmerkmalen* ', *see* VOLKER KREY, *Deutsches Strafrecht Allgemeiner Teil,* Vol. 2, (2003) at 15, 17.
7. Kelt and von Hebel used the phrase 'material elements and the principle of mens rea coverage' instead of 'element analysis', see Maria Kelt and Herman von Hebel, *General Principles of Criminal Law and the Elements of Crimes,* in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE, 19-40 (Roy Lee ed., 2001).
8. See the AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES, Vol. 1, (The American Law Institute, 1985). It is worth pointing out that within United States there are fifty-two American criminal codes, and it is often difficult to state 'the American rule on any point of criminal law'.
9. *Model Penal Code and Commentaries,* § 2.02, *supra* note 6, at 229, n. 1.
10. Model Penal Code, § 2.02(4).
11. Elements of Crimes, U.N. Doc. ICC-ASP/1/3, 1st Sess., Official Record (adopted by the Assembly of States Parties on September 9, 2002).
12. Rome Statute, Article 30(2)(a).
13. Rome Statute, Article 30(2)(b).
14. Rome Statute, Article 30(3).
15. Piragoff and Robinson, *Article 30 - Mental Element, supra* note 5, at 852-853.
16. See the very recent and challenging discussion on the subject by Kevin Jon Heller, *Mistake of Legal Element, the Common Law, and Article 32 of the Rome Statute, A Critica Analysisl,* 6 *JICJ* 419 (2008).
17. See footnote 15.
18. *Ibid.,* at 853.
19. *Ibid.*
20. See footnote 11.
21. Piragoff and Robinson, *Article 30 - Mental Element, supra* note 5, at 853. Maria Kelt and Herman von Hebel, *What Are the Elements of Crimes?,* in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE, 13-18 (Roy Lee ed., 2001): 'there was considerable debate [during the negotiations of the elements of crimes] as to whether they [the contextual elements] really were "material elements" - and if so whether they were (fully) covered by the mental element of article 30 - or whether they formed a separate type of element. Some participants thought, for example, that there might be a category of elements that are neither material nor mental, but which should be considered "jurisdictional" or "merely jurisdictional". Ultimately, however, an explicit decision as to whether these elements were "material elements" became unnecessary, as for each contextual element some corresponding mental element [however, lower than that provided for under Article 30] was specified in most cases, which, as a result, [...] rendered the other question moot'.
22. See *Prosecutor* v. *Tihomir Bla%24skic,* (Case No. IT-95-14-A) Judgment, July 29, 2004, para. 41. See also *Prosecutor* v. *Naser Oric,* Case No. IT-03-68-T, Trial Judgment, 30 June 2006 (*Oric* Trial Judgment), para. 279.
23. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW, (3rd edn., 2001) at 119; See also GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART, §§ 16, 18 (2nd edn., 1961).
24. See footnote 12.
25. See footnote 13.

26. Clark, *The Mental Element in International Criminal Law, supra* note 3, at 303, n. 38.
27. As suggested by Piragoff and Robinson, *Article 30 - Mental Element, supra* note 5, at 859; Gerhard Werle and Florian Jessberger, *'Unless Otherwise Provided' - Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law,* 3 *JICJ* 35 (2005) at 41; Albin Eser, *Mental Elements,* in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY (Antonio Cassese *et al.* eds., 2001) at 913.
28. Clark, *The Mental Element in International Criminal Law, supra* note 3, at 303, n. 39.
29. Piragoff and Robinson, *Article 30 - Mental Element, supra* note 5, at 859.
30. *United States* v. *Hilliard,* 31 F.3d 1509 (10th Cir. 1994).
31. See Michael Duttwiller, *Liability for Omission in International Criminal Law,* 6 *ICLR* 1 (2006) at 56-58.
32. Report of the Preparatory Committee on the Establishment of an International Criminal Court, (*Proceedings of the Preparatory Committee During March-April and August 1996*), U.N. GAOR 51st Sess., Supp. No. 22, UN Doc. A/51/22 (1996) Vol. I, p. 45, and Vol. II, at 90.
33. Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. GAOR, 53rd Sess., U.N. Doc. A/AC.249/1998/CRP.7 (1998), pp. 64-65 (article) 28.
34. Piragoff and Robinson, *Article 30 - Mental Element, supra* note 5, at 858-859.
35. Eser, *Mental Elements, supra* note 27, at 912; See also footnote 29.
36. Gadirov and Clark, *Article 9 - Elements of Crimes, supra* note 5, at 515.
37. *Lubanga* Décision sur la confirmation des charges, *supra* note 1, paras. 351-355. In the present case, Pre-Trial Chamber I employed the phrase 'omissions' eight times while discussing Article 30 of the ICC Statute.
38. Judgment, *Limaj* (IT-03-66-T), Trial Chamber, 30 November 2005, § 509 (emphasis added); Judgment, *Krstic* (IT-98-33-A), Appeals Chamber, 19 April 2004, § 188; Judgment, *Kunarac* (IT-96-23-T & IT-9623/1-T), Trial Chamber, 22 February 2001, § 390; Judgment, *Gacumbitsi* (ICTR-2001-64-T, Trial Judgment, 17 June 2004, § 285 ("Committing" refers generally to the direct and physical perpetration of the crime by the offender himself"); Judgment, *Kayishema* (ICTR-95-1-A), Appeals Chamber, 1 June 2001, § 187; Judgment, *Vasiljevic* (IT-98-32-T), Trial Chamber, 29 Nov. 2002, § 62 ('The Accused will only incur individual criminal responsibility for committing a crime under Article 7(1) where is it is proved the he personally physically perpetrated the criminal acts in question or personally omitted to do something in violation of international humanitarian law'); Judgment, *Kamuhanda* (ICTR-99-54A-T), Trial Chamber, § 595 ('To commit a crime usually means to perpetrate or execute the crime by oneself or to omit to fulfil a legal obligation in a manner punishable by penal law.'); See also Judgment, *Tadic* (IT-94-1-A), Appeals Chamber, 15 July 1999, § 188; Judgment, *Kunarac* (IT-96-23-T & IT-9623/1-T), Trial Chamber, 22 February 2001, § 390; Judgment, *Krstic* (IT-98-33-T), Trial Chamber, 2 August 2001, § 601; Judgment, *Krnojelac* (IT-97-25-T), Trial Chamber, 15 March 2002, § 73. Judgment, *Blagoje Simic* (IT-95-9-T) Trial Chamber, 17 October 2003, § 137 ('Any finding of commission requires the personal or physical, direct or indirect, participation of the accused in the relevant criminal act, or a finding that the accused engendered a culpable omission to the same effect, where it is established that he had a duty to act, with requisite knowledge.').
39. Model Penal Code, § 2.02(2)(a)(i).
40. *United States* v. *Bailey et al.,* 444 U.S. 394; 100 S. Ct. 624; 62 L. Ed. 2d 575; U.S. Lexis 69, November 7, 1979, Argued, January 21, 1980, Decided, at 632; See also *United States* v. *United States Gypsum Co.,* 438 U.S. 422, 445 (1978).
41. KREY, DEUTSCHES STRAFRECHT: ALLGEMEINER TEIL, *supra* note 6, at 109.
42. Cramer, in STRAFGESETZBUCH: KOMMENTAR, (Schönke and Schröder eds., 1997) at 263. (*Absicht ... liegt nur dann vor, wenn der Handlungswille des Täters final gerade auf den vom Gesetz bezeichneten Handlungserfolg gerichtet war*); LACKNER, *Strafgesetzbuch,* (München: Beck, 1991) 95. For more details on *Vorsatz* in German criminal law in the English language *see* Mohamed Elewa **Badar**, *Mens Rea - Mistake of Law and Mistake of Fact in German Criminal Law: A Survey for International Criminal Tribunals,* 5 *ICLR* 203 (2005).
43. *Lubanga* Décision sur la confirmation des charges, *supra* note 1.
44. *Ibid.,* para. 351.
45. *Ibid.*
46. Rome Statute, Chapeau element of Article 6: '... genocide means any of the following acts committed *with intent to* destroy ...'
47. Rome Statute, Article 7(2)(f): "'Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with intent of affecting the ethnic composition of any population ...'
48. Rome Statute, Article 7(2)(h): "'Enforced disappearance of persons" means the arrest, detention or abduc-

tion ... with the intention of removing them from the protection of the law for a prolonged period of time.'
49. See Mohamed Elewa **Badar**, *Drawing the Boundaries of Mens Rea in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia,* 6 *ICLR* 313 (2006) at 317-328.
50. *Lubanga* Décision sur la confirmation des charges, *supra* note 1, para. 352.
51. *Ibid.*
52. As suggested by Werle and Jessberger, *Unless Otherwise Provided, supra* note 27, at n. 34.
53. See Otto Triffterer, *The New International Criminal Law - Its General Principles Establishing Individual Criminal Responsibility,* in THE NEW INTERNATIONAL CRIMINAL LAW, 639-727 (Kalliopi Koufa ed., 2003) at 706.
54. Eser, *Mental Elements, supra* note 27, at 915: "... the perpetrators being aware that the action will result in the prohibited consequence ... with certainty..."
55. Model Penal Code, § 2.02(2)(b)(ii).
56. For a thorough analysis of the notion of 'oblique intent' in the criminal law of England see Glanville Williams, *Oblique Intention,* 46 CAMBRIDGE LJ (1987) 417.
57. *Ibid.*, at 420.
58. *Ibid.*
59. *Ibid.*
60. *Buzzanga* (1979) 49 C.C.C. (2d) 369 (Ont.C.A), per Justice Martin, quoted in DON STUART, CANADIAN CRIMINAL LAW: A TREATISE (2001) at 218-219. The relevant facts of the case as summarised by Stuart were as follows: The accused had been convicted ... of wilfully promoting hatred against the French Canadian public in Essex County. They had circulated an inflammatory handbill entitled 'Wake Up Canadians Your Future is At Stake'. The two accused, who identified with French Canadian aspirations and culture, denied intent to promote hatred. They were involved with a movement to establish a French language high school in Essex County. Their purpose was to dramatise how ridiculous the opposition had been and to prompt the government into quick intervention.
61. *BGHSt* 21, 283 (Vol. 21, at 283).
62. Eser, *Mental Elements, supra* note 27, at 914-915.
63. Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections,* 10 *EJIL* 158 (1999), at 153: 'While it is no doubt meritorious to have defined these two notions [intent and knowledge in Article 30], it appears questionable to have excluded recklessness as a culpable *mens rea* under the Statute.'; Johan D. Van der Vyver, *The International Criminal Court and the Concept of Mens Rea in International Criminal Law,* 12 MIAMI INT'L & COMP L. REV. 57-149 (2004), at 64-65: 'Antonio Cassese has criticized the ICC Statute for not recognizing "recklessness" as the basis of liability for war crimes. However, if one takes into account the resolve to confine the jurisdiction of the ICC to "the most serious crimes of concern to the international community as a whole," it is reasonable to accept that crimes committed without the highest degree of *dolus* ought as a general rule not to be prosecuted in the ICC.'; Werle and Jessberger, *Unless Otherwise Provided, supra* note 27, at 41-42: 'This interpretation of Article 30(2)(b) and 3 ICCSt., which appears to be shared by most commentators, results in the establishment of a standard of mens rea apparently stricter than that usually applied by both domestic and international courts.' Werle and Jessberger, 'Unless Otherwise Provided', *supra* note 27, at 53: 'the requirements of the perpetrator's being aware that the consequence will occur in the ordinary course of events or of the perpetrator's meaning to cause that consequence (Article 30(2)(b) ICCSt.) excludes both forms of subjective accountability. It thus follows from the wording of Article 30(2)(b) that recklessness and *dolus eventualis* do not meet the requirement.'
64. Piragoff and Robinson, *Article 30 - Mental Element, supra* note 5, at 533-544; Hans H. H. Jescheck, *The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute,* 2 *JICJ* 38-55 (2004), at 45. Ferrando Mantovani, *The General Principles of International Criminal Law: The Viewpoint of a National Criminal Lawyer,* 1 *JICJ* 26-38 (2003), at 32: '...the ICC Statute's provision on the mental element (Article 30) appears to limit itself to intent (dolus) alone, thereby excluding negligence (culpa). Using ambiguous and psychologically imprecise wording ... It ... does include intent and recklessness (*dolus eventualis*) ...';
65. Clark, *The Mental Element in International Criminal Law, supra* note 3, at 301.
66. See *R.* v. *G and Another* [2004] 1 AC 1034 (HL).
67. DON STUART, CANADIAN CRIMINAL LAW, A TREATISE, *supra* note 60, at 224.
68. *Sansregret* v. *The Queen,* [1985] 45 C.R. (3d) 193, 203-204 (S.C.C.).
69. *ibid.*
70. *U.S.* v. *Trinidad-Aquino,* 259 F.3d at 1146.

71. Model Penal Code, § 2.02(2)(c).
72. *ibid.*
73. *United States* v. *Albers,* 226 F. 3d 989, 995 (9th Cir. 2000).
74. *United States.* v. *Albers,* 226 F. 3d 989, 995 (9th Cir. 2000), *citing Farmer* v. *Brennan,* 511 U.S. 825, 836-37 (1994) (emphasis added); see also *United States.* v. *Trinidad-Aquino,* 259 F.3d 1140, 1146 (9th Cir. 2001).
75. David M. Treiman, *Recklessness and the Model Penal Code,* 9 AM J CRIM LAW 281 (1981), at 351.
76. See FINBARR MCAULEY AND J. PAUL MCCUTCHEON, CRIMINAL LIABILITY (2000) 301-303.
77. Heribert Schumann, *Criminal Law,* in INTRODUCTION TO GERMAN LAW, (Werner F. Ebke and Matthew W. Finkin eds., 1996), at 389-390.
78. BGHSt 36, 1; 44, 99; BGH NStZ (Neue Zeitschrift fuer Strafrecht) 1999, p. 507; BGH NStZ 2000, 583.
79. JOHANNES WESSELS AND WERNER BEULKE, STRAFRECHT: ALLGEMEINER TEIL 76 (2002).
80. CLAUS ROXIN, STRAFRECHT: ALLGEMEINER TEIL, 376 (1997).
81. *Ibid.*
82. *Prosecutor* v. *Milomir Stakic,* Case No. IT-97-24-T, Trial Judgment, 31 July 2003 (*Stakic* Trial Judgment), para. 587.
83. *Ibid.*
84. *Ibid.*
85. The perpetrator could still be held criminally responsible and liable for being consciously negligent.
86. *Ibid.,* para. 351.
87. Elewa **Badar**, *Drawing the Boundaries of Mens Rea, supra* note 49, at 313.
88. See footnote 50.
89. *Ibid.,* para. 352 (emphasis added, footnotes omitted).
90. *Ibid.,* paras. 353-354.
91. *Ibid.,* para. 355.
92. In French criminal law, a distinction is made between two forms of intent, namely, *dol général* (general intent - to act unlawfully) and *dol spécial* which must be proved for certain offences. The term 'dol' in French criminal law means the deliberate intention to commit a wrong and involves both 'knowledge' that something is prohibited and the 'deliberate willingness' to carry out the proscribed conduct. The classic definition of *dol général* is provided by Emel Garçon, the eminent nineteenth century French criminal law scholar: "L'intention, dans son sens juridique, est la volonté de commettre le délit tel qu'il est déterminé par la loi; c'est la conscience, chez le coupable, d'enfreindre les prohibitions légales..." According to Garçon, *dol général* encompassed two mental elements: la conscience (awareness) and la volonté (willingness/desire). This definition of dol général was accepted by subsequent French legal scholars. The element of conscience, in French criminal law, simply refers to the accused's knowledge that he or she is breaking the law. This implies a similarity between the facts as understood by the perpetrator and as described in the criminal code. With regard to the element of 'desire', it is interpreted as simply referring to the accused's willingness to commit the wrongful act and not the desire to accomplish the result of the act in question. On French criminal law *see* JOHN BELL, SOPHIE BOYRON AND SIMON WHITTAKER, PRINCIPLES OF FRENCH LAW, (1998); BRICE DIKSON, INTRODUCTION TO FRENCH LAW, (1994); EMILE GARÇON, CODE PÉNAL ANNOTÉ (1st ed., 1901); Catherine Elliot, *The French Law of Intent and Its Influence of the Development of International Criminal Law,* 11 CRIM L. FORUM 36 (2000). R. MERLE AND A. VITUE, TRAITÉ DE DROIT PÉNAL (1997).
93. *Lubanga* Décision sur la confirmation des charges, *supra* note 1, at n. 438. For different opinions on the concept of *dolus eventualis see* GEORGE FLETCHER, RETHINKING CRIMINAL LAW, (2000) at 445-446: (*dolus eventualis* entails 'a particular subjective posture towards the result'); See also Mihajlo Acimovic, *Conceptions of Culpability in Contemporary American Law,* 26 LA. L. REV. 28 (1965), at 48 (describing a Romanist law test according to which the perpetrator acted intentionally if he could have said to himself: It may be either so or different, it may happen either so or differently; anyhow I shall act.) For a different opinion see Paul T. Smith, *Recklessness in Dolus Eventualis,* 96 SOUTH AFRICAN LAW JOURNAL 81 (1979): (criticizing South African law to the extent that it interprets *dolus eventualis* as indifference rather than foresight).
94. *Lubanga* Décision sur la confirmation des charges, *Supra* note 2 above, fn. 438.
95. Cassese, *The Statute of the International Criminal Court, supra* note 63, at 153-154.
96. *Ibid.,* at 154.
97. Triffterer, 'The New International Criminal Law', *supra* note 53, at 706.
98. Kai Ambos, *General Principles of Criminal Law in the Rome Statute,* 10 CRIM. L. FORUM 1-32 (1999), at 21-22.
99. For an in depth analysis of the criminal intent in Islamic criminal law *see* MOHAMED ELEWA **BADAR**,

THE CONCEPT OF MENS REA IN INTERNATIONAL CRIMINAL LAW: THE CASE FOR A UNIFIED APPROACH (Hart Publishing, June 2009).
100. Compare Rome Statute, Article 30 (2) (b) and Article 30 (3).
101. See footnote 14.
102. *Ibid.*
103. Rome Statute, Article 7(1): 'For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with the knowledge of the attack.'
104. Rome Statute, Article 7(1)(g).
105. Rome Statute, Articles 8(2)(b)(xxii), and Article 8(2)(e)(vi).
106. *Contra* see *Prosecutor* v. *Sylvestre Gacumbitsi,* Case No. ICTR-2001-64-A, Appeal Judgment, 7 July 2006, (*Gacumbitsi* Appeal Judgment) in which the prosecution argued that non-consent of the victim and the perpetrator's knowledge thereof should not be considered as constitutive elements of the offence that must be proved by the Prosecution.
107. *Contra* see the Model Penal Code § 2.02(7) which stretched the definition of knowledge with regard to the attendant circumstance to encompass 'awareness of *high probability* of the existence of a particular fact'.
108. Glanville Williams, *Criminal Law: The General Part, supra* note 23, at 159.
109. Rome Statute, Article 8(2)(b)(xxvi); Article 8(2)(e)(vii). It is to be noted that the latter Article incriminate the enlisting of children into "armed forces or groups". The reason is that this Article applied to war crimes committed in armed conflicts not of an international character.
110. Elements of Crimes, U.N. Doc. ICC-ASP/1/3, 1st Sess., Official Record (adopted by the Assembly of States Parties on September 9, 2002) reprinted in WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, (2004) 310. Article 8(2)(b) (xxvi) War Crime of using, conscripting or enlisting children. See Kelt and von Hebel, *General Principles of Criminal Law and the Elements of Crimes, supra* note 7, at 31.
111. Smith & Hogan, Criminal Law, (2005) at 109-110.
112. Elements of Crimes, Article 8(2)(b)(vii)-1, reprinted in Schabas, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, *supra* note 110, at 299.
113. Elements of Crimes, Article 8(2)(b)(vii)-2., reprinted *ibid* at 299.
114. Elements of Crimes, Article 8(2)(b)(vii)(3)-1, and Article 8(2)(b)(vii)(3)-2, reprinted *ibid* at 299 (emphasis added).
115. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, *supra* note 110, at 108.
116. Rome Statute, Article 6(1).
117. Rome Statute, Article 7.
118. Rome Statute, Article 7 (2)(b), (emphasis added).
119. Rome Statute, Article 8. Other crimes provided for in the ICC Statute contains in their definition a subjective element, see Article 7(2) (e), (f) and (h); Article 8 (2) (b) (i), (ii), (iii), (iv), (ix), (xxiv) and (xxv), and Article 8 (2) (e) (i), (ii), (iii) and (iv).
120. See in general Werle and Jessberger, *Unless Otherwise Provided, supra* note 27. Piragoff hold the same opinion: 'The major significance of Article 30, however, is its affect on definitions that do not expressly specify a mental element. Although a particular definition of a crime may be silent as to the requisite mental element, Article 30 would import the mental elements of "intent and knowledge" as being the mental elements require in order to render an accused criminally responsible and liable for punishment for that particular crime.' See Donald D. Piragoff, *Article 30 - Mental Element,* in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE, 527-535 (Otto Triffterer ed., 1999) at 531.
121. *Ibid.,* at 531.
122. *Ibid.*
123. *Ibid.*
124. Margaret McAuliffe deGuzman, *Article 21 Applicable Law,* in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE, 435 (Otto Triffterer ed., 1999) at 436-438.
125. Rome Statute, Article 21.
126. Adopted by the Preparatory Commission of the International Criminal Court in June 2000, see Report of the Preparatory Commission for the International Criminal Court. Finalized draft text of the Rules of Procedure

and Evidence (PCNICC/2000/1/Add.1); and Finalized draft text of the Elements of Crimes (PCNICC/2000/1/Add.2).
127. Rome Statute, Article 6 (e).
128. Claus Kress, *The Crime of Genocide under International Law,* 6 *ICLR* 461 (2006) at 485 (emphasis in original, footnotes omitted).
129. *Lubanga* Décision sur la confirmation des charges, *supra* note 1, para. 356.
130. *Ibid.,* para. 358. The Pre-Trial Chamber I observed that: 'The "should have known" requirement set forth in the Elements of Crimes - which is to be distinguished from the "must have known" or constructive knowledge requirement - falls within the concept of negligence because it is met when the suspect: i. did not know that the victims were under the age of fifteen years at the time they were enlisted, conscripted or used to participate actively in hostilities; and ii. lacked such knowledge because he or she did not act with due diligence in the relevant circumstances one can only say that the suspect" should have known" if his or her lack of knowledge results from his or her failure to comply with his or her duty to act with due diligence).'
131. *Ibid.,* paras. 356-359.
132. *Ibid.,* para. 360.
133. See the sixth element of the Elements of Crimes of Article 6(e) Genocide by forcibly transferring children. For more information on this specific crime see Kurt Mundorff, 2008, *Working Paper: Other Peoples'* Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(e), The Selected Works of Kurt Mundorff, available at http://works.bepress.com/kurt_mundorff/3/, last visited June 22, 2008.
134. Erkin Gadirov, *Article 9 - Elements of Crimes,* in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE, (Otto Triffterer ed., 1999) at 301-302.
135. See footnote 11, pp. 113-115.
136. ICC-ASP/1/3, Article 6(a) Genocide by killing.
137. Rome Statute, Article 25(3)(a), (letters added).
138. BASSIOUNI, THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: AN ARTICLE-BY-ARTICLE EVOLUTION OF THE STATUTE, (2005) at 200.
139. *Lubanga* Décision sur la confirmation des charges, *supra* note 1, paras. 322-367.
140. *Ibid.,* para. 326.
141. *Ibid.*
142. *Ibid.,* para. 328.
143. *Ibid.,* para. 329.
144. *Ibid.,* para. 330.
145. *Ibid.,* para. 331.
146. *Ibid.,* para. 330.
147. *Ibid.,* para. 332.
148. CLAUS ROXIN, TÄTERSCHAFT UND TATHERRSCHAFT, (2000) at 294, 299.
149. *Lubanga* Décision sur la confirmation des charges, *supra* note 1, paras. 343-345.
150. *Ibid.,* paras. 346-348.
151. *Ibid.,* paras. 349-360.
152. *Ibid.,* paras. 366-367.
153. *Ibid.,* para. 349.
154. *Ibid.,* para. 361.
155. *Ibid.*
156. *Ibid.,* para. 365.
157. *Ibid.,* paras. 366-367.
158. Kai Ambos, *Article 25 - Individual Criminal Responsibility,* in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE, 435 743-769 (Otto Triffterer ed., 2008) at 757.
159. *Model Penal Code and Commentaries, supra* note 6, § 2.06 Comment at 312, at n. 42.
160. *Ibid.*
161. Piragoff and Robinson, *Mental Element - Article 30, supra* note 5, at 855.
162. *Ibid.*
163. *Bla%24skic* Appeal Judgment, *supra* note 22, para. 41.
164. *Oric* Trial Judgment, *supra* note 22, para. 288 (emphasis added, footnotes omitted).
165. William A. Schabas, *General Principles of Criminal Law in the International Criminal Court Statute (Part*

III), 6 EUR J CRIME CR L CR J 84 (1998), 95-98.
166. Ambos, 'Individual Criminal responsibility', *supra* note 158, 757. Eser arrived to the same conclusion, see Eser, *Individual Criminal Responsibility,* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, (Cassese *et al.* eds., 2002) at 801.
167. Rome Statute, Article 25(3)(d).
168. Eser, *Individual Criminal Responsibility, supra* note 166, at 802-804.
169. *Prosecutor* v. *Thomas Lubanga Dyilo,* case No. ICC-01/04-01/06-356, Document Containing the Charges, Article 61(3)(a), August 28, 2006, para. 20.
170. Antonio Cassese, *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise,* 5 *JICJ* 109 (2007), at 112.
171. *Ibid.*
172. See footnote 125.
173. *Ibid.*
174. The notion of joint criminal enterprise as adopted by the two ad hoc Tribunals has been a source of endless fascination for commentators, generating an enormous amount of literature: Allen O'Rourke, *Joint Criminal Enterprise and Br##anin: Misguided Over-Correction,* 47 HARV INTL L. J. 307 (2006); Antonio Cassese, *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise,* 5 *JICJ* 109 (2007); Allison Marston Danner and Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Law,* 93 CAL L. REV. 75 (2005); Kai Ambos, *Joint Criminal Enterprise and Command Responsibility,* 5 *JICJ* (2007) 159; Mohamed Elewa **Badar**, *"Just Convict Everyone!" 'Joint Perpetration: From Tadic to Stakic and Back Again,* 6 *ICLR* 293 (2006); Kai Hamdorf, *The Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime: A Comparison of German and English Law,* 5 *JICJ* 208 (2007); Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise,* 5 *JICJ* 69 (2007); Nicola Piacente, *Importance of the Joint Criminal Enterprise Doctrine for the ICTY Prosecutorial Policy,* 2 *JICJ* 446 (2004); Katrina Gustafson, *The Requirement of an 'Express Agreement'* for Joint Criminal Enterprise Liability: A Critique of Br##anin, 5 *JICJ* 134 (2007); Harmen van der Wilt, *Joint Criminal Enterprise, Possibilities and Limitations,* 5 *JICJ* 91 (2007); Elies van Sliedregt, *Pathway to Convicting Individuals for Genocide,* 5 *JICJ* 184 (2007).
175. For critical analysis of the third category of JCE, see Elewa **Badar**, *supra* note 174.
176. The *travaux préparatoires* of the first Additional Protocol is reproduced in four volumes and one supplement in the work of HOWARD S. LEVIE, PROTECTION OF WAR CRIMES: PROTOCOL 1 TO THE 1949 GENEVA CONVENTIONS, (1981). The Supplement appears in year (1985).
177. Proposed Amendment to Article 76 by Syrian Arab Republic, CDDH/1/74, 20 March 1974, *Official Records,* Vol. III, p. 328, in Levie, *Protection of War Crimes, ibid.,* at 302.
178. Mr. Cerda (Argentina), CDDH/I/74, in Levie, *ibid.,* at 306.
179. *Ibid.*
180. Proposal submitted by the United States (A/CONF.183/C.1/L.2) (emphasis added) reprinted in M. CHERIF BASSIOUNI, THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: SUMMARY RECORDS OF THE DIPLOMATIC CONFERENCE, (2005) paras. 67-68.
181. UN Doc. A/CONF 183/C.1/SR.1 (16 June 1998), Mr. Nathan (Israel), reprinted in Bassiouni, *Summary Records of the Diplomatic Conference, ibid.,* at 78, para. 73.
182. *Ibid.*
183. *Prosecutor* v. *Sefer Halilovic,* Case No. IT-01-48-T, Trial Judgment, 16 November 2005, (*Halilovic* Trial Judgment) para. 71; *Bla%24skic* Appeal Judgment, *supra* note 22, para. 63; *Prosecutor* v. *Ignace Bagilishema,* Case No. ICTR-95-1A-A, Judgment 3, 3 July 2002, (*Bagilishema* Appeal Judgment), paras. 34-35.
184. *Lubanga* Décision sur la confirmation des charges, *supra* note 1, n. 439.
185. *Ibid.*
186. *Ibid.*
187. *Bla%24skic* Appeal Judgment, *supra* note 22, para. 62.
188. David M. Treiman, *Recklessness and the Model Penal Code, supra* note 75, at 351.
189. *Ibid.*
190. *Ibid.*
191. Rome Statute, Article 32(1).
192. Rome Statute, Article 32(2).
193. Otto Triffterer, *Article 32 - Mistake of Fact or Mistake of Law,* in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY

ARTICLE, 895-914 (Otto Triffterer, ed., 2nd edn., 2008) at 902 (italics in the original).
194. *Lubanga Décision sur la confirmation des charges, supra* note 1, para. 304. See also Transcript, 26 November 2006.
195. WILLIAM A. SCHABAS, INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, (3rd edn., 2007) at 230.
196. *Lubanga Décision sur la confirmation des charges, supra* note 1, para. 305.
197. *Ibid.*, paras. 315-316 (footnotes omitted).
198. Thomas Weigend, *Intent, Mistake of Law, and Co-perpetration in the Lubanga Decision on Confirmation of Charges,* 6 *JICJ* 471 (2008) at 476.
199. *Ibid.*
200. *Ibid.*, at 482.
201. *Lubanga* Décision sur la confirmation des charges, *supra* note 1, paras. 356-359.
202. According to paragraph 2 of Article 66 'the onus is on the Prosecutor to prove the guilt of the accused.'
203. Sunan Al Tirmizi, Vol. 4, p. 25.
204. Abd El-Khaleq Ebn Al Mofaddal Ahmaddon, Qa'edat dar'e al hedood bel-Shobehat wa atharoha fi al fiqh al gena'ei al islami (The Rule of Eliminating Penalty on Suspicion Criterion and Its Role in Islamic Penal Jurisdiction), 7 CONTEMPORARY JURISPRUDENCE RESEARCH JOURNAL 7-75 (1995), at 9.
205. See MOHAMED ELEWA **BADAR**, THE CONCEPT OF MENS REA IN INTERNATIONAL CRIMINAL LAW: THE CASE FOR A UNIFIED APPROACH (Hart Publishing, June 2009).

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C

Uniform Laws Annotated Currentness
Model Penal Code (Refs & Annos)
Part I. General Provisions
Article 2. General Principles of Liability
§ 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

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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 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.

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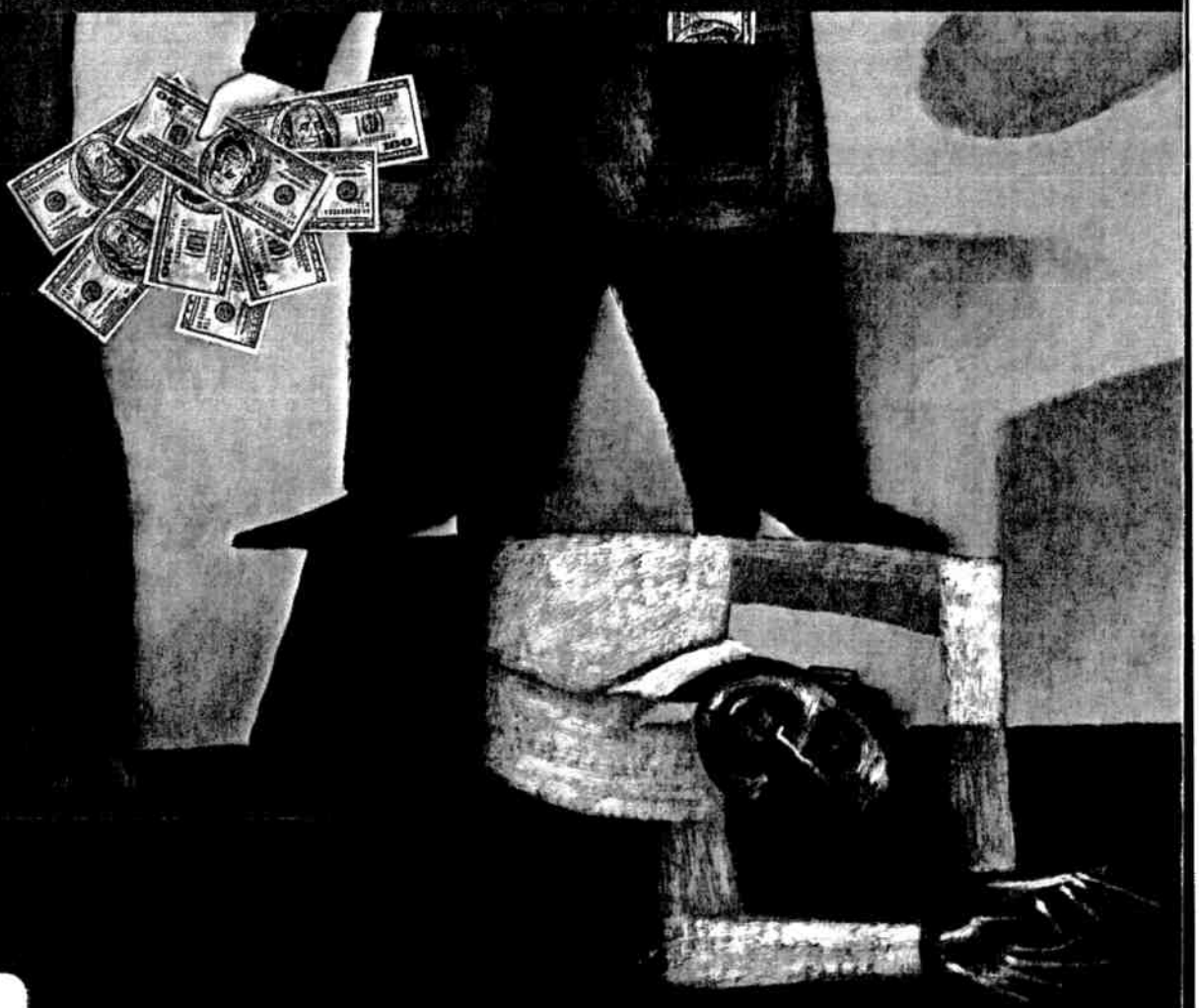

Andrew Ashworth

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10.3 THE CONDUCT ELEMENT IN COMPLICITY

We have seen that the 1861 Act refers to those who 'aid, abet, counsel or procure' a crime. As a matter of history, it seems that this Act was intended only to declare the procedure whereby accomplices could be convicted and sentenced as principals, and not to provide a definition of complicity. Earlier statutes had used a wide range of terms—contriving, helping, maintaining, directing—and the wording of the 1861 Act was probably intended merely as a general reference to the existing common law on accomplices. However, the words have taken on an authority of their own. In 1976 the Court of Appeal declared that each of the four verbs should be given its ordinary meaning,[18] but, as we shall see, there are several decisions on the scope of the four terms. One factor that formerly had considerable importance was presence during the commission of the crime. So long as the other conditions for liability were fulfilled, presence turned the accomplice into an aider or abettor, absence into a counsellor or procurer.[19] However, it appears that the distinction no longer has any practical consequences in English law.[20] Whether an accomplice is described as an aider, abettor, counsellor, or procurer seems to depend partly on ordinary language and partly on specific judicial decisions.

(a) AIDING AND ABETTING

It has been traditional to consider the modes of complicity in terms of the two time-honoured pairings: 'aid or abet', and 'counsel or procure'. In fact, the concept of abetment seems to play no independent role now. Abetting involves some encouragement of the principal to commit the offence and this usually accompanies, or is implicit in, an act of aiding. Aid may be given by supplying an instrument to the principal, keeping a look-out, doing preparatory acts, and many other forms of assistance given before or at the time of the offence. The disappearance of the old requirement of presence may be illustrated by two cases. In *Bainbridge* (1959)[21] a man who provided equipment for use in a burglary was treated as a counsellor and procurer, because the burglary was to take place some days hence, whereas it would now be more natural to refer to him as an aider since he gave assistance by supplying the equipment. In *Attorney General* v *Able* (1984)[22] the discussion of D's criminal liability for supplying a booklet explaining various ways of committing suicide was conducted on the basis that this would be aiding and abetting, whereas in former times this would have been regarded as counselling, since the author of the book was not present at the suicides.

[18] *Attorney-General's Reference (No. 1 of 1975)* [1975] QB 773.

[19] See e.g. Lord Goddard CJ in *Ferguson* v *Weaving* [1951] 1 KB 814, and generally J. C. Smith, 'Aid, Abet, Counsel or Procure', in P. R. Glazebrook (ed.) *Reshaping the Criminal Law* (1978).

[20] *Howe* [1987] AC 417, overruling *Richards* [1974] QB 776.

[21] [1960] 1 QB 129.

[22] [1984] 1 QB 795.

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Once it has been shown that the accomplice's conduct helped or might have helped the principal in some way, it does not have to be established that the accomplice caused the principal's offence. Causation requirements often function so as to fix the threshold of legal liability. However, one cannot, in general, trace causal responsibility through the voluntary act of another person[23]—so it will not usually be possible to hold that an accomplice *caused* the principal to act, save in a rather diluted form of 'causing'.[24] Sanford Kadish has argued that the law does require a form of causation: the courts must be satisfied that the accomplice's help *might* have made a difference to whether the principal's offence was actually committed, in the sense that one could not be sure that it would have been committed but for the accomplice's assistance.[25] However, it is not easy to reconcile all decisions with this approach. Thus in *Wilcox* v *Jeffery* (1951) a jazz enthusiast attended a concert, applauding the decision of an American jazz musician to give an illegal performance. No point was taken in court about whether the musician was actually encouraged by the defendant's acts.[26] Indeed, in cases where several people applaud or encourage some kind of unlawful spectacle, it would be difficult to maintain that the performer(s) drew actual encouragement from the acts of any one of the spectators. In *Giannetto*[27] the Court of Appeal stated that 'any involvement from mere encouragement upwards would suffice', and did not dissent from the trial judge's suggestion that, if another man had said to D that he was about to kill D's wife, 'as little as patting him on the back, nodding, saying "Oh goody" ' would be sufficient to turn D into an aider and abettor. Since this example involves a principal who has already decided to commit the offence, the accomplice's contribution can hardly be said to make a causal difference.

Another type of situation occurs where the principal is unaware of the help given by the secondary party. In the famous American case of *State* v *Tally* (1894),[28] Judge Tally, knowing that his brothers-in-law had set out to kill the deceased, and knowing that someone else had sent a telegram to warn the victim, sent a telegram to the telegraph operator telling him not to deliver the warning telegram. The telegraph operator complied, and the brothers-in-law committed the offence. The judge was convicted of aiding and abetting murder, even though the brothers-in-law were unaware of the judge's assistance when they killed the victim. It could be said that there was a causal connection in this case, but surely it should have been enough that the judge's act was more than minimal and he intended to aid. The law might deal more satisfactorily with these cases if it included a general offence of assisting or encouraging crime, discussed in section 10.8 below.

[redacted]

[23] See above, Ch 4.6(a) and (b).
[24] Cf. H. L. A. Hart and T. Honoré, *Causation in the Law* (2nd edn., 1985), 388.
[25] S. Kadish, *Blame and Punishment* (1987), 162.
[26] [1951] 1 All ER 464.
[27] [1997] 1 Cr App R 1, at 13.
[28] *State* v *Tally* (1894) 15 So 722.

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(b) ACCOMPLICE LIABILITY AND SOCIAL DUTIES

We saw in Chapter 4.4 how accomplice liability has been used in English law to establish criminal liability for certain omissions, and the relevant authorities must now be considered in the context of complicity. The cases raise issues of constitutional and social importance, but the key question in accessorial liability is simple to state: can a person be convicted as an accomplice merely for standing by and doing nothing while an offence is being committed?

If mere presence at the scene during the principal's offence were sufficient for accomplice liability, this would amount to recognizing a citizen's duty either to leave straight away or to take reasonable steps to prevent or frustrate any offence which is witnessed. The courts have held that non-accidental presence, such as attending a fight or an unlawful theatrical performance, is not conclusive evidence of aiding and abetting.[29] At a minimum there must be an act of encouragement (accompanied by an intention to encourage, discussed in section 10.4 below). Some judgments suggest that it must be shown that encouragement was not just given but also had some effect on the principal,[30] but this has not usually been required. The factual questions are for the jury or magistrates. The finding of an act of encouragement may require more than going to the place where the performance is taking place, but payment and applause may suffice;[31] however, in one case it was held that remaining in a vehicle that was being used to obstruct the police, in circumstances showing that D supported the actions of the driver, might amount to aiding.[32] The position of spectators who happen upon an illegal fight or event and stay to watch it is similar: simply sitting or standing nearby is unlikely to be sufficient for liability, but any cheering or applause would probably tip the balance in favour of conviction. The problems are particularly acute in cases of public disorder. To impose duties on bystanders, even the duty to move away, might be regarded as an incursion on a citizen's right to freedom of assembly (declared in Article 11 of the European Convention). What must be proved, to amount to aiding and abetting one of the offences in the Public Order Act, is that D was present, was giving encouragement, and was intending to encourage others to commit the specified offence.[33] Mere presence should not be sufficient, particularly in view of Article 11.

Are there arguments in favour of the law going further and imposing a duty to take steps to prevent crime? The public disorder example may be complicated by the impotence of individuals to do anything to stop the disturbance and, indeed, the imprudence of their trying to do so. But is it not arguable that there should be at least a duty to alert the police? If so, should failure to do so constitute a distinct

[29] *Coney* (1882) 8 QBD 534. [30] Hawkins J in ibid., and *Clarkson* [1971] 1 WLR 1402.

[31] *Wilcox* v *Jeffery* [1951] 1 All ER 464.

[32] *Smith* v *Reynolds et al.* [1986] Crim LR 559; for another decision based on voluntary presence, see *O'Flaherty* [2004] Crim LR 751.

[33] *Jefferson et al.* (1994) 99 Cr App R 13, at 22; for a summary of the main public order offences, see Ch 8.3(h) above.

offence (as in French law[34]) or complicity in the public disorder? Another example, which does not involve public disorder, occurs where a woman is living with a man who she discovers is dealing in drugs. If the police raid the dwelling and find drugs on the premises, should the law treat her as an accomplice even if there is no evidence of active assistance or encouragement of the drug-dealing? In the case of *Bland* (1988)[35] the Court of Appeal quashed the woman's conviction as an accomplice. Cases such as this demonstrate a vivid conflict between individuals' rights of privacy in their personal relationships and the social interest in suppressing serious crime. Would it be right for the law to co-opt husbands against wives, parents against children, house-sharing friends against friends in order to increase public protection?[36]

Probably the only way to answer this question is to balance the relative centrality of the right against the seriousness of the offence involved—not a simple exercise, but an inevitable one if the true nature of the problem is to be confronted. The same applies to the situation in *Clarkson* (1971):[37] two soldiers happened to enter a room where other soldiers were raping a woman. It was not found that they did anything other than watch, but they certainly did nothing to discourage continuance of the offence. The Courts Martial Appeal Court quashed their convictions for aiding and abetting, because the judge had not made it clear that there should be proof of both an intent to encourage and actual encouragement. Nothing was said about a duty to alert the authorities immediately in the hope of preventing the crime's continuance. What if three persons came upon one man raping a woman? If it was within their power to put a stop to the offence and to apprehend the offender, should they have a duty to do so—or at least a duty to inform the police? The practical possibilities will vary from case to case, but the real issue is whether there is to be a principle that citizens ought to take reasonable steps to inform the police when they witness an offence. The decision in *Allan* (1965)[38] is against this, emphasizing the requirement of encouragement and adding that, even if D would have joined in if necessary, it would be unacceptable 'to convict a man on his thoughts, unaccompanied by any physical act other than the facts of mere presence'. However, variations in the facts of cases could be accommodated by requiring the citizen only to take 'reasonable steps',[39] and no law should require a person to place his or her own safety in jeopardy. Even if this were accepted, there would remain the question whether it is fairer to convict the defaulting citizen of a new offence of failing to inform the police rather than making the citizen into an accomplice to the principal crime. The former is surely more appropriate in terms of fair labelling.

[34] Art. 223(1) of the French Penal Code, discussed by A. Ashworth and E. Steiner, 'Criminal Omissions and Public Duties: the French Experience' (1990) 10 Legal Studies 153.

[35] [1988] Crim LR 41; cf. also *Bradbury* [1996] Crim LR 808.

[36] Cf. s. 80 of the Police and Criminal Evidence Act 1984, which makes a husband or wife (but not a non-spouse) compellable as a witness on a charge of violence towards a child under 16 in the household.

[37] [1971] 1 WLR 1402.

[38] [1965] 1 QB 130; see further G. Williams, 'Criminal Omissions—the Conventional View' (1990) 107 LQR 86.

[39] See n 34 above.

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Can a person be said to aid an offence by an omission?[40] There would surely be no awkwardness in describing the cleaner of a bank who, in pursuance of an agreed plan, purposely omits to lock the doors when leaving as 'aiding' a burglary of the bank. In such a case, there is a clear duty and a failure to perform it, and the causation question is answered (in so far as it is relevant to aiding) in the same way as for omissions generally.[41] Another example would be the driving instructor who is supervising a learner driver and who realizes that the learner is about to undertake a manœuvre which is dangerous to other road-users: if, as in *Rubie* v *Faulkner* (1940),[42] the instructor fails to intervene, either by telling the learner not to do it or by physically acting to prevent it, then this failure in the duty of supervision is rightly held to be sufficient to support liability for aiding and abetting the learner driver's offence.

From these cases of duty we turn to cases of legal power, and the so-called 'control principle'. The owner of a car who is a passenger when the car is being driven by another has the legal power to direct this other person not to drive in certain ways;[43] the licensee of a public house has the legal power to require customers to leave at closing-time;[44] the owners of a house have the legal power to direct the behaviour of their children and of visitors to their premises. In the first two cases the courts have held the car owner and the licensee liable as accomplices to the crime of the offender who drives carelessly or remains drinking after hours. What is unusual about these cases is that they rest on the legal *power* of control of, respectively, the car owner and the licensee and not, like *Rubie* v *Faulkner* above, on the existence of a legal *duty* to ensure compliance with the law. A similar analysis is found in *J.F. Alford Transport Ltd* (1997),[45] where the company's convictions for aiding and abetting drivers to falsify their tachograph records were quashed. If the prosecution had proved the power of control, knowledge, and encouragement by non-intervention, that would have been sufficient. But this case, unlike the previous two, did not involve D's presence during the commission of the offences; and knowledge, or wilful blindness, was held not to have been established. However, the control principle was reasserted, and that principle departs from the usual approach of not imposing liability for an omission unless a clear duty exists.[46] What the courts have done, in effect, is to assimilate these cases of 'power of control' to cases of duty, thereby creating a new class of public duty.[47] Even though English law does not impose liability for failing to take reasonable steps to prevent an offence which occurs in the street, these cases hold that a property owner will be liable for failing to take

[40] K. J. M. Smith, *Modern Treatise on Complicity*, 39–47. [41] See above, Ch 4.6(c).

[42] [1940] 1 KB 571, discussed by M. Wasik, 'A Learner's Careless Driving' [1982] Crim LR 411, and D. J. Lanham, 'Drivers, Control and Accomplices' [1982] Crim LR 419.

[43] *Du Cros* v *Lambourne* [1907] 1 KB 40. [44] *Tuck* v *Robson* [1970] 1 WLR 741.

[45] [1997] 2 Cr App R 326.

[46] The Law Commission's view was that the breach of duty must also have actually amounted to assistance or encouragement (Law Commission Consultation Paper No. 131, *Assisting and Encouraging Crime* (1993), para. 2.29), but the decisions seem to regard this requirement as easily fulfilled.

[47] Cf. the debate between G. Williams, 'Which of You Did It?' (1989) 52 MLR 179 and D. J. Lanham, 'Three Cases of Accessorial Absurdity' (1990) 53 MLR 75.

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reasonable steps to prevent an offence which occurs on or with that property (and with the owner's knowledge). The law has, in effect, co-opted property owners as law-enforcement agents in respect of their own property, and *J.F. Alford Transport* provides for employers to be co-opted in respect of their employees' conduct at work.

Does it amount to aiding if a shopkeeper sells an item to P knowing that P intends to use it in a crime, or if a borrower returns an article to its owner knowing that the owner intends to use it in crime? These could be said to be acts of assistance, in the sense that the physical conduct of selling or returning goods helps an offender: should they, if accompanied by the required mental element, amount to aiding the principal? The problem is that both acts are 'normal': the shopkeeper is simply selling goods in the normal course of business, and the borrower is merely fulfilling a duty to restore the goods to their owner. If the law were to regard either of these acts as 'aiding', it would be requiring the defendants to do something abnormal in the circumstances, and—in effect—punishing them for the omission to do the abnormal thing.

Three approaches to this problem may be considered. The first was described by Devlin J in *National Coal Board* v *Gamble* (1959): 'if one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent whether the third man lives or dies and interested only in the cash profit to be made out of the sale, but he can still be an aider or abettor'.[48] This view criminalizes the shopkeeper as an accomplice in every case where the customer's intention to commit that kind of offence is known. Criminal liability might be justified by arguing that a small sacrifice is properly required of shopkeepers in order to benefit the potential victims of crime. Surely, where an offence against the person is a possibility, it is right to place the potential victim's right not to be subjected to assault or injury above the shopkeeper's liberty to sell to all-comers. After all, the shopkeeper is not being required to intervene or even to notify the police of the customer's intentions. The requirement is not to sell goods when the customer is known to be bent on crime.

Despite the decision in *Gillick* v *West Norfolk and Wisbech Area Health Authority* (1986),[49] the statement in *NCB* v *Gamble* that selling goods in the ordinary course of business can satisfy the conduct element of 'aiding' remains good law. But, as we will see in section 10.4 below, there is also support for a second approach, long upheld in many American jurisdictions, namely, that a shopkeeper should be liable as an accomplice only where it was his or her *purpose* to further the customer's offence.[50] This stresses the notions of free trade and individual autonomy, treating the shopkeeper as a mere trader rather than as a fellow citizen's keeper. A third approach would not involve the law of complicity, but would treat the shopkeeper's liability as a matter of general criminal law—either by creating a special offence of selling goods

[48] *NCB* v *Gamble* [1959] 1 QB 11.

[49] *Gillick* v *West Norfolk and Wisbech Area Health Authority* [1986] AC 112, criticized in Ch 4.9(b) and Ch 5.2(b)(ii) above, and discussed in detail at pp. 424–5 below.

[50] Model Penal Code, s. 2.06(3); see also the reasoning of Glanville Williams, *Criminal Law: the General Part* (2nd edn., 1961), sect. 124.

which are likely to be used in the commission of crime (of which there are some examples now, such as the sale of knives) or through a general offence of facilitating crime.

Is there a material difference where someone who has borrowed goods is asked by the owner to return them so that they may be used for a crime? In *NCB* v *Gamble* it was held by Devlin J that returning goods in these circumstances is a 'negative act' rather than a 'positive act': 'a man who hands over to another his own property on demand, although he may physically be performing a positive act, in law is only refraining from detinue'.[51] To invent a distinction between 'positive' and 'negative' acts in order to exempt a borrower who returns goods is unconvincing. In one sense the case is weaker than that of the shopkeeper, since the borrower has a duty to return goods to their owner, whereas a shopkeeper has no duty to sell; but in another sense it is just as strong, since a court would be reluctant to find the borrower liable in tort for failing to return goods in such circumstances, and would be more likely to recognize a defence based on the prevention of crime. Devlin J's analysis, despite the fragility of the positive–negative distinction, may appear to offer a pragmatic solution, but it is inadequate when it comes to dealing with a case where the borrower is returning a gun which is then to be used for killing someone. The potential victim's rights must count for more than the borrower's duty to return goods to their owner. Rather than concealing these conflicts behind Devlin J's unconvincing analysis, a preferable course would be either to allow a defence of 'balance of evils' to any apparently criminal complicity,[52] or to state that D should not be liable for returning property to its owner unless D shares the owner's criminal purpose or unless a crime of violence is known to be in contemplation.[53]

(c) COUNSELLING AND PROCURING

The characteristic contribution of the counsellor or procurer is to incite, instigate, or advise on the commission of the substantive offence by the principal. One way of expressing this is to describe the role as 'encouraging' the perpetrator. Some European legal systems provide a higher maximum penalty for an accomplice who incites or instigates than for a mere helper, and a general justification for this can readily be found. No offence might have taken place at all but for the instigation, and this is surely more reprehensible than assisting someone who has already decided to commit a crime. In practice, however, there are many shades of culpability between helpers and instigators, a point which strikes the English lawyer more forcefully because of the uncertain limits of the terms 'counselling' and 'procuring'. The ordinary meaning of 'counselling' may fall well short of inciting or instigating an offence, and covers such

[51] [1959] 1 QB 11, at 20, discussing *Lomas* (1913) 9 Cr App R 220. [52] See above, Ch 4.8.

[53] G. Williams, 'Obedience to Law as a Crime' (1990) 53 MLR 445; an alternative advanced by G. R. Sullivan, 'The Law Commission Consultation Paper on Complicity: Fault Elements and Joint Enterprise' [1994] Crim LR 252, is to exempt crimes triable only on indictment.

THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY

Volume IB

EDITORS

ANTONIO CASSESE
PAOLA GAETA
JOHN R. W. D. JONES

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INDIVIDUAL CRIMINAL RESPONSIBILITY

Albin Eser

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national laws, that the instigator anticipates the crime in its essential elements and rough outlines.[125]

5. Excess of the Perpetrator

As the instigator's scope of intent at the same time limits his responsibility, he cannot be held liable for crimes which go beyond his intent. Consequently, an excess of the principal by committing a crime which was not covered by the intent of the instigator, cannot be attributed to him. This is clearly the case in which the principal commits another crime than he was instigated to (e.g. instead of supposedly torturing a man, he rapes a woman), but also in the case that the principal does more than he was instigated to (e.g. killing the victim instead of merely injuring him). It is still irrelevant, however, when the deviation of the actual from the proposed crime is inessential.

E. Aiding, Abetting, or Otherwise Assisting (Article 25(3)(c) of the ICC Statute)

This provision covers the 'classical' field of complicity by assistance which falls short of instigation (subparagraph (b)), on the one side, and goes beyond other contributions (such as contributing to group activities according to subparagraph (d)) on the other. In contrast to the usual language of 'aiding and abetting', used in the ICTY and ICTR Statutes,[126] the Rome Statute speaks of a person who 'aids, abets or otherwise assists' in the attempt or accomplishment of a crime, including 'providing the means for its commission'. This wording indicates that, first, aiding and abetting are no more an indistinguishable unity but that each of them has its own meaning, secondly, that aiding and abetting are just two ways of other possible forms of 'assistance', the latter thus serving as a sort of umbrella term, and thirdly, that 'providing the means' for the commission of a crime is merely a special example of assistance.

1. Objective Requirements

(a) Like instigation, complicity by assistance is also a form of *accessorial* liability in relation to the principal crime; this means that it must assist the accomplishment (or at least the attempt) of a crime.[127] Therefore, preparatory contributions, though determined to enable the commission of a crime, remain unpunishable if the intended principal crime is not carried out.[128] If, however, the principal crime reaches at least the stage of an attempt, it does not matter at what time and place

[125] E.g. to the German law, cf. H.-H. Jescheck and Th. Weigend, *Strafrecht*, Allgemeiner Teil (5th edn., 1997) 688.

[126] In Arts. 7 and 6(1) of the ICTY and ICTR Statutes, respectively 'otherwise aiding and abetting' comes after 'planning, instigating, ordering and committing'; cf. *supra* V.B.3.

[127] Cf. *supra*, V.D.1.

[128] As to the question of attempted complicity, cf. *infra*, VI.E.

during the preparation and performance of the crime the assistance was rendered. Although in this respect the ICTY and ICTR Statutes are clearer by explicitly speaking of aiding and abetting 'in the planning, preparation and execution' of a crime,[129] there is no reason why the assistance in certain stages of a crime should be excluded from responsibility here either.[130]

(b) The *forms of contribution* for facilitating the commission of the main crime are, except for 'providing the means' for its being carried out, not specified, as even the 'classical' terms of 'aiding and abetting' are far from determined.[131] If the ICTR defines aiding as 'giving assistance to someone', whereas abetting would 'involve facilitating the commission of an act by being sympathetic thereto',[132] aiding, perhaps not surprisingly, is practically identical with assisting, while abetting comes close to, if not being almost completely identifiable with, instigation.[133] Instead of exchanging synonyms, which are in any case rather unclear, it appears preferable to resort to the umbrella term of 'assistance' which can consist of any sort of contribution facilitating the commission of the crime.

(c) With such a broad understanding of assistance, however, some sort of other restriction appears necessary if not even very remote involvement in or connection with the planning or performing of a crime is to be made punishable. One way of keeping complicity within certain boundaries could be the requirement of a *causal connection* between the assistance and the principal crime. If this requirement in terms of a '*conditio sine qua non*' were taken seriously, however, complicity by assistance would not only come very close to, if not even be absorbed by, co-perpetration, but would exclude even most serious contributions in the preparation or performance of the crime from criminal responsibility if the aider were

[129] Arts. 7 and 6(1) of the ICTY and ICTR Statutes, respectively.

[130] The same view was taken by the ICTY Trial Chamber in the *Tadić* case when stating: 'not only does one not have to be present but the connection between the act contributing to the commission and the act of commission itself can be geographically and temporarily distanced', *supra* note 6, para. 687; cf. also paras. 691 f. As far as the ILC was dealing with aiding and abetting and related problems, it was merely occupied with the question of direct and/or substantial contribution, but obviously not concerned with the stage and place where it is rendered (cf. Report of the ILC, 48th Sess., *supra* note 5, 23 ff.). With regard to the national laws as well, even where the time of a contribution to the commission of a crime plays a role, this mainly concerns co-perpetration rather than complicity by aiding and abetting: cf., for instance, to the Spanish Código Penal which in its Art. 29 speaks of 'actos anteriores o simultáneos', Mir Puig, *supra* note 63, 406 ff., or to the German Strafgesetzbuch which in its § 27 simply speaks of '"Hilfeleistung" zu einer vorsätzlich begangenen rechtswidrigen Tat', cf. Cramer and Heine, in Schönke and Schröder (eds.), *supra* note 61, § 27 margin Nos. 13, 17.

[131] Cf., for instance, the endeavours for distinguishing between aiding and abetting and for demarcating a lower and a higher frontier by Fletcher, *supra* note 59, 640 ff.

[132] ICTR Trial Chamber *Akayesu* case, *supra* note 123, para. 484.

[133] This is even more evident with the common definition of abetting in terms of 'to command, procure, council, encourage, induce, or assist' in *Black's Law Dictionary*, *supra* note 116, 5. See also B. Huber, 'Alleinhandeln und Zusammenwirken aus englischer Sicht', in Eser, Huber, and Cornils, *supra* note 45, at 79, 84.

able to show that despite his contribution, the perpetrator would have been ready and able (as, for instance, by finding assistance by others) to perform the crime, thus negating the causality of his own contribution. Therefore, either a true causal connection between the assistance to and the commission of the crime cannot be required in principle, as seems to be the position of the ICTY when declaring as erroneous that the assistance should have a causal effect on the crime,[134] or the causal connection has to be construed in a less strict way, such as letting suffice that the aiding and abetting was at least furthering or facilitating the crime or running the risk of it being carried out.[135]

Whether one follows one or the other line of disregarding or softening the requirement of a causal connection, at some point one arrives at the question as to whether the assistance of the aider and abettor should have a certain quality in terms of a '*direct and/or substantial*' contribution to the commission of the crime. This question arises even on the proposition that the commission of the crime must be connected with the assistance of the accomplice by a causal chain; for even if this is given, the causal contribution may be so minor or remote that it appears unjustified to attribute it to the accomplice. This doubt may have caused the Drafters of the Code of Crimes of 1996 to require that the aider and abettor must have 'directly and substantially' assisted in the commission of a crime.[136] And although the formulations of aiding and abetting in the ICTY and ICTR Statutes did not contain this restriction,[137] both the ICTY and the ICTR were prepared to read it into the relevant Statutes.[138] Similarly the formulation of aiding and abetting in the Rome Statute might be interpreted in the same way. Still, hopes should not be raised too high. If, for instance, a contribution has to be considered to be substantial if 'the criminal act most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed', and if, accordingly, 'all acts of assistance by words or acts that lend encouragement or support' are thereby covered,[139] then this is nothing more than a softening of the 'classical' causality requirement by letting suffice both physical and psychological assistance in furthering the crime.[140] These reservations must not mean that the

[134] ICTY Trial Chamber, *Prosecutor v. Furundžija*, IT-95-17/1-T, 10 December 1998, para. 232.

[135] Rich case law and intensive discussions on these approaches seem particularly present in Germany and Spain: cf., for instance, Cramer and Heine, in Schönke and Schröder (eds.), *supra* note 61, § 27 margin No. 7 ff., and Mir Puig, *supra* note 63, 410 respectively.

[136] Art. 2(3)(d) of Draft Code 1996; cf. *supra*, V.B.2 at note 75.

[137] Cf. *supra*, V.B.3.

[138] Cf. the ICTY Trial Chamber in the *Tadić* case, *supra* note 6, para. 691, confirmed in the *Čelebići* decision, *Prosecutor v. Delalić et al.*, IT-96-21-T, 16 November 1998, para. 329. Basically on the same lines the ICTY Trial Chamber in the *Furundžija* case, *supra* note 134, para. 232, as well as the ICTR Trial Chamber in the *Akayesu* case, *supra* note 123, para. 484, and in *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, 21 May 1999, paras. 199 f.

[139] ICTY Trial Chamber in the *Tadić* case, *supra* note 6, para. 689.

[140] For a closer analysis of the ICTY/ICTR judgments, see Ambos, in Triffterer, *supra* note 7, Art. 25 margin Nos. 15 ff.

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requirement of a 'substantial' contribution is completely futile; for although not providing clear delineations, it can function as a sort of monitor by which, for instance, casual remarks, though perceived by the principal as encouragement, are obviously irrelevant, because easily exchangeable, and can thus be excluded. What this means in practice, however, is hardly definable in an abstract formula but has to be realized in a case-by-case method whereby certain modern theories of (positive and negative) imputation and attribution might be helpful when taken into consideration.[141]

2. Subjective Requirements

Unlike instigation, which is governed by the ordinary requirements of the mental element according to Article 30 of the ICC Statute,[142] complicity by way of aiding, abetting, or otherwise assisting requires two different forms of *mens rea*.

(a) With regard to *facilitating* the commission of the crime, the aider and abettor must act with *'purpose'* (Article 25(3)(c) of the ICC Statute). This means more than the mere knowledge that the accomplice aids the commission of the offence, as would suffice for complicity according to the ICTR and ICTY Statutes,[143] rather he must know as well as wish that his assistance shall facilitate the commission of the crime. Consequently, if a civilian, asked by a soldier to disclose the hiding place of the later victim, is doing so out of fear and with the hope that the victim may have fled, he will not be criminally responsible, even if he is aware that the soldier might find and kill the victim.

(b) With regard to all other elements as his own assistance as well as the principal's crime, the same mental elements are required and sufficient as with instigation. Correspondingly, the aider and abettor must have *'double intent'* both with regard to the intentional commission by the principal and the requisite elements of his assistance.[144] In sum, while the objective requirements of aiding, abetting, and assisting are relatively low, the criminal responsibility of aiders and abettors contains certain restrictions by means of higher subjective requirements.[145]

[141] To the same end, see Ambos, in Triffterer, *supra* note 7, margin No. 18 and A. Serini, 'Individual Criminal Responsibility', in F. Lattanzi (ed.), *The International Criminal Court: Comments on the Draft Statute* (1998) 140. On the various theories of the foundation and exclusion of imputation and attribution, see most recently Th. Lenckner, in Schönke and Schröder (eds.), *supra* note 61, § 13 pre-notes 71–102 and, in particular on participation, Cramer and Heine, in Schönke and Schröder (eds.), *supra* note 61, § 27 margin No. 9a, 10a.

[142] Cf. *supra*, V.D.4.

[143] According to Arts. 7 and 6(1) of the ICTR and ICTY Statutes; cf. the judgments by the ICTY Trial Chamber in the *Furundžija* case, *supra* note 134, para. 249; cf. also ICTY Trial Chamber in the *Tadić* case, *supra* note 6, para. 692 and ICTR Trial Chamber in the *Akayesu* case, *supra* note 123, para. 479, and furthermore the critical analysis by Ambos, *supra* note 38, 789 ff.

[144] Cf. *supra*, V.D.4.

[145] This is also the conclusion by Ambos, in Triffterer, *supra* note 7, margin No. 19.

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Individual Criminal Responsibility before the International Criminal Court
A Comparison with the *Ad Hoc* Tribunals

Barbara Goy[1]
Legal Officer (Appeals), Office of the Prosecutor, International Criminal Tribunal for the former Yugoslavia

Abstract
For more than 15 years the two *ad hoc* Tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), have interpreted the requirements of different forms of individual criminal responsibility. It is thus helpful to look at whether and to what extent the jurisprudence of the ICTY/ICTR may provide guidance to the International Criminal Court (ICC). To this end, this article compares the requirements of individual criminal responsibility at the ICTY/ICTR and the ICC. The article concludes that, applied with caution, the jurisprudence of the ICTY/ICTR – as an expression of international law – can assist in interpreting the modes of liability under the ICC Statute. ICTY/ICTR case law seems to be most helpful with regard to accessorial forms of liability, in particular their objective elements. Moreover, it may assist in interpreting the subjective requirements set out in Article 30 ICC Statute.

Keywords
individual criminal responsibility; modes of liability; International Criminal Court (ICC); International Criminal Tribunal for the former Yugoslavia (ICTY); International Criminal Tribunal for Rwanda (ICTR)

1. Introduction

The most serious crimes of international concern are rarely committed by one individual alone but usually involve larger numbers of persons. International criminal law as applied by the ICC and the *ad hoc* Tribunals, the ICTY and ICTR,[2] mostly focuses on the organisers or masterminds of such atrocities.

[1] The views expressed herein are those of the author alone and do not necessarily reflect the views of the ICTY, the Office of the Prosecutor of the ICTY or the United Nations in general. The author wishes to thank especially Helen Brady, Reinhold Gallmetzer, Fergal Gaynor and Steffen Wirth for their helpful comments.

[2] The judges of the ICTY Appeals Chamber are the same as those of the ICTR Appeals Chamber, thus the decisions of one Appeals Chamber are highly persuasive with the other, *Prosecutor* v. *Miroslav Kvočka et al.* (IT-98-30/1-A), Judgement, Appeals Chamber, 28 February 2005, Separate Opinion of Judge Shahabuddeen, para. 41.

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be certain which crime will ultimately be committed. Rather, it is sufficient if he or she is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed.[439]

Consistent with the subjective requirements for ordering, instigating and planning, the awareness of a probability/substantial likelihood should be sufficient with regard to both, the assistance and the crime of the principal.[440] In this sense, a Trial Chamber at the Special Court for Sierra Leone in *Brima et al.* held:

> The *mens rea* required for aiding and abetting is that the accused knew that his acts would assist the commission of the crime by the perpetrator or that he was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator.[441]

6.2. *ICC*

Article 25(3)(c) ICC Statute provides for aiding, abetting or otherwise assisting in the commission or attempted commission of a crime, including providing the means for its commission.[442]

While at the ICTY/ICTR aiding and abetting are used as one concept,[443] it has been suggested that at the ICC each term has its own meaning, and that 'assistance' serves as an umbrella term.[444]

The ICC Statute does not specify how strongly the assistance must impact on the principal's commission of the crime. According to one view, the use of the word 'facilitating' confirms that direct and substantial assistance is not required and that the act of assistance need not be a *conditio sine qua non* for the commission of the crime.[445] Other legal scholars take the view that – as at the ICTY/ICTR – the assistance has to have a substantial effect on the commission of the crime.[446] The latter seems to be consistent with the structure of Article 25(3) ICC

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439) *Haradinaj et al.* Appeal Judgement, *supra* note 438, para. 58; *Blaškić* Appeal Judgement, *supra* note 6, para. 50; *Simić* Appeal Judgement, *supra* note 51, para. 86.

440) *See also* submissions of the prosecution in the ICTY case of *Blagojević & Jokić*, summarized in *Blagojević & Jokić* Appeal Judgement, *supra* note 424, paras. 219-220 and footnote 577.

441) *Prosecutor* v. *Alex Tamba Brima et al.* (SCSL-04-16-T), Judgement, Trial Chamber II, 20 June 2007, para. 776; confirmed on appeal: *Prosecutor* v. *Alex Tamba Brima et al.* (SCSL-2004-16-A), Judgement, Appeals Chamber, 22 February 2008, para. 243.

442) Art. 25(3)(c) ICC Statute provides: "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".

443) *The Prosecutor* v. *Laurent Semanza* (ICTR-97-20-T), Judgement and Sentence, Trial Chamber III, 15 May 2003, para. 385; *Orić* Trial Judgement, *supra* note 5, para. 280; for the distinction between the two concepts *see The Prosecutor* v. *Sylvestre Gacumbitsi* (ICTR-2001-64-T), Judgement, Trial Chamber III, para. 286 and *Semanza* Trial Judgement, para. 384.

444) Eser, Individual Criminal Responsibility, *supra* note 377, p. 798.

445) Ambos, Article 25, *supra* note 254, p. 760.

446) Werle, Individual Criminal Responsibility, *supra* note 9, p. 969; Eser, Individual Criminal Responsibility, *supra* note 377, pp. 800-801.

Statute, which can be understood as listing modes of liability in order of seriousness:[447] Article 25(3)(a) ICC Statute, 'committing', contains the highest degree of criminal liability, since it constitutes a principal form of liability. Committing jointly requires an essential contribution in order to enable the co-perpetrators to jointly control the crime.[448] The 'substantial effect' which is suggested here to be required for Article 25(3)(c) ICC Statute requires less than the 'essential contribution'.[449] This is consistent with aiding and abetting being an accessorial form of liability. Accordingly, the contribution does not have to be essential so as to render control over the crime.

Although the wording "or otherwise assists" could suggest that no particular threshold is required, the structure of Article 25(3) ICC Statute speaks in favour of a certain threshold. Article 25(3)(c) ICC Statute is followed by Article 25(3)(d) ICC Statute which foresees contributions "[i]n any other way". This suggests that the assistance required for Article 25(3)(c) ICC Statute is more than that required by (d). A way to distinguish between the contributions required for Article 25(3)(c) and (d) ICC Statute is to require a *substantial* contribution for (c) and a *significant* one (which does not have to be substantial) for (d), applying the distinction used in the ICTY jurisprudence for JCE contributions.[450]

While the jurisprudence of the ICTY/ICTR can be used to interpret the objective elements, particularly the type of conduct and the causal connection required, the ICC Statute has its own subjective requirements.

According to Article 25(3)(c) ICC Statute, the assistant must act "for the purpose of facilitating the commission of the crime". This introduces a subjective threshold which goes beyond the subjective elements required by Article 30 ICC Statute.[451] It also goes beyond the subjective requirements for aiding and abetting applied at the ICTY and ICTR. This purpose requirement means that mere knowledge that the assistant aids the commission of the offence is not sufficient. Rather, the assistant must want that his or her assistance facilitates the commission of the crime.[452] On the other hand, it is not required that the assistant possesses the *mens rea* required for the crime, such as the genocidal intent.[453] "For the purpose of facilitating" could be read as relating only to the act of assistance, so that regarding the crime of the principal Article 30 ICC Statute would apply.[454]

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447) *See also* Werle, *Principles*, *supra* note 55, p. 169.
448) *See supra* 3.3.2.1.
449) Werle, Individual Criminal Responsibility, *supra* note 9, p. 969.
450) *See Brdanin* Appeal Judgement, *supra* note 62, para. 430; *see also* Cryer, *supra* note 313, p. 247.
451) *See also* Ambos, Article 25, *supra* note 254, p. 760.
452) Eser, Individual Criminal Responsibility, *supra* note 377, p. 801 refers to "wish".
453) Werle, Individual Criminal Responsibility, *supra* note 9, p. 969; *see however* Clark, *supra* note 384, p. 547.
454) Eser, Individual Criminal Responsibility, *supra* note 377, p. 801; Van Sliedregt, *Criminal Responsibility*, *supra* note 156, p. 88.

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Mental elements under article 30 of the Rome Statute of the International Criminal Court: a comparative analysis

Sarah Finnin

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Legislation cited: Statute of the International Criminal Court 1998 (United Nations) art.30

Cases cited: Prosecutor v Lubanga Dyilo (Thomas) (Decision on Confirmation of Charges) Unreported January 29, 2007 (ICC)
Prosecutor v Bemba Gombo (Jean-Pierre) (Decision on Confirmation of Charges) Unreported June 15, 2009 (ICC)

***325 Abstract** The Rome Statute of the International Criminal Court is the first international instrument that includes a general provision on the mental element required before criminal responsibility for an international crime attaches (Article 30). This article analyses that provision from a comparative perspective, drawing on common law and civil law understandings of intent. It analyses the jurisprudence and commentary concerning Article 30 in detail, and attempts to draw some conclusions as to what aspects of the common law and civil law concepts of intent are covered by it.

I. INTRODUCTION

Prior to the Rome Statute of the International Criminal Court (Rome Statute),1 no international statute, code or charter included a general provision on the mental element required before criminal responsibility for an international crime would attach. The Nuremberg and Tokyo Charters,2 which governed the trials of the major German and Japanese war criminals following the Second World War, contained no such provision. Nor did Control Council Law No 10,3 which governed the subsequent trials of war criminals in post-war occupied Germany. The Statutes of the ad hoc International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR)4 did not contain such a provision, nor did the various Draft Codes of Crimes against the Peace ***326** and Security of Mankind prepared by the United Nations International Law Commission.5 This omission was not repeated with the Rome Statute, which includes a specific provision (Article 30) on the mental element required for crimes within the jurisdiction of the International Criminal Court (ICC). This makes Article 30 the first of its kind.

Article 30 of the Rome Statute provides that:

1. 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.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly.

Thus, Article 30 represents an ambitious attempt at codification of the rules relating to the mental element in international criminal law. As Pisani states, it is 'designed to bring some consistency into this area of the law'.6 First, it aims to set a default rule that applies, in principle, to all crimes included in the Rome Statute. It therefore requires that, unless otherwise provided, the material elements of a crime be committed with 'intent and knowledge'. Second, it seeks to provide a comprehensive definition of these concepts of 'intent' and 'knowledge' in the two subsequent paragraphs.

While the mere presence of Article 30 in the Rome Statute is a step forward compared to previous international statutes, codes and charters that did not include any such provision, the article has been subject to criticism from all corners of academia. Cassese describes it as 'confusing and ambiguous',7 while Werle and Jessberger state that it 'raises more questions than answers'.8 Satzger describes it as 'an extremely complex rule' that is 'quite clearly a ***327** compromise between continental and Anglo-American criminal law'.9 Eser, on the other hand, while recognizing that Article 30 'can certainly not be called a masterpiece of legal architecture', considers that 'it provides sufficient building blocks for a meaningful construction of "intention"'.10

This article analyses Article 30 of the Rome Statute from a comparative perspective, by drawing on the different approaches taken by two broad groupings of States: the common law grouping, and the civil law grouping. The primary systems drawn on as examples of the common law grouping are the United States, the United Kingdom and Australia,11 while that drawn on as an example of the civil law grouping is Germany.12 The article begins with a general introduction to the concept of intent, as it is understood in both civil law and common law domestic legal systems. This is necessary in order to understand the approach taken at Rome because, as Kelt and von Hebel explain, Article 30 'necessarily consisted of compromises between different concepts or norms from various legal systems'.13 Part III examines the provisions of Article 30 in detail, and attempts to draw some conclusions as to what aspects of the common law and civil law concepts of intent are covered by it. Part IV discusses the exceptions to Article 30, and the article concludes with some opinions on the appropriate direction of future jurisprudence and a possible amendment to the Rome Statute.

***328** II. THE CONCEPT OF INTENT IN COMMON LAW AND CIVIL LAW

A. Gradations of Intent

In all domestic criminal law systems, the general rule (although it is not without exceptions) is that conduct must be committed with 'intent' in order for it to constitute a crime.14 Conduct that is unintentional, or that is committed negligently, will constitute a crime only in limited circumstances (usually, but not always, where specifically provided for by statute). While all systems require 'intent', the definition of intent varies widely depending on the particular domestic system in question. Furthermore, it is rare for a single definition of intent to be applied to every crime. Rather, domestic criminal law systems recognize different *gradations* or *degrees* of intent. The same goes for international criminal law. Each gradation or degree has two components: a cognitive component (the element of awareness) and a volitional component (the element of desire).15 What sets each gradation or degree of intent apart is the relative level of each component.

Generally speaking, common law systems recognize three gradations of intent: direct intent, oblique intent and recklessness. In addition, certain crimes can be committed negligently, or even unintentionally (eg strict or absolute liability offences). Civil law countries similarly recognize three gradations of intent: *dolus directus* in the first degree, *dolus directus* in the second degree and conditional intent (generally referred to as *dolus eventualis).* In addition, civil law countries recognize two forms of negligence (advertent and inadvertent). Furthermore, both common law and civil law systems recognize some form of special (or additional) intent for particular crimes.16

Table 1 represents my attempt to provide a visual comparison of the different gradations of intent recognized in the domestic criminal justice systems of common law and civil law countries, in descending order of culpability.17 Inevitably, it only gives a broad outline of these gradations, as there is no one 'common law' or 'civil law' approach to intent. In fact, approaches differ considerably among civil law countries (and, to a lesser extent, between common

Table 1. Gradations of intent under common law and civil law

Common law	**Civil law**
Special (additional) intent	Special (additional) intent (besondere Absicht or dolus specialis)
Direct intent	Direct intent in the first degree (Absicht or dolus directus in the first degree)
V = Very High C = Low %Y(45)27	V = Very High C = Low %W6D
Oblique intent	Direct intent in the second degree (direkter Vorsatz or dolus directus in the
V = Low C = High	second degree)
	V = Low C = Very High %W6D
	Conditional intent
%W6D	(bedingter Vorsatz or dolus eventualis)
Recklessness V = Low C = Low/Moderate	V = Low C = Moderate %W6D
	Advertent (conscious) negligence (bewusste Fahrlässigkeit)
%W6D (Inadvertent/unconscious) negligence V = None C = None	V = Low C = Low %W6D Inadvertent (unconscious) negligence V = None C = None

***329** law countries).18 While some countries recognize every gradation listed, others do not recognize them all.19 Similarly, while some countries define certain gradations in a particular way, other countries adopt very different definitions.20 Therefore, the borders between each gradation should not be viewed as clear ***330** lines, but rather as boundaries that move, depending on the particular domestic legal system one is examining and the time at which it is examined.

In the same way, there is no one view on how the various gradations of intent recognized by common law and civil law systems line up when compared directly. Commentators disagree, for example, on whether recklessness (in common law) and *dolus eventualis* (in civil law) are really different, and in what way. Thus, the placement of certain common law gradations next to (or above or below) certain civil law gradations should not be viewed as definitive, but rather as a starting point for the following discussion. In fact, it is questionable whether it is even possible to compare the different gradations directly, as the concepts are so different. Instead of comparing *concepts,* it may therefore be more accurate to view the following table as comparing the likely *outcomes;* in other words, comparing whether an individual in a particular

case would be considered to fulfil the definition of the relevant gradation if that same individual was to come before each domestic criminal justice system.

Before examining Table 1, a few more explanations are required. First, in addition to the English terms for each of the civil law gradations of intent, I have provided both the German and Latin terms, which are more commonly used by commentators and courts. Second, beneath the name of each gradation, an indication has been given of the relative level of the volitional (V) and cognitive (C) components required for each. As will be seen, both the volitional and cognitive components are present for all gradations, except for (inadvertent) negligence.

B. Direct Intent (in the First Degree)

Putting aside the question of special or additional intent, the highest gradation or level of intent for both civil law and common law systems is characterized by the perpetrator's *purposeful will* to bring about the prohibited result. This gradation is captured by the following example:

P (the perpetrator) is a sniper who wishes to kill *V* (the victim). *V* is standing inside a building a significant distance away. *P* shoots in the direction of *V* when *V* passes in front of the window of the building. The bullet shatters the window, and hits *V*. *V* dies as a result of the gunshot wound.

In this example, *P* has a strong desire to kill *V;* thus, the volitional component is very high. He is not sure whether, by his conduct, he will succeed in killing *V* (that is, whether he can hit his target at such a distance), but this does not matter, as this gradation of intent is still satisfied even where the cognitive component is low.

This gradation is generally known in civil law systems as direct intent (or *dolus directus)* in the first degree. In German law, direct intent in the first degree *(Absicht)* requires that the perpetrator 'have the completion of the ***331** offence (element) as his purpose'.21 The perpetrator will be deemed to have this level of intent 'also with regard to any fact that is a necessary or indispensable interim or ulterior consequence of his primary purpose' (eg shattering the window in the example above).22 As to the cognitive component, in German law it is not necessary that the perpetrator be certain that the prohibited result will occur (that is, it is not necessary that the perpetrator be certain that he will succeed in killing *V*).23

This gradation is known in some common law systems (eg the US) as acting 'purposely', while other common law countries (eg the UK and Australia) refer to it simply as acting 'intentionally'. To avoid confusion, I have adopted the more academic title for this gradation: direct intent. As to the content of this gradation in common law, the US Model Penal Code provides that a person acts 'purposely' when it is his or her 'conscious object' to engage in conduct or cause a result.24 Similarly, the Commonwealth Criminal Code in Australia provides that a person acts with 'intention' if he or she 'means to' engage in conduct or to bring about a result.25 Under English common law, this gradation covers cases where an individual acts 'in order to bring about a result'.26 As with the same gradation under civil law, where a person acts in order to achieve a particular purpose, knowing that this cannot be done without causing another result (eg shattering a window), he or she must be held to intend to cause that other result (whether it be a pre-condition for, or a necessary concomitant of, the first result).27

C. Oblique Intent, or Direct Intent in the Second Degree

The second gradation or level of intent for both civil law and common law systems does not require the same purposive degree as the first gradation. This gradation is captured by the following example:

P wishes to kill *V* by bombing the building in which *V* is located. *P* is aware that there are other individuals in the building, and that they will almost certainly be killed as well. While *P* does not want these other individuals to be killed (and in fact he hopes fervently that they will somehow escape death), he nevertheless bombs the building. Both *V* and a number of other individuals are killed in the blast.

***332** In this case, *P* will be held to have fulfilled the second gradation or level of intent with respect to the deaths of the *other* individuals who were in the building with *V*. So, with this second gradation of intent, the volitional component is weaker (*P* did not *wish* to kill these other individuals); it is the cognitive component that dominates (*P* was almost certain

that these individuals would die as a result of his conduct in bombing the building).

This gradation is generally known in civil law systems as direct intent (or *dolus directus*) in the second degree. In such cases, the perpetrator foresees *as a certainty* or *as highly probable* that certain consequences will flow from his or her conduct.28 As Van der Vyver explains, despite the perpetrator not having any desire for those consequences to occur, the perpetrator nevertheless engages in the conduct.29 According to **Badar**, he or she acts indifferently with regard to the consequences, and is therefore *deemed* to have desired those consequences.30 Similarly, the German Federal Supreme Court of Justice states that 'a perpetrator who foresees a consequence of his conduct as certain is considered to act *willfully* with regard to this consequence, even if he regrets its occurrence'.31

This gradation is known in some common law systems (eg the US) as acting 'knowingly', although in others (eg the UK and Australia) it is still referred to as acting 'intentionally'.32 Again, I have adopted the more academic title of oblique intent in Table 1. The US Model Penal Code provides that a person acts 'knowingly' with respect to a result when he or she is 'practically certain' that his or her conduct will cause such a result.33 Similarly, under English common law, the concept of oblique intent covers cases where a consequence is 'virtually certain'.34 According to Williams, '[t]here are twin consequences of the act, *x* and *y;* the doer wants *x,* and is prepared to accept its unwanted twin *y* '.35 In other jurisdictions, the test is not as high. For example, in the Australian Commonwealth Criminal Code, a person acts with this type of intention with respect to a result where he or she 'is aware that it will occur in ***333** the ordinary course of events'.36 This provision was based on37 clause 18(b)(ii) of the Draft Criminal Code Bill prepared by the English Law Commission.38 The Law Commission intended this phrase to cover cases where a result was 'a virtual certainty' (ie a result that would occur 'in the absence of some wholly improbable supervening event').39 It admitted in its report, however, that it was possible, under this definition, that 'juries will, in a few cases, find intention to be proved where, under the existing law [which required foresight of the *virtual certainty* of the result], they might not have done so'.40 For this reason, in Table 1 the 'oblique intent' category (in the common law column) extends lower than the 'direct intent in the second degree' category (in the civil law column). This is an attempt to demonstrate that depending on the jurisdiction (for example, in Australia), this category may capture more cases (on the lower end of the scale) than the equivalent civil law category. This is because the test for acting with oblique intent in a common law system may require only that the result occur in the ordinary course of events, whereas the test for acting with 'direct intent in the second degree' in a civil law system will require that a consequence be foreseen as a certainty or as highly probable. Nevertheless, in both common law and civil law systems, this gradation of intent is characterized by a low volitional component, and a high cognitive component.

D. Recklessness and Dolus Eventualis

In the third gradation or level of intent, the volitional component remains weak and the cognitive component still dominates; however, the cognitive component is weaker than in the second gradation. Let us consider a slightly modified version of the last example:

P wishes to kill *V* by bombing the building in which *V* is located. This building is in a busy street. *P* is aware that there is a risk that, in the explosion, other individuals may be injured or even killed. While *P* does not want these other individuals to be injured or killed, he nevertheless bombs the building. Both *V* and a number of other individuals are killed in the blast.

In this example, while *P* is not certain that other individuals will be killed in the blast, he is aware of a *risk* that this might occur. Thus, the cognitive component ***334** is weaker than in the last example. Again, *P* does not wish to kill the other individuals, so the volitional component is low.

In civil law systems, this gradation is occupied by the concept of *dolus eventualis* or conditional intent. There is no one test or definition for *dolus eventualis.* Different tests or definitions have been put forward by commentators and adopted by courts at different times and in different jurisdictions.41 Broadly speaking, *dolus eventualis* exists where a person 'is aware that a material element included in the definition of a crime ... may result from his conduct and "reconciles himself" or "makes peace" with this fact'.42 As Bohlander explains, the major schools of thought generally agree that the perpetrator must have been aware of the fact that his or her actions *might* lead to particular consequences; the disagreement centres mainly on the volitional component.43 Some theories do not require any volitional component (but differ as to the required level of awareness of the possibility or probability of the result occurring), while others do require a voli-

tional component (but differ as to whether this should constitute approval/mental consent to the result, or whether an attitude of indifference would suffice).44 According to Bohlander, the German courts have adopted a 'watered-down approval theory'.45 By this theory, a perpetrator will act with *dolus eventualis* where he or she foresees the consequences of his or her actions as possible (but not inevitable), and approves of them (in the sense that he or she has reconciled him- or herself to those consequences for the sake of achieving his or her goal).46 The approval of the perpetrator does not need to be explicit, and the perpetrator need not morally approve of the result; it is sufficient if he or she nevertheless accepts it in order to reach his or her ulterior goal.

The broad equivalent of *dolus eventualis* in common law systems is recklessness. Essentially, recklessness is a form of 'conscious risk-taking',47 as it involves a person taking an unreasonable and unjustifiable risk, of which he or she is aware. Under the Australian Commonwealth Criminal Code (which is based on the US Model Penal Code),48 a person will be found to have acted ***335** recklessly if that person was aware of a substantial risk that his or her conduct would cause a particular result, and, having regard to the circumstances known to him or her at the time, it was unjustifiable to take that risk.49 Under Australian common law, the test for recklessness is foresight of probability in cases of murder, and foresight of possibility for all other crimes. Recklessness is defined in the Code in terms of a 'substantial' risk rather than in terms of probability or possibility because those terms 'invite speculation about mathematical chances'.50 Regardless of the exact formulation, the cognitive element for recklessness is low. Unlike *dolus eventualis,* recklessness does not specifically require that a person reconcile him- or herself to, or accept the outcome of, his or her risk-taking. It simply requires a decision to take a substantial and unjustifiable risk.

Commentators disagree as to whether there is any real difference between the concepts of recklessness and *dolus eventualis.* Generally, those who believe there is a difference argue that *dolus eventualis* sets a 'higher threshold' than recklessness, because recklessness does not require as high a volitional component.51 This appears to be the position taken by the ICTY Trial Chamber in the *Stakc* case,52 as well as ICC Pre-Trial Chamber I in the ***336** *Lubanga* case.53 However, while the test for recklessness does not *explicitly* require as high a volitional component as the test for *dolus eventualis,* because the individual does not have to be shown to have 'accepted' or 'been reconciled with' the outcome, the fact that the individual decides to proceed with the relevant conduct despite knowledge of the substantial risk is evidence of some level of volition.54 Whatever the differences may be between the two concepts, as Werle suggests, these gradations of the mental element would 'usually cover the same factual constellations'.55 Nevertheless, in recognition of the fact that recklessness does not *specifically* require that a person reconcile him- or herself or accept the outcome of his or her risk-taking, recklessness is given a lower volitional element than *dolus eventualis* in Table 1.

Having introduced the concept of intent in common law and civil law domestic criminal justice systems and identified the various gradations of intent recognized in those systems, the next part of this article turns to Article 30 of the Rome Statute, and attempts to situate the concepts covered by it in relation to the gradations of intent set out in Table 1.

III. ARTICLE 30 OF THE ROME STATUTE

A. Intent and *Knowledge*

Paragraph 1 of Article 30 sets out the general rule that the material elements of an international crime must be committed with intent and knowledge. However, prior to the February 1997 session of the Preparatory Committee for the Rome Conference, there was debate as to whether these two terms should be disjunctive ('or') or conjunctive ('and').56 Ultimately, a decision was made to use the conjunctive formulation. As both Pisani and Eser explain, it was felt that this formulation was necessary in order to emphasize, from a psychological-analytical point of view, the necessary co-existence of the cognitive and volitional components of intent, both of which can vary in different degrees for the different gradations (as depicted in Table 1 ***337** above).57 However, as is noted below, this does not mean that each particular material element must be committed with both 'intent' and 'knowledge', as those terms are defined in the subsequent two paragraphs of Article 30.

B. Element Analysis Approach

Unlike the statutes and codes that came before it, the Rome Statute takes an 'element analysis' approach, rather than a 'crime analysis' or 'offence analysis' approach.58 'Elements' are the basic 'building blocks' of a crime.59 The Rome Statute recognizes two types of element: material elements (also known variously in domestic systems as the *actus reus,*

physical elements or objective elements) and mental elements (also known variously in domestic systems as the *mens rea* or subjective elements). The material elements represent the 'external side of criminal conduct', while the mental elements represent the 'internal side'.60 As **Badar** explains:

Under 'offence analysis', crimes are defined in general terms; intentional crimes, reckless crimes and negligent crimes, whereas 'element analysis' in contrast, recognizes that a single crime definition may require a different culpable state of mind for each objective element of the offence.61

The jurisprudence of previous military and international tribunals tended to take an offence analysis approach, and did not distinguish the various material elements of a crime and apply different mental elements to each. The ICC, however, is required by its Statute to analyse crimes in terms of their different types of material elements, which are each assigned a different mental element.

***338** The Rome Statute contemplates three types of material element: conduct elements, consequence elements and circumstance elements;62 it does not define the terms 'conduct', 'consequence' or 'circumstance'.63 According to commentators:

• Conduct includes 'a prohibited action or prohibited omission that is described in the definition of a crime'.64 As Werle notes, 'every international crime presumes some conduct that is more precisely delineated in the definition of the crime'.65

• Consequences 'can refer either to a completed result, such as the causing of death, or the creation of a state of harm or risk of harm, such as endangerment, for example'.66

• Circumstances 'qualify the conduct and consequences. They may, for example, describe the requisite features of the persons or things mentioned in the conduct and consequence elements'.67 According to Heller, a circumstance element is 'an additional state of affairs that must exist for the prohibited conduct and consequence to be criminal' (which may be either factual or legal).68

Because the mental element is defined differently for different kinds of material elements, the classification of a material element as a conduct, consequence or circumstance element is critical: the relevant mental element cannot be determined until each material element of a crime is properly characterized.69 However, as a number of commentators have pointed out, the dividing line between these types of material elements is not always ***339** clear.70 Robinson and Grall argue that most of these difficulties can be avoided if 'conduct' elements are

defined literally, and thus narrowly, to mean pure conduct, that is, to mean the actual physical movement of the actor. Thus, objective elements of an offense definition that might otherwise be classified as conduct elements, but which actually describe characteristics of the conduct--i.e., elements concerning the 'nature of conduct'--should be treated as circumstances.71

In a way, this would involve breaking down what would normally be considered one element (eg transferring, directly or indirectly, parts of the population of an Occupying Power into occupied territory)72 into two or more separate elements (thus, in this example, transferring parts of a population into a territory as a conduct element, and the status of the territory as occupied territory and of the population as that of an Occupying Power as circumstance elements). According to this argument, whenever a phrase combines a conduct element with a circumstance element in the Rome Statute, the elements should be separated out.

Similarly, material elements that might otherwise be classified as conduct elements but that actually describe *results* following the conduct, should be treated as consequence elements. Again, this involves breaking down what would normally be considered one element (eg inflicting great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act)73 into two or more separate elements (in this example, committing the inhumane act as a conduct element, and the requisite effect of the act, such as great suffering, as a consequence element). Again, according to this argument, whenever a phrase combines a conduct element with a consequence element in the Rome Statute, the elements should be separated out.

Robinson and Grall also note the fact that distinguishing circumstance elements from consequence elements can be difficult.74 To resolve such problems, they suggest defining a consequence as 'a circumstance changed by the actor'.75 All elements that do not fit this definition would be 'independent circumstance elements'.76 Let us take the example of the war crime of starvation as a method of warfare, and the particular element of that crime of 'depriving civilians of objects indispensable to their survival': the actor creates the deprivation (a consequence element), but he or she cannot alter the status ***340** of the objects as indispensable to the survival of the civilians (a circumstance element).77

In conclusion, Robinson and Grall's suggestions create the following situation:

In every offense, the conduct element, although perhaps linguistically merged with other elements, would simply perform the function of the act requirement. [Consequence] elements would be easy to detect; they would be circumstances changed by the actor. All other elements would be circumstance elements.78

Once a material element has been properly characterized as a conduct, consequence or circumstance element, paragraphs (2) and (3) of Article 30 provide the applicable definition of the mental element. For a conduct element, only intent is required, as knowledge is not defined with respect to conduct. Similarly, for a circumstance element, only knowledge is required, because intent is not defined with respect to circumstances. For a consequence element, however, both intent and knowledge must be proven, because Article 30 defines both those terms with respect to consequence elements. The definitions of 'intent' and 'knowledge' provided in Article 30, as they apply to the three different material elements, are set out in Table 2.79

Therefore, depending on whether a particular element is a conduct, consequence or circumstance element, the required mental element will be *either* intent *or* knowledge *or* both. This position is supported by the Elements of Crimes, which states that

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, for example, intent, knowledge *or both,* set out in article 30 applies.80

For this reason, although Article 30(1) provides that a person shall be criminally responsible only if the material elements are committed with intent and knowledge, as Werle and Jessberger explain, this part of the article 'cannot be interpreted as requiring that *all* material elements have to be committed with intent and knowledge'.81

Nevertheless, as all crimes under the jurisdiction of the ICC involve conduct and at least one other type of material element (whether it be a consequence element or a circumstance element), when the various elements of the crime are combined, one will end up with proof of both intent *and* knowledge.82

Table 2. Definitions of 'intent' and 'knowledge' in Article 30

	Intent	**Knowledge**
Conduct	means to engage in the conduct: Article 30(2)(a)	None
Consequence	means to cause the consequence OR aware that it will occur in the ordinary course of events: Article 30(2)(b)	aware that it will occur in the ordinary course of events: Article 30(3)
Circumstance	None	aware it exists: Article 30(3)

***341** *C. Definitions of 'Intent'*

Article 30(2) defines two different levels or gradations of 'intent'. A person has 'intent' with respect to conduct or a consequence if he or she 'means to' engage in the conduct (Article 30(2)(a)) or cause the consequence (Article 30(2)(b) (first alternative)). A person also has 'intent' with respect to a consequence if he or she 'is aware that it will occur in the ordinary course of events' (Article 30(2)(b)(second alternative)).

1. 'Means to'

The first level or gradation of intent ('means to' engage in conduct or cause a consequence) is defined using language identical to the wording found in the Australian Commonwealth Criminal Code, which was based on the English Draft Criminal Code Bill. In those Codes, this language was used to codify the concept of 'direct intent'. I submit, therefore, that this language covers what is known in the common law as direct intent, and what is known in civil law countries as *dolus directus* in the first degree (that is, the highest gradation or level of intent).83 In my view, it should therefore be interpreted as covering cases characterized by the accused's *purposeful will* to engage in the conduct or bring about the prohibited consequence (ie where the volitional component is very high). In the language of the US Model Penal Code, engaging in the conduct or causing the result should be the perpetrator's 'conscious object'. This interpretation of the language 'means to' is supported by the jurisprudence of Pre-Trial Chambers I and II of the ICC, which have held that this language requires that the accused act with the 'concrete intent',84 'purposeful will'85 or 'express intent'86 to bring about the material elements of the crime. ***342** As is the case for this level or gradation of intent in domestic law, the perpetrator should also be taken to have this level of intent with regard to any fact that is a necessary or indispensable interim or ulterior consequence of his or her primary purpose (such as shattering the window in the example given above).

There will, in my view, be one significant difference between the 'means to' concept in Article 30 and the concept of direct intent or *dolus directus* in the first degree in common law and civil law systems respectively. That difference relates to the required cognitive component. In common law and civil law systems, the law relating to this gradation of intent generally does not require anything more than a low cognitive component to accompany the very high volitional component. Thus, it is not required that the perpetrator be certain that he or she will succeed in engaging in the conduct, or in bringing about the prohibited result. In fact, it would be sufficient for the perpetrator to believe that it is very unlikely that he or she will succeed. Take, for example, the case of an individual who shoots at a target that is some distance away. In this case, the perpetrator believes it unlikely that he or she will successfully kill the victim at such a great distance, but, if he or she succeeds, he or she will be considered to have fulfilled this gradation of intent, so long as it was his or her conscious object to kill the victim.

Under Article 30, however, for a person to be held criminally responsible for a crime, the material elements must be committed with intent *and* knowledge. From the discussion above, we know that both intent and knowledge will only be required in relation to a consequence element, because this is the only element for which 'intent' *and* 'knowledge' are defined.87 Therefore, with respect to a consequence element, it must be proven not only that the perpetrator 'meant to' cause a consequence, but that he or she also fulfilled the definition of 'knowledge' (that is, that he or she was aware that the consequence would occur in the ordinary course of events). Therefore, while only a low cognitive component is necessarily required by the definition of intent, the cognitive component for a consequence element is raised by the requirement that consequence elements be committed with knowledge. The effect of this is that whereas a perpetrator need not be certain that he or she will succeed in engaging in conduct (because there is no knowledge requirement for a conduct element), a perpetrator must be aware that he or she will succeed in bringing about a consequence 'in the ordinary course of events'. Therefore, this gradation of mental element in Article 30 of the Rome Statute is much more difficult to fulfil than the equivalent gradation in common law and civil law systems.

This position regarding the necessary cognitive component when applied to a consequence element is supported by ICC Pre-Trial Chamber I's decision in *Lubanga,* where the Chamber noted that Article 30 covered 'first and ***343** foremost' the concept of '*dolus directus* of the first degree'. It defined this concept as covering situations where the perpetrator:

... (i) *knows* that his or her actions or omissions *will* bring about the objective elements of the crime, and (ii) undertakes such actions or omissions with the concrete intent to bring about the objective elements of the crime ...88

Thus, the Chamber viewed this gradation of intent as requiring that the perpetrator 'know' that his or her conduct would bring about a certain consequence (a very high cognitive component).

In conclusion, while at first it might appear that the language 'means to' in Article 30(2)(a) and (b)(first alternative) incorporates the concept of direct intent or *dolus directus* in the first degree (as those concepts are defined in domestic law), the requirement that consequence elements also be committed with 'knowledge' means that this gradation in Article 30 is in fact much higher than its equivalent in domestic law. Unlike in domestic law, where this gradation is normally characterized by a very high volitional component and only a low cognitive component, under Article 30 the gradation is characterized by very high volitional *and* cognitive components (when it is applied to consequences).

To give an example of the practical impact this may have, consider the case of an accused who plants an improvised explosive device (or 'IED', which have a notoriously low success rate), which he or she intends to initiate remotely when civilians come within range. It is the perpetrator's conscious object to kill those civilians; however, unless it could be shown that he or she *knew* (at the time the device was initiated) that the device would explode successfully and thereby result in the death of those civilians, the perpetrator would not satisfy this gradation of intent. Regardless of how much he or she might desire to kill those civilians, and how much he or she might hope that the IED will initiate properly, this would not be sufficient if it could not also be shown that he or she had the required knowledge. This obviously represents an unexpected and undesired consequence of the conjunctive 'intent and knowledge' wording of Article 30.

2. 'Aware it will occur in the ordinary course of events'

The second level or gradation of intent defined in Article 30(2) exists where a person 'is aware that [a consequence] will occur in the ordinary course of events' (Article 30(2)(b)(second alternative)). As with the first level, this language is identical to the wording used in the Australian Commonwealth Criminal Code and the English Draft Criminal Code Bill. In those Codes, it was used to codify the concept of oblique intent. I submit, therefore, that this language broadly covers what is known in the common law as oblique intent, ***344** and what is known in civil law countries as *dolus directus* in the second degree.89 In such cases, the perpetrator foresees *as practically certain* or *as highly probable* that certain consequences will flow from his or conduct. While the perpetrator does not have any desire for these consequences to occur, he or she nevertheless engages in the conduct, and is therefore deemed to have desired them. This gradation does not require the same purposive degree as the first gradation defined in Article 30 (that is, it does not require the same high volitional component), but the cognitive component is high (that is, the perpetrator must see the relevant consequence as virtually certain or highly probable).90 Therefore, as with the interpretation of the phrase 'in the ordinary course of events' under the English Draft Criminal Code Bill, I submit that this phrase in Article 30 should be interpreted to mean that the result would occur *in the absence of some wholly improbable supervening event.*91 This is also the position taken by Werle and Jessberger and by **Badar**, who interpret the language to mean that the consequence would occur 'unless extraordinary circumstances intervened'.92

It is relatively clear that the language of Article 30(2)(b)(second alternative) covers the concept of oblique intent or *dolus directus* in the second degree. This has been confirmed by the jurisprudence of the Court to date. For example, in *Bemba,* ICC Pre-Trial Chamber II described this gradation as requiring that the accused be 'aware that [the material] elements will be the *almost inevitable outcome* of his acts or omissions'.93 The more important question, however, is whether such language includes anything lower than this. In other words, do the words 'will occur in the ordinary course of events' also cover cases that would fall within the categories of *dolus eventualis* or recklessness, as they are understood in their respective domestic criminal law systems?

Provisions giving definitions of *dolus eventualis* and recklessness were present early on in the negotiations of a draft statute prior to Rome. According to **Badar**, the notion *of dolus eventualis* 'was last discussed in the 1996 Report of the Preparatory Committee and since then had vanished from all the subsequent reports and Statute drafts',94 whereas, as Clark explains, the provision on recklessness 'was ultimately to vanish also from the Statute at ***345** Rome'.95 In both cases, there was no formal decision to drop the relevant provisions,96 leading commentators to speculate now with respect to the intentions of the drafters. For example, Clark explains that his understanding of the terms of the debate among States at the Rome Conference 'was that most of the players ... were generally uncomfortable with liability based on recklessness or its civil law (near) counterpart *dolus eventualis* '.97 Pisani argues that, while a formulation that clearly included *dolus eventualis* did not appear in the final formulation of Article 30, 'this consideration *on its own* would not constitute an obstacle to the application of international criminal responsibility based on *[dolus] eventualis* '.98 She concludes, however, that:

[t]he extensive debate amongst the various points of view as well as the preparatory drafts and the definitive choice adopted by the Statute to exclude recklessness as a form of responsibility are all unequivocal indications that those who drafted the Statute wanted to limit the subjective element to ... direct intent ... [and] oblique intent ... It seems clear, then, that the word 'intent' must be interpreted as excluding recklessness as well as ... *dolus eventualis.*99

Werle and Jessberger argue that 'the fact that a definition of recklessness provided for in the Draft Statute was removed during the negotiations at Rome does not militate against including recklessness as a basis for criminal responsibility under the ICC Statute'.100 Other authors, such as Ambos, have interpreted this deletion as meaning exactly that.101

It is possible that a provision defining *dolus eventualis* was dropped early on because drafters viewed it as being already covered by the terms of Article 30. On the other hand, it is arguable that the fact that the provision defining recklessness was retained up until Rome suggests that this concept was *not* already covered by the terms of Article 30 (that is, the definitions of 'intent' and 'knowledge' contained therein); in other words, if the wording 'will occur in the ordinary course of events' left room for such a concept, there would have been no need for a separate provision defining it.

***346** With the drafting history providing little help, the dispute over whether recklessness and *dolus eventualis* are included within the meaning of Article 30 comes down to differing interpretations of the specific wording of that provision. With respect to recklessness, academics generally agree that this concept is not covered by Article 30, because it does not have the necessary volitional component required by the conjunctive use of 'intent and knowledge' in Article 30(1).102 This was also the position adopted by ICC Pre-Trial Chamber I in the *Lubanga* case.103 As the Chamber explained:

The concept of recklessness requires only that the perpetrator be aware of the existence of a risk that the objective elements of the crime may result from his or her actions or omissions, but does not require that he or she reconcile himself or herself with the result. In so far as recklessness does not require the suspect to reconcile himself or herself with the causation of the objective elements of the crime as a result of his or her actions or omissions, it is not part of the concept of intention.104

Thus, recklessness, which the Court regards as having a lower volitional component than *dolus eventualis,* is not, in the view of Pre-Trial Chamber I, covered by the terms of Article 30. Pre-Trial Chamber II also took the view in *Bemba* that recklessness is not captured by Article 30 of the Statute.105

As for the concept of *dolus eventualis,* the dispute comes down to the interpretation of the wording 'will occur'. On the one side, there are those who argue that such wording cannot be interpreted to include *dolus eventualis.* They argue that mere probability that a consequence may occur is insufficient, and that the wording requires that the perpetrator foresee the occurrence of the consequence as *certain.* For example, according to Werle and Jessberger, *dolus eventualis* is excluded by the wording 'will occur'; in their view, *dolus eventualis* (which requires only a *risk* that a consequence may occur, rather than a practical *certainty)* would only be covered if the language were 'may occur'.106 This is also the view taken by Eser,107 Ambos,108 Heller109 and van Sliedregt.110

***347** On the other side, those in favour of the inclusion of *dolus eventualis* argue that this phrase requires only that the perpetrator be aware of the *probable* occurrence of the consequence. However, as Werle and Jessberger note, '[r]emarkably, the few commentators who advocate the inclusion of ... *dolus eventualis* ... hardly ever give any reasons for their position'.111 Examples include Jescheck,112 Mantovani,113 Knoops,114 Triffterer115 and Cassese.116 One exception is Piragoff and Robinson, who argue that if the concept *of dolus eventualis* is defined in terms of a substantial or high degree of probability (as opposed to merely a risk) that the consequence will occur, then it is covered by the terms of Article 30(2)(b)(second alternative); only those definitions of *dolus eventualis* that require merely a risk that a consequence will occur would be excluded.117 Ambos seems to agree with Piragoff and Robinson, stating that 'there are other, more cognitive concepts of *dolus eventualis* (requiring awareness or certainty as to a consequence) and these may indeed be included in Article 30'.118

Some of those commentators who argue *against* inclusion of *dolus eventualis* in Article 30(2)(b)(second alternative) have recognized that it would be possible for the ICC to interpret the phrase 'in the ordinary course of events' in a way that would include recklessness or *dolus eventualis,* but consider that such an interpretation may well conflict with the principle of strict construction.119 Indeed, this is exactly what has occurred: Pre-Trial Chamber I, in the first substantive decision of a Chamber of the ICC to interpret Article 30, found that the wording 'will occur in the ordinary course of events'

does include the concept of *dolus eventualis.* It stated that the concept of intention in Article 30 covers

situations in which the suspect (a) is aware of the risk that the objective elements of the crime may result from his or her actions or omissions, and (b) accepts such an outcome by reconciling himself or herself with it or consenting to it (also known as *dolus eventualis*).120

***348** The Chamber went on to state:

if the risk of bringing about the objective elements of the crime is substantial (that is, there is a likelihood that it 'will occur in the ordinary course of events'), the fact that the suspect accepts the idea of bringing about the objective elements of the crime can be inferred from:

i. the awareness by the suspect of the substantial likelihood that his or her actions or omissions would result in the realization of the objective elements of the crime; and

ii. the decision by the suspect to carry out his or her actions or omissions despite such awareness.

... Where the state of mind of the suspect falls short of accepting that the objective elements of the crime may result from his or her actions or omissions, such a state of mind cannot qualify as a truly intentional realization of the objective elements, and hence would not meet the 'intent and knowledge' requirement embodied in article 30 of the Statute.121

Thus, it appears that Pre-Trial Chamber I viewed the definition of intent with respect to consequences (ie that a consequence 'will occur in the ordinary course of events') as being fulfilled where: (a) there is a 'substantial' risk that the consequence will occur; and (b) the accused is shown to have been aware of this risk, and to have proceeded with the conduct regardless. While the Chamber was devoted to the idea that a volitional element must be shown in the form of acceptance of the outcome, however, this definition does not appear all that different from the definition of recklessness. In reality, therefore, there may not be any difference in terms of outcome. In Weigend's view, whether or not Pre-Trial Chamber I is correct in its interpretation of the wording of Article 30(2)(b), 'the Court's more expansive interpretation of that clause certainly makes theoretical and political sense'.122 While he does not explain what he means by this, it is likely that he is referring to the fact that both domestic legislation implementing provisions of the Rome Statute and the jurisprudence of the ICTY and ICTR have recognized liability for international crimes in cases where the perpetrator has only recklessness or *dolus eventualis.*123

More recently, in the *Bemba* case, ICC Pre-Trial Chamber II took the opposite position to Pre-Trial Chamber I regarding *dolus eventualis,* holding that the concept is *not* captured by Article 30.124 The Chamber made this ***349** finding on the basis that the wording 'will occur' 'does not accommodate a lower standard than the one required by *dolus directus* in the second degree (oblique intention)'.125 Pre-Trial Chamber II stated further:

by way of a literal (textual) interpretation, the words '[a consequence] will occur' serve as an expression for an event that is 'inevitably' expected. Nonetheless, the words 'will occur', read together with the phrase 'in the ordinary course of events', clearly indicate that the required standard of occurrence is close to certainty. In this regard, the Chamber defines this standard as 'virtual certainty' or 'practical certainty', namely that the consequence will follow, barring an unforeseen or unexpected intervention that prevent[s] its occurrence.

This standard is undoubtedly higher than the principal standard commonly agreed upon for *dolus eventualis* --namely, foreseeing the occurrence of the undesired consequences as a mere likelihood or possibility. Hence, had the drafters of the Statute intended to include *dolus eventualis* in the text of article 30, they could have used the words 'may occur' or 'might occur in the ordinary course of events' to convey mere eventuality or possibility, rather than near inevitability or virtual certainty.126

Pre-Trial Chamber II found that this interpretation was supported by the *travaux préparatoires* of the Statute, which suggested that 'the idea of including *dolus eventualis* was abandoned at an early stage of the negotiations' of the Statute.127

No decision has yet been made by the Appeals Chamber of the ICC to resolve the contradictory conclusions reached by

Pre-Trial Chambers I and II with regard to *dolus eventualis*. Thus, it remains unclear whether this concept is covered by Article 30. In my view, however, the detailed analysis conducted by Pre-Trial Chamber II of the language and *travaux préparatoires* of the Statute lends greater weight to its finding that *dolus eventualis* is not covered by the language of Article 30. Furthermore, as a matter of policy, given the ICC's nature as a court of last resort and the principle of strict construction, an interpretation of Article 30 that does not include *dolus eventualis* is appropriate.

D. Definitions of 'Knowledge'

Article 30(3) provides two definitions of 'knowledge'. A person has 'knowledge' with respect to a circumstance if he or she has 'awareness that [it] exists', while a person has 'knowledge' with respect to a consequence if he or she has 'awareness that ... [it] will occur in the ordinary course of events'.

***350** *1. 'Awareness that a circumstance exists'*

The first definition ('awareness that a circumstance exists') appears to require *positive* or *actual* knowledge of the relevant circumstance. The question is whether this requirement could be satisfied by proof of 'wilful blindness', as it is understood under the common law.128 In other words, would it be sufficient to prove that an accused *suspected* that a circumstance existed, but *avoided* actual knowledge by deliberately shutting his or her eyes to an obvious means of knowledge.129

Piragoff and Robinson recognize that the specific definition in Article 30(3) may exclude such a concept and that actual awareness or cognizance may be required. They also recognize, however, that 'it may be open to the Court to interpret "awareness" to include wilful blindness in some situations'.130 Eser seems to have come to the same conclusion, submitting that while a draft clause covering wilful blindness had been considered prior to Rome but was ultimately abandoned,131 this does not necessarily mean that the language of Article 30 could not be interpreted to cover cases of 'implied' or 'constructive' knowledge.132 **Badar** argues, on the other hand, that the wording of Article 30(3) 'limits the meaning of knowledge to "actual knowledge" as opposed to "constructive" knowledge'.133 He states that '[e]ven knowledge of "high probability" of the existence of a particular fact" is insufficient.134 He therefore concludes that the doctrine of 'wilful blindness' would only be covered by Article 30 'if the doctrine is understood to apply only in situations where the perpetrator is *virtually certain* that the fact exists'.135 Thus, in his view, Article 30 could be argued to cover cases where the accused realized the high probability that the circumstance existed, but purposely refrained from obtaining the final confirmation because he or she wanted to be able to deny knowledge.136

In my view, in the context of international crimes, where criminal conduct is widespread and ongoing, actual knowledge will be extremely difficult to prove if some concept of wilful blindness is not permitted as a method of proof. For ***351** this reason, Article 30(3) should be interpreted as allowing proof by at least a limited form of wilful blindness, as put forward by **Badar**. As such, proof that an accused was virtually certain that a circumstance existed should be taken to satisfy the definition of knowledge in that provision.

2. 'Awareness that ... a consequence will occur in the ordinary course of events'

The second definition of knowledge is formulated in exactly the same terms as the second gradation of intent defined in Article 30(2)(b)(second alternative). The issue of whether *dolus eventualis* is covered by this wording therefore applies equally to this definition of knowledge.

Having examined the default rule in Article 30 and the meaning of the terms intent and knowledge, the final substantive part of this article considers exceptions to that default rule.

IV. EXCEPTIONS TO ARTICLE 30 OF THE ROME STATUTE

A. Interpretation of 'Unless otherwise provided ...'

As indicated by the phrase '[u]nless otherwise provided' in Article 30(1), there are exceptions to the rule that the material elements of all crimes must be accompanied by knowledge and intent. Article 30 merely sets out a general or default rule

that applies unless another rule provides for a departure from the general rule by requiring a different mental element.137

The issue of what sources of law may provide for a deviation from Article 30 in accordance with paragraph (1) was not settled at the Rome Conference, and commentators also hold differing opinions. Some argue that only provisions of the Rome Statute can provide an alternative mental element to that required by Article 30. For example, Weigend submits that the principle of legality means that 'expansions of the definition of the mental element in art. 30 of the ICC statute would have to be found in the statute itself, not in outside sources'.138 Eser is more specific: he argues that a deviation from Article 30 'may be found elsewhere in the Statute, for instance within the specific definition of crimes or general principles of criminal law'.139 Ambos goes further, however, arguing that 'deviations from Art. 30 can only arise directly from Art. 6-8' (the provisions which set out the crimes within the ICC's jurisdiction).140 This view is untenable, because Article 28, which relates to superior responsibility, is ***352** clearly a provision within the Statute that provides an alternative (and less strict) mental element. Schabas argues that '[i]t would seem to be going too far to suggest that the Article 30 standard in the Statute could be amended if an exception is provided for in the Elements of Crimes', although he notes that this is exactly what they have done.141 Similarly, Kreß has stated his opinion that the Elements of Crimes cannot '*by themselves* "provide otherwise"'.142

Others argue that the terms of Article 30(1) may encompass rules arising from the Elements of Crimes and other sources of international law under Article 21 of the Statute.143 According to Article 21(1) (which sets out the applicable law that governs the Court), the Court shall apply, in the first place, the Statute and the Elements of Crimes. In the second place, it may apply, 'where appropriate', applicable treaties and rules of customary international law. A final subsidiary source of law is 'general principles of law derived by the Court from national laws of legal systems of the world'.

The argument that sources outside the Statute may 'otherwise provide' for a mental element is based on a literal interpretation of the language of Article 30. As this argument goes, the wording of Article 30(1) does not specify that the default rule requiring intent and knowledge applies 'unless otherwise provided for *in this Statute';* rather, a comparison of that wording with other wording in the Statute suggests, according to Werle and Jessberger, 'that the range of norms referred to in this case is much wider':144

When other provisions in the Statute itself are referenced, the reference is generally made explicit; thus, a comparable clause in Article 31(1) ICCSt. on the grounds for exclusion from punishment explicitly refers to 'other grounds for excluding criminal responsibility *provided for in this Statute* '.145

While Werle and Jessberger recognize the argument that the principle of legality requires that any expansion of the definition of the mental element in Article 30 'would have to be found in the Statute itself and not in outside sources', they view the 'uniform interpretation and application of the ICC ***353** Statute and customary international law' as a more important objective in the context of international criminal law.146

Debate on this issue continued at the negotiations by the Preparatory Commission of the Elements of Crimes.147 As Piragoff and Robinson explain:

Some delegations were of the view that the Elements could not call for a deviation from article 30, as the Elements document is subsidiary to the Statute. Other delegations, while conceding that the Elements could not override the Statute, argued that some deviations were necessary to make the crimes workable and to faithfully reflect the intent of the Statute as well as the jurisprudence.148

The latter view was eventually accepted, and the General Introduction to the Elements of Crimes indicates that any exceptions to the standard of Article 30 that are found in the Elements of Crimes are based 'on the Statute, *including applicable law under its relevant provisions'* .149 Piragoff and Robinson further state that:

This formulation recognizes the primacy of the Statute, and indicates that exceptions must directly or indirectly flow from the Statute, but also recognizes that the Statute itself, through article 21 (applicable law), allows reliance on other sources, including treaties, general principles and the Elements. Thus, the approach seems to avoid suggesting that States Parties could *legislate* a deviation through the Elements, but allows them to *codify* a deviation where necessary to reflect their intent when drafting the Statute or to reflect the relevant treaties and jurisprudence.150

This position is consistent with rules of interpretation applicable to treaties, whereby a subsequent agreement among all treaty parties (eg the Assembly of States Parties to the Rome Statute) concerning the application or interpretation of a treaty (in this case, the Statute) may be taken into account in interpreting the treaty (ie may be taken into account by the Court itself when it interprets its Statute).151

While the ICC Pre-Trial Chambers have thus far accepted that the Elements of Crimes can provide for a deviation from the Article 30 standard,152 it ***354** remains unclear whether, in the absence of a clear indication in the Elements of Crimes, the Court can have reference to sources of law outside the Statute to found a deviation from that standard. For example, when determining what mental element is applicable to the modes of liability set out in Article 25(3) of the Statute (the elements of which were not elaborated in the Elements of Crimes), could the Court rely on customary international law to found a deviation from the Article 30 standard?

The argument put forward by Werle and Jessberger--that uniform interpretation and application of the Rome Statute and customary international law is a more important objective than strict adherence to the principle of legality--is compelling.153 While it is desirable to have clarity and precision in codification in order to give fair notice of the scope of prohibitions, it is perhaps more desirable for the law that is to be applied by a newly established and permanent international criminal court to be consistent with customary international law, as has been developed over a significant period of time prior to its establishment. Therefore, in my view, Article 30(1) should be interpreted to allow the Court to balance the potentially competing aims of the principle of legality and consistency with customary international law, by allowing the Court to have recourse to sources outside the Statute when determining the applicable mental element in a particular case, where the Elements of Crimes are silent (or where there are no Elements of Crimes, as in the case of modes of liability under Article 25 of the Statute).

B. Types of Exceptions to Article 30

Determining whether the language of a provision establishes an exception to the general rule set out in Article 30 must be done on a case-by-case basis.154 According to both Eser and to Werle and Jessberger, provisions that 'otherwise provide' for a mental element can do one of three things:

(i) impose a mental element that is *less* stringent than that provided for in Article 30;

(ii) impose a mental element that is *more* stringent than that provided for in Article 30; or

(iii) impose a mental element *in addition to* that provided for in Article 30 (ie a *special* or *additional* mental element).

Examples from the first category broaden or expand criminal responsibility, by requiring anything from recklessness or *dolus eventualis* to negligence.155 The second and third categories narrow criminal responsibility.

***355** *1. Less stringent mental elements*

In addition to examples of the Statute itself providing for a less stringent mental element than that imposed by Article 30,156 there are various examples of the Elements of Crimes providing for a less stringent mental element with respect to one of the crimes it considers.157 These less stringent mental elements were imposed because, in the view of the Preparatory Commission that drafted the Elements of Crimes (and the Assembly of States Parties that adopted them), a less stringent mental element was justified in those cases (perhaps on the basis of a rule under some other 'applicable law'). It will be up to the Court to decide whether it agrees with this assessment, and whether it will therefore uphold the imposition of a less stringent mental element than that required by Article 30.158

2. More stringent mental elements

It is not entirely clear what the difference is between the second and third categories of provisions that 'otherwise provide' for a mental element (ie the category that imposes a mental element that is *more stringent* than that provided for in Article 30, and the category that imposes a *special* or *additional* mental element). In fact, Eser cites some of the same

examples (eg aiding and abetting) for both categories,159 and Werle and Jessberger do not provide any example of the category of more stringent mental requirements.160 It is perhaps for this reason that Piragoff and Robinson recognize only two categories (the first (less stringent mental elements) and the third (special or additional mental elements).161

In my view, because Article 30 incorporates what is understood to be the highest gradation of mental element in both common law and civil law systems (direct intent or *dolus directus* in the first degree), there is simply no room for other provisions to impose a more stringent mental element. There is, of course, room to impose *additional* mental elements (as is the case with genocide). However, in order to impose a *more stringent* mental element, the only possibility would be to require, for example, that the accused 'meant to' cause a consequence (thereby removing the lesser alternative included in ***356** Article 30(2)(b) of being aware that a consequence 'will occur in the ordinary course of events'). There are no such examples of a *more stringent* mental element in the Statute or the Elements of Crimes.

3. Additional mental elements

As Piragoff and Robinson explain, an additional mental element exists where the Statute states that conduct must be committed for an ulterior purpose, or in pursuance of a specific goal (ie 'with intent to', 'with the intention of' or 'for the purpose of' achieving certain ends).162 This special intent, they state, is an element that must be proved *in addition* to any intent imposed by Article 30: 'It is a separate mental element that is not linked to any material element that must be proved or to which ... article 30 would apply'.163 Similarly, Werle and Jessberger view an additional mental element as one that does 'not necessarily refer to a material element of the crime, such as conduct, consequence or circumstance'.164 This may be where the difference lies between this category and the second category discussed above: where a more stringent mental element is required *with respect to* a particular material element, such a case would fall within category (ii) above;165 where an additional mental element is required that is *not* linked to any material element, such a case would fall within category (iii) above.

The fact that an additional mental element is not linked to any material element means that the accomplishment of the consequence that is the focus of that additional mental element--because the additional mental element is almost always directed at a particular consequence, rather than a circumstance or conduct--does not have to be proven.166 According to Triffterer, it does not even have to be proven that the particular consequence could *ever* be achieved.167

Examples of additional mental elements that are commonly cited are: the intent to inflict pain or suffering for such purposes as 'obtaining information or a confession, punishment, intimidation or coercion or for any reason based on ***357** discrimination of any kind' for the war crime of torture under Article 8(2)(c)(i);168 the intent to maintain the 'institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups' for the crime against humanity of apartheid under Article 7(1)(j); the intent to destroy 'in whole or in part, [a] national, ethnical, racial or religious group, as such' for the crime of genocide under Article 6;169 the intent to discriminate on 'political, racial, national, ethnic, cultural, religious, gender ... or other grounds' for the crime of persecution under Article 7(1)(h);170 the intent to 'deprive the owner of the property and to appropriate it for private or personal use' for the war crime of pillaging under Article 8(2)(b)(xvi) or 8(2)(e)(v);171 and the intent to 'facilitat[e] the commission of ... a crime' for the purposes of aiding and abetting under Article 25(3)(c).

One interesting question is whether the definitions of 'intent' and 'knowledge' contained in Article 30 apply to *additional* mental elements, or whether a higher or lower gradation of intent or definition of knowledge might apply. As an additional mental element is, by definition, a mental element that has no corresponding material element, it would appear that Article 30 does *not* apply, as Article 30's definitions of 'intent' and 'knowledge' are required only with respect to the material elements of a crime. If it is accepted that Article 30 does not regulate the mental element with respect to *additional* mental elements (that is, that there is a gap in the Statute), then the Court would be permitted to turn to *other* sources of law to provide the necessary contents of those mental elements. For example, the Court would be permitted to turn to customary international law (and the rich jurisprudence of the ICTY and ICTR before which that law has developed) in order to determine the meaning of the 'intent to destroy' requirement for genocide. Thus, it would be possible for the Court to adopt a different gradation of intent (ie one that includes the concept *of dolus eventualis)* or a different definition of knowledge (ie one that includes a more expansive concept of wilful blindness) for the purposes of such additional mental elements, if there is a basis to do so in another source of law to which the Court can have reference under Article 21.172

*358 V. CONCLUSION

This article has demonstrated that some of the criticisms of Article 30 made by academics may be well founded. Article 30 does establish an extremely complex rule,173 requiring that material elements be classified as conduct, consequence or circumstance elements, and then requiring that a different definition of 'intent' or 'knowledge' or both be applied to each. Certain aspects of Article 30 are indeed confusing and ambiguous.174 For example, the lack of any definition of the terms 'conduct', 'consequence' and 'circumstance' (given the critical importance of accurately classifying material elements in order to determine what definition of 'intention' or 'knowledge' applies) is a clear failure on the part of the drafters of the Statute. Furthermore, the provision's attempt to define the concept of intent in Article 30(2)(a) is not entirely satisfactory, as the requirement that consequence elements be committed with intent and knowledge means that the gradation of mental element established under this sub-paragraph is higher than that of direct intent or *dolus directus* in the first degree under common law and civil law systems respectively. As noted above, this obviously represents an unexpected and undesired consequence of the conjunctive 'intent and knowledge' wording of Article 30. Moreover, the use of the phrase 'will occur in the ordinary course of events' in Article 30(2)(b) and (3) clearly 'raises more questions than answers',175 as it has led to conflicting opinions among both academics and the different Pre-Trial Chambers of the Court with respect to *dolus eventualis.* Finally, the definition of knowledge with respect to a circumstance in Article 30(3) appears to set too high a standard.

Nevertheless, I agree with Eser that Article 30 'provides sufficient building blocks for a meaningful construction of "intention"'.176 Some creative jurisprudence from the Chambers of the Court (in particular, from the Appeals Chamber on the issue of *dolus eventualis)* would go a significant way towards addressing these failures of drafting. In my view, the Court should:

1. Adopt definitions of the different types of material elements along the lines of those suggested by Robinson and Grall. Thus, conduct elements would be defined literally and narrowly to mean pure conduct; consequence elements would be defined as circumstances changed by the actor; all elements that do not fit these definitions would be independent circumstance elements.

2. Clearly exclude *dolus eventualis* from the definition of intent under Article 30(2)(b) and (3), along the lines of the decision in *Bemba.*

*359 3. Allow for knowledge of a circumstance to be satisfied by proof of 'wilful blindness' (that is, by proof that the accused was virtually certain that a circumstance existed, but avoided actual knowledge by deliberately shutting his or her eyes to an obvious means of knowledge).

4. Interpret Article 30(1) to allow for recourse to sources outside the Statute when determining whether the applicable mental element in a particular case is 'otherwise provided', in circumstances where the Elements of Crimes are silent.

Finally, in my view it would be desirable for Article 30(1) of the Rome Statute to be amended by the Assembly of States Parties to replace the conjunctive 'and' with the disjunctive 'or', to avoid the difficulties involved with requiring both knowledge *and* intent with respect to consequence elements (and to prevent the perpetrator who plants an unpredictable IED from escaping liability).

BA/LLB (Hons) (University of Melbourne 2006); PhD (Asia Pacific Centre for Military Law, University of Melbourne, 2011); Summary Prosecutor, Office of the Director of Public Prosecutions (Northern Territory, Australia). This article forms part of the author's PhD thesis, 'Elements of Accessorial Modes of Liability: Article 25(3)(b) and (c) of the Rome Statute of the International Criminal Court' (Martinus Nijhoff 2012, forthcoming).

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1. Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.
2. Charter of the International Military Tribunal, annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (adopted 8 August 1945) 82 UNTS 279 (Nuremberg Charter); Charter of the International Military Tribunal for the Far East (adopted 19 January 1946, amended 26 April 1946) TIAS 1589, 4 Bevans 20

(Tokyo Charter).
3. Control Council Law No 10: Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity (adopted 20 December 1945) in Official Gazette of the Control Council for Germany, No 3, Berlin, 31 January 1946, 50-5 (Control Council Law No 10).
4. Statute of the International Criminal Tribunal for the former Yugoslavia, adopted 25 May 1993, annexed to UNSC Res 827 (25 May 1993) UN Doc S/RES/827 (ICTY Statute); Statute of the International Criminal Tribunal for Rwanda, adopted 8 November 1994, annexed to UNSC Res 955 (8 November 1994) UN Doc S/RES/955 (ICTR Statute).
5. See, eg, International Law Commission, 'Draft Code of Crimes against the Peace and Security of Mankind with Commentaries' in 'Report of the International Law Commission to the General Assembly on the Work of its Forty-eighth Session' (6 May-26 July 1996) UN Doc A/51/10.
6. N Pisani, 'The Mental Element in International Crime' in F Lattanzi and WA Schabas (eds), *Essays on the Rome Statute of the International Criminal Court* (Il Sirente 2004) 125.
7. A Cassese, '*Mens Rea* and the International Criminal Tribunal for the Former Yugoslavia' (2003) 37 New England LR 1015, 1025.
8. G Werle and F Jessberger, "'Unless Otherwise Provided": Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law' (2005) 3 J Int'l Crim Justice 35, 37.
9. H Satzger, 'German Criminal Law and the Rome Statute: A Critical Analysis of the New German Code of Crimes against International Law' (2002) 2 Int'l Crim LR 261, 269.
10. A Eser, 'Mental Elements: Mistake of Fact and Mistake of Law' in A Cassese, P Gaeta and JRWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary,* vol 1 (OUP 2002) 907.
11. Despite the US not being a State Party to the Rome Statute, it has nevertheless had a great influence on the drafting of the statute, and on the development of international criminal law more generally. The US made a significant contribution to the early development of international criminal law through its influence on the Nuremberg and Tokyo Trials, and the trials before the US Nuremberg Military Tribunals. With respect to the Rome Statute specifically, the Model Penal Code prepared by the American Law Institute had considerable impact on the drafting of Article 30 of the Rome Statute and on the 'purposive' element of aiding and abetting under Article 25(3)(c). This article also draws on domestic criminal law principles derived from the United Kingdom and Australia, as the text of Article 30 bears striking resemblance to the equivalent provisions of the English Law Commission's Draft Criminal Code Bill and the Australian Commonwealth Criminal Code.
12. Like US law, German law has had a great influence on the development of international criminal law, with a number of German criminal law professors establishing themselves in the field, and acting as judges of international courts or tribunals (for example, Albin Eser and Hans-Peter Kaul). More importantly, German criminal law theory 'enjoys widespread influence in the civil law world': M Dubber, 'Theories of Crime and Punishment in German Criminal Law' (2005) 53 Amer J Comp L 679, 679. Dubber notes, however, that criminal law in common law countries has, until fairly recently, developed largely independently of German influence (ibid). German law therefore provides a good example against which to compare general principles of law that are recognized across common law systems.
13. M Kelt and H von Hebel, 'General Principles of Criminal Law and the Elements of Crimes' in Roy S Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) 22.
14. The term 'intent' is used here in the broad sense, to refer to any mental state that is higher than negligence. Negligence is excluded from the concept of 'intent' in this context, because it is characterized by the absence of any volitional or cognitive component (see Table 1 below). On this point, see G Williams, *Criminal Law: The General Part* (2nd edn, Stevens & Sons 1961) 31. See also GP Fletcher, *Rethinking Criminal Law* (OUP 2000) 508-10.
15. See, eg, *Prosecutor v Bemba Gombo* (Confirmation Decision) ICC-01/05-01/08, PT Ch II (15 June 2009) para 357 (Bemba Confirmation). See also Eser (n 10) 905; William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) 475.
16. The concept of special or additional intent is discussed below in Part IV.
17. I have not been able to find any similar visual representation of the differences between the gradations recognized in common law and civil law countries. The hope is that a visual representation will assist the reader in understanding how the different gradations in these two systems roughly compare.
18. As Clark has put it, 'the civil law is not a monolith; the common law is not a monolith': RS Clark, 'The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences' (2001) 12 Crim L Forum 291, 294.
19. For example, according to van Sliedregt, France does not recognize *dolus eventualis* as a form of intent: E van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (TMC Asser Press 2003) 46. See also ME **Badar**, 'Dolus Eventualis and the Rome Statute Without It?' (2009) 12 New Crim LR 433, 455-6;

C Elliott, 'France' in K Heller and M Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford Law Books 2010) 218.
20. This is particularly the case for *dolus eventualis,* where even scholars *within* some countries hotly debate the definition of this gradation of intent (eg in Germany).
21. M Bohlander, *Principles of German Criminal Law* (Hart Publishing 2009) 63-4. See also Pisani (n 6) 126 ('The accused must have acted with the precise scope or desire to bring about that particular result...').
22. Bohlander (n 21) 64.
23. ibid. See also ME **Badar**, '*Mens Rea:* Mistake of Law and Mistake of Fact in German Criminal Law: A Survey for International Criminal Tribunals' (2005) 5 Int'l Crim LR 203, 222. See also Pisani (n 6) 126-7, 128.
24. US Model Penal Code § 2.02(2)(a)(i).
25. Criminal Code Act 1995 (Australia) s 5.2(1).
26. See A Ashworth, *Principles of Criminal Law* (6th edn, OUP 2009) 171-2.
27. See, eg, Law Commission (England), *A Criminal Code for England and Wales: Volume 1, Report and Draft Criminal Code Bill* (Report No 177, 1989) 192.
28. **Badar**, *'Mens Rea'* (n 23) 224.
29. Van der Vyver describes this form of intent as *'dolus indirectus',* rather than 'direct intent in the second degree': J Van der Vyver, 'The International Criminal Court and the Concept of *Mens Rea* in International Criminal Law' (2004) 12 Univ Miami Int'l & Comp LR 57, 63. I would submit, however, that he is referring to the same concept.
30. **Badar**, *'Mens Rea'* (n 23) 224.
31. ME **Badar**, 'The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective' (2008) 19 Crim L Forum 473, 486 (emphasis in original).
32. While civil law systems make a clear distinction between the two degrees of direct intent (direct intent in the first degree and direct intent in the second degree), this distinction is not as clear when it comes to common law systems. Generally, the first two gradations are referred to simply as 'intention', a category that covers two possible instances: where an individual acts purposely (direct intent) and where an individual acts knowingly (oblique intent). It is for this reason that the dividing line between the two concepts on the common law side of Table 1 is indicated with a dotted line.
33. US Model Penal Code § 2.02(2)(b)(ii).
34. See Ashworth (n 26) 174, discussing the House of Lords decision in *R v Woolin* [1999] AC 82.
35. G Williams, 'Oblique Intention' (1987) 46 CLJ 417, 421.
36. Criminal Code Act 1995 (Australia) s 5.2(3).
37. Criminal Law Officers Committee of the Standing Committee of Attorneys-General (Australia), *Model Criminal Code: Chapters 1 and 2, General Principles of Criminal Responsibility: Report* (December 1992) 25.
38. See Law Commission (England), *Criminal Code, Volume 1* (n 27). Clause 18(b)(ii) provided that a person acts intentionally with respect to a result 'when he acts either in order to bring it about or being aware that *it will occur in the ordinary course of events'* (emphasis added). This Draft Bill was never enacted into law.
39. See Law Commission (England), *A Criminal Code for England and Wales: Volume 2, Commentary on Draft Criminal Code Bill* (Report No 177, 1989) 192.
40. ibid 193.
41. Fletcher, *Rethinking Criminal Law* (n 14) 445-6; Bohlander (n 21) 64. For example, Weigend states that '[w]ords such as *dolus eventualis* have, at different times and in different legal systems, acquired different connotations, and it is thus far from clear that speakers from different backgrounds mean the same thing when they use the same Latin expression': T Weigend, 'Intent, Mistake of Law and Co-perpetration in the *Lubanga* Decision on Confirmation of Charges' (2008) 6 J Int'l Crim Justice 471, 482.
42. Werle and Jessberger (n 8) 51-2.
43. Bohlander (n 21) 64.
44. For a detailed discussion of the various schools of thought, see **Badar**, *'Mens Rea'* (n 23) 228-32; **Badar**, 'Dolus Eventualis' (n 19) 458-62. See generally G Taylor, 'The Intention Debate in German Criminal Law' (2004) 17(3) Ratio Juris 346. For an analysis of the concept of *dolus eventualis* in Egypt, France, Italy and South Africa and under Islamic law, see **Badar**, 'Dolus Eventualis' (n 19) 452-64.
45. Bohlander (n 21) 65.
46. ibid. See also Taylor (n 44) 348; **Badar**, 'The Mental Element' (n 31) 490.
47. See Law Commission (England), *Criminal Code, Volume 2* (n 39) 194.
48. Criminal Law Officers Committee (Australia) (n 37) 27. The US Model Penal Code provides in § 2.02(2)(c): '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.' The Australian Model Criminal Code (which became the Commonwealth Criminal Code) did not adopt the requirement of a 'gross deviation'.

49. Criminal Code Act 1995 (Australia) s 5.4(2).

50. Criminal Law Officers Committee (Australia) (n 37) 27. For a discussion of the law relating to recklessness in England, Canada and the US, see **Badar**, 'The Mental Element' (n 31) 488-9.

51. This is the position taken by Ambos, who situates recklessness somewhere between *dolus eventualis* and conscious negligence: K Ambos, 'General Principles of Criminal Law in the Rome Statute' (1999) 10 Crim L Forum 1, 21. Similarly, Triffterer situates recklessness between *dolus eventualis* and negligence: O Triffterer, 'The New International Criminal Law: Its General Principles Establishing Individual Criminal Responsibility' in K Koufa (ed), *The New International Criminal Law* (Sakkoulas Publications 2003) 709. This is also the position taken by Eser, who views recklessness as being more the equivalent of conscious negligence. In his view, the volitional element in recklessness is entirely lacking: Eser (n 10) 906. Van Sliedregt (n 19) 46 views recklessness as being 'broader' than *dolus eventualis.* See also Wise, who states that '*dolus eventualis* demands that the accused have a particular subjective posture toward the possible consequences of his conduct, where common law terminology minimizes the relevance of the accused's desires, wishes, or wants': E Wise, 'General Principles of Criminal Law' (1998) 13 *Nouvelles Études Pénales: Model Draft Statute for the International Criminal Court Based on the Preparatory Committee's Text to the Diplomatic Conference, Rome, June 15-July 17 1998* 39, 53.

52. As **Badar** notes, the ICTY Trial Chamber has held that the common law concept of recklessness is not equivalent to the civil law concept of *dolus eventualis,* because of the lack of any volitional component for recklessness. **Badar** states that the trial judgment in the *Stakic* case 'clearly shows that mere common law recklessness is not equivalent to the continental law *dolus eventualis.* The latter requires a cognitive element of awareness and a volitional element of acceptance of the risk, whereas mere recklessness lacks such a volitional element': ME **Badar**, 'Drawing the Boundaries of *Mens Rea* in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia' (2006) 6 Int'l Crim LR 313, 332, citing *Prosecutor v Stakic* (Judgment) IT-97-24-T, T Ch II (31 July 2003) para 642. While I do not agree that there is *no* volitional component required for the gradation of recklessness, I do consider that this volitional component is lower than that which exists in cases of *dolus eventualis.*

53. See *Prosecutor v Lubanga Dyilo* (Confirmation Decision) ICC/01/04-01/06, PT Ch I (29 January 2007) at fn 438 (Lubanga Confirmation).

54. Cassese seems to take this view, as he equates the two concepts and also states that recklessness requires a volitional act: A Cassese, *International Criminal Law* (2nd edn, OUP 2008) 66-7.

55. G Werle, *Principles of International Criminal Law* (2nd edn, TMC Asser Press 2009) 153 (fn 90). See also Taylor (n 44) 348 (who describes *dolus eventualis* as 'tak[ing] the place of the missing concept of recklessness' in German criminal law) and Wise (n 51) 53 (who states that '[r]ecklessness and *dolus eventualis* are not identical, although, as a practical matter, they are likely to produce similar results in most cases').

56. D Piragoff and D Robinson, 'Article 30: Mental Element' in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd edn, Beck 2008) 854. See also Eser (n 10) 905.

57. Pisani (n 6) 129; Eser (n 10) 905, 907. However, the terms 'intent' and 'knowledge' as used in Article 30 do not themselves equate to 'volition' and 'cognition'. Rather, they are *legal* terms defined in paragraphs (2) and (3) of Article 30 respectively, while the terms 'volition' (ie desire) and 'cognition' (ie awareness) are the two *components* that must both be present in each of the gradations of 'intent'/'knowledge'.

58. See, eg, Bemba Confirmation (n 15) para 355. This 'element analysis' approach was designed by the drafters of the US Model Penal Code: see US Model Penal Code § 1.13(9); P Robinson and J Grall, 'Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond' (1983) 35 Stanford LR 681. In fact, Heller states that Article 30's element analysis approach 'is similar to, and almost certainly based on, the approach taken by the Model Penal Code': KJ Heller, 'The Rome Statute of the International Criminal Court' in KJ Heller and MD Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford Law Books 2010) 603. See also **Badar**, 'The Mental Element' (n 31) 476. The element analysis approach has also been adopted by a number of model or draft criminal codes prepared in common law countries, for example, the English Law Commission's Draft Criminal Code Bill and the Australian Commonwealth Criminal Code: Law Commission (England), *Criminal Code, Volume 1* (n 27) 51-2 (clause 18); Criminal Code Act 1995 (Australia) Div 5.

59. M Kelt and H von Hebel, 'What Are Elements of Crimes?' in RS Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) 14.

60. GP Fletcher, *The Grammar of Criminal Law* (OUP 2007) 43.

61. **Badar**, 'The Mental Element' (n 31) 476. See also Robinson and Grall (n 58) which states (at 683) that under an 'of-

fence analysis' 'one spoke of intentional offenses, reckless offenses, and negligent offenses... [whereas an 'element analysis'] recognize[s] that a single offense definition may require a different culpable state of mind for each objective element of the offense'.
62. This follows the approach of the US Model Penal Code, which recognizes 'conduct', 'result[s] of conduct' and 'attendant circumstances' as the possible elements of a crime: see US Model Penal Code § 2.02.
63. The US Model Penal Code similarly did not provide any usable definitions for these terms, an omission that Robinson and Grall have described as having 'severely undercut' the usefulness of the defined mental elements: Robinson and Grall (n 58) 707.
64. Piragoff and Robinson (n 56) 852. See also Kelt and von Hebel, 'What Are Elements of Crimes?' (n 59) 14. Similarly, Heller describes a conduct element as 'the positive act or omission prohibited by the crime in question': Heller (n 58) 602. According to Cassese, '[t]he conduct is described by the international rule that imposes a certain behaviour... and therefore criminalizes any act or omission contrary to such a rule': Cassese, *International Criminal Law* (n 54) 55.
65. Werle (n 55) 144.
66. Piragoff and Robinson (n 56) 852. Similarly, Heller describes a consequence element as 'the required result of the prohibited conduct' (which may involve 'either actual harm ... or simply the possibility of harm'): Heller (n 58) 602. Werle describes a consequence as including 'all effects of the criminal conduct' and explains that they can consist of 'harm that has actually occurred ... or merely of danger to a protected right': Werle (n 55) 144. See also Kelt and von Hebel, 'What Are Elements of Crimes?' (n 59) 15.
67. Piragoff and Robinson (n 56) 852.
68. Heller (n 58) 602. Werle explains that '[o]bjective circumstances can be of a factual nature ... or they can concern normative characteristics': Werle (n 55) 145. See also Eser, who defines circumstances as 'any objective or subjective facts, qualities, or motives with regard to the subject of the crime (such as the perpetrator and any accomplices), the object of the crime (such as the victim or other impaired interests) or any other modalities of the crime (such as means or time and place of commission)': Eser (n 10) 919. See also Kelt and von Hebel, 'What Are Elements of Crimes?' (n 59) 15.
69. Robinson and Grall (n 58) 707.
70. Kelt and von Hebel, 'What Are Elements of Crimes?' (n 59) 15. As Clark notes, there is often overlap between 'conduct' and 'circumstances', and many of those involved in the drafting of the Rome Statute 'thought of conduct as including causation and results': Clark, 'The Mental Element' (n 18) 306. The difficulty in drawing the dividing line between 'conduct' and 'circumstances' was also recognized in the Commentary to the Australian Model Criminal Code: Criminal Law Officers Committee (n 37) 7.
71. Robinson and Grall (n 58) 719-20.
72. See ICC, Elements of Crimes, Article 8(2)(b)(viii), Element 1(a).
73. See ibid, Article 7(1) (k), Element 1.
74. Robinson and Grall (n 58) 723.
75. ibid 724 (emphasis omitted).
76. ibid.
77. See ICC, Elements of Crimes, Article 8(2)(b)(xxv), Element 1.
78. Robinson and Grall (n 58) 724.
79. As is the case with Table 1, Table 2 is my attempt to visually represent the definitions contained in Article 30, arranged with respect to the relevant material element.
80. ICC, Elements of Crimes, General Introduction, 2 (emphasis added).
81. Werle and Jessberger (n 8) 38. See also Werle (n 55) 151.
82. See Triffterer (n 51) 704.
83. This is also the position taken by **Badar**, 'The Mental Element' (n 31) 482-3.
84. Lubanga Confirmation (n 53) para 351.
85. Bemba Confirmation (n 15) para 358.
86. *Prosecutor v Katanga and Ngudjolo Chui* (Confirmation Decision) ICC-01/04-01/07, PT Ch I (30 September 2008) para 529 (Katanga Confirmation).
87. See Table 2 above.
88. Lubanga Confirmation (n 53) para 351 (emphases added).
89. This is the position taken by Eser (n 10) 914-15.
90. See Bemba Confirmation (n 15) para 358 (stating that 'the volitional element decreases substantially and is overridden by the cognitive element'), and para 369 (stating that the standard is that of 'virtual certain[ty]').
91. This was the meaning intended by the English Law Commission, which was the first body to use the phrase: see Law Commission (England), *Criminal Code, Volume 2* (n 39) 192.

92. Werle and Jessberger (n 8) 41; **Badar**, 'The Mental Element' (n 31) 484-5; **Badar**, 'Dolus Eventualis' (n 15) 440. See also Pisani (n 6) 131.
93. Bemba Confirmation (n 15) para 359 (emphasis added). See also Lubanga Confirmation (n 53) paras 351-2; Katanga Confirmation (n 86) para 530.
94. **Badar**, 'Dolus Eventualis' (n 15) 452. Clark similarly states that the 1996 Report of the Preparatory Committee was 'the last time that the words *dolus eventualis* appear in any draft': R Clark, 'Elements of Crimes in Early Confirmation Decisions of Pre-Trial Chambers of the International Criminal Court' (2008) 6 NZ YB Int'l L 215.
95. Clark, 'The Mental Element' (n 18) 301. Clark has stated elsewhere that *'dolus eventualis* and its common law cousin, recklessness, suffered banishment by consensus [at Rome]. If it is to be read into the Statute, it is in the teeth of the language and history': R Clark, 'Drafting a General Part to a Penal Code: Some Thoughts Inspired by the Negotiations of the Rome Statute of the International Criminal Court and by the Court's First Substantive Law Discussion in the *Lubunga Dyilo* Confirmation Proceedings' (2008) 19 Crim L Forum 519, 529; Clark, 'Elements of Crimes' (n 94) 220.
96. The provision defining recklessness was ostensibly dropped because the term did not appear anywhere in the final text of the Statute, so there was no need to define it. See W Schabas, 'General Principles of Criminal Law in the International Criminal Court Statute' (Pt III) (1998) 6 EJ Crime, Crim L & Crim Justice 409, 420; W Schabas, *Introduction to the International Criminal Court* (3rd edn, CUP 2007) 224; Clark, 'Elements of Crimes' (n 94) 216; Werle and Jessberger (n 8) 52; Wise (n 55) 52.
97. Clark, 'Drafting a General Part' (n 95) 525. See also Clark, 'Elements of Crimes' (n 94) 212, 216.
98. Pisani (n 6) 132 (emphasis added).
99. ibid. However, note that, in other places, Pisani seems to suggest that Article 30 *includes dolus eventualis* and recklessness (ibid 125, 134).
100. Werle and Jessberger (n 8) 52.
101. Ambos, 'General Principles' (n 51) 21.
102. See, eg, Piragoff and Robinson (n 56) 860 (fn 67). See also Eser (n 10) 906. Despite this recognition, some academics clearly view the failure to allow for recklessness as a standard gradation of mental element in Article 30 as 'questionable', given its status under customary international law (and, in particular, the heavy reliance on recklessness as a sufficient gradation of mental element for serious crimes in the jurisprudence of the ad hoc Tribunals): see, eg, A Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10 EJIL 158, 153.
103. Lubanga Confirmation (n 53) fn 438.
104. ibid.
105. Bemba Confirmation (n 15) para 360.
106. Werle and Jessberger (n 8) 41, 53.
107. Eser (n 10) 932-3 (and see also 915).
108. Ambos, 'General Principles' (n 51) 21-2. See also K Ambos, 'Some Preliminary Reflections on the *Mens Rea* Requirements of the Crimes of the ICC Statute and of the Elements of Crimes' in LC Vohrah and others (eds), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Kluwer Law International 2003) 20-1. However, note Ambos' more recent statement below, which seems to contradict this position: see text accompanying n 118.
109. Heller (n 58) 604.
110. Van Sliedregt (n 19) 51-2.
111. Werle and Jessberger (n 8) 41 (fn 36).
112. H-H Jescheck, 'The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute' (2004) 2 J Int'l Crim Justice 38, 45.
113. F Mantovani, 'The General Principles of International Criminal Law: The Viewpoint of a National Criminal Lawyer' (2003) 1 J Int'l Crim Justice 26, 32.
114. G-J Knoops, *Defenses in Contemporary International Criminal Law* (2nd edn, Martinus Nijhoff 2007) 5.
115. Triffterer (n 51) 706.
116. Cassese, *International Criminal Law* (n 54) 73.
117. Piragoff and Robinson (n 56) 860.
118. K Ambos, 'Critical Issues in the *Bemba* Confirmation Decision' (2009) 22 Leiden J Int'l L 715, 718. However, Ambos also states that he concurs with the exclusion *of dolus eventualis* from Article 30.
119. Werle and Jessberger (n 8) 42. The 'principle of strict construction' refers to Article 22(2), which provides that '[t]he definition of a crime shall be strictly construed and shall not be extended by analogy'. See also T Weigend, 'The Harmonization of General Principles of Criminal Law: The Statutes and Jurisprudence of the ICTY, ICTR and the ICC: An Overview' (2004) 19 *Nouvelles Études Pénales: Quo Vadis?* 319, 327 (fn 19).
120. Lubanga Confirmation (n 53) para 352.
121. ibid paras 353-5.

122. Weigend, '*Lubanga* Decision' (n 41) 482-3.
123. See Werle and Jessberger (n 8) 42, 53-4.
124. In the Katanga Confirmation, which was handed down between the Lubanga Confirmation and the Bemba Confirmation, Pre-Trial Chamber I stated that the majority of the Chamber (Judge U%24sacka dissenting) 'endorse[d]' the previous finding in the Lubanga Confirmation that Article 30 incorporates *dolus eventualis:* Katanga Confirmation (n 86) fn 329. It stated, however, that '[f]or the purpose of the present charges in the present Decision, it is not necessary to determine whether situations of *dolus eventualis* could also be covered by this offence, since, as shown later, there are substantial grounds to believe that the crimes were committed with *dolus directus* ': ibid, fn 329. See also at para 531, where the Chamber stated that it need not take a position on 'whether the concept of *dolus eventualis* has a place within the framework of article 30', because it did not intend to rely on this concept for the mental element in relation to the crimes charged.
125. Bemba Confirmation (n 15) para 360.
126. ibid paras 362-3.
127. ibid paras 364-8.
128. As Piragoff and Robinson explain, in domestic legal systems that recognize the concept of 'wilful blindness', it is treated as tantamount to actual knowledge: Piragoff and Robinson (n 56) 861.
129. See, eg, Law Commission (England), *Criminal Code, Volume 2* (n 39) 191-2. See also Piragoff and Robinson (n 56) 861.
130. Piragoff and Robinson (n 56) 861.
131. A proposal for a draft provision on mental elements submitted to the Preparatory Committee in 1996 provided that: 'For the purposes of this Statute and unless otherwise provided, "know", "knowingly" or "knowledge" means: ... (b) [To be aware that there is a substantial likelihood that a circumstance exists and deliberately to avoid taking steps to confirm whether that circumstance exists] [to be wilfully blind to the fact that a circumstance exists or that a consequence will occur]': *Report of the Preparatory Committee on the Establishment of an International Criminal Court,* UN Doc A/51/22 (13 September 1996) Volume II: Compilation of Proposals, art H(3)(b). This paragraph did not appear in any later draft provisions on the mental element.
132. Eser (n 10) 931-2.
133. **Badar**, 'The Mental Element' (n 31) 496.
134. ibid.
135. ibid (emphasis added).
136. ibid, citing Williams, *Criminal Law* (n 14) 159.
137. See, eg, Bemba Confirmation (n 15) paras 136, 353 (describing the language of Article 30(1) as establishing a 'default rule').
138. Weigend, 'Harmonization' (n 119) 327.
139. Eser (n 10) 898. Triffterer also appears to favour this line of reasoning: Triffterer (n 51) 699-700.
140. K Ambos, *Der Allgemeine Teil des Völkerstrafrechts* (2002) 789, cited in Werle and Jessberger (n 8) 43.
141. Schabas, *Introduction* (n 96) 225. In light of the recent jurisprudence of the Court (see below n 152), Schabas appears to have changed his position in his more recent book, where he states that 'article 21 lists [the Elements] as a source of applicable law, and to the extent that [alternative mental elements] are "provided" by such a source, they may be deemed "otherwise provided"': Schabas, *Commentary* (n 15) 475.
142. C Kreß, 'The Crime of Genocide under International Law' (2006) 6 Int'l Crim LR 461, 485 (emphasis in original).
143. See, eg, Clark, 'The Mental Element' (n 18) 321 (submitting that an alternative mental element 'might be based on the general law, and in particular applicable treaties, customary law and general principles of law'); **Badar**, 'The Mental Element' (n 31) 500 (stating that Article 30(1) 'enables the Statute to absorb the corresponding rules of international humanitarian law'); Cassese, *International Criminal Law* (n 54) 74. For an explanation of the approach taken by the Preparatory Commission in the Elements of Crimes, see Mauro Politi, 'Elements of Crimes' in Cassese, Gaeta and Jones (n 10) 461; Kelt and von Hebel, 'General Principles' (n 13) 29.
144. Werle and Jessberger (n 8) 45.
145. ibid 46 (emphasis in original).
146. ibid.
147. See Piragoff and Robinson (n 56) 856.
148. ibid.
149. Elements of Crimes, General Introduction, 2 (emphasis added).
150. See Piragoff and Robinson (n 56) 856.
151. Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31(3).

152. See Lubanga Confirmation (n 53) paras 356-9, where Pre-Trial Chamber I of the ICC accepted that the Elements of Crimes--which required only negligence with respect to the age of the victims in the case of Article 8(2)(b)(xxvi) (War crime of using, conscripting or enlisting children)--represented 'an exception to the "intent and knowledge" requirement embodied in article 30 of the Statute': at para 359. However, as Clark notes, '[w]hether the negligence exception is consistent with the Statute, as understood in Article 9(3), is a question that will no doubt be argued by the defence [in the *Lubanga* case] at a later stage': Clark, 'Elements of Crimes' (n 94) 222. See also Bemba Confirmation (n 15) paras 136, 353, where Pre-Trial Chamber II stated that 'it must be established that the material elements of the respective crime were committed with "intent and knowledge", unless the Statute *or the Elements of Crimes* require a different standard of fault' (emphasis added).
153. Although it is heavily criticized by Clark: Clark, 'Drafting a General Part' (n 95) 525 (fn 18); Clark, 'Elements of Crimes' (n 94) 214 (fn 14).
154. Werle and Jessberger (n 8) 44, 46-7. See also Eser (n 10) 901.
155. For an example of recklessness, see, eg, Article 8(2)(a)(iv), where the use of the term 'wantonly' reduces the level of the required mental state to recklessness. For an example of negligence, see, eg, Article 28(a)(i), which provides that a commander shall be criminally responsible for crimes committed by forces under his or her command not only when that military commander knew but also where the commander 'should have known' that such crimes were being committed. See also the Elements of Crimes for Article 8(2)(b)(xxvi) (the war crime of using child soldiers), which provides that the Prosecution need only prove that an accused 'should have known' that a soldier was a minor.
156. See the example of Article 28 cited in n 155 above.
157. See above n 155.
158. Pre-Trial Chamber I has accepted such an example in Lubanga Confirmation (n 53) paras 356-9 (concerning the war crime of using child soldiers).
159. Eser (n 10) 899, 900.
160. Werle and Jessberger (n 8) 48.
161. Piragoff and Robinson (n 56) 856-8.
162. ibid 857. See also Cassese, *International Criminal Law* (n 54) 65.
163. Piragoff and Robinson (n 56) 858. Kelt and von Hebel also agree that such additional mental elements have no particular material element connected to them: 'General Principles' (n 13) 31, 32. See also Triffterer (n 51) 703.
164. Werle and Jessberger (n 8) 48. On the concept of additional mental elements, see Commonwealth Attorney-General's Department (Australia), *The Commonwealth Criminal Code: A Guide for Practitioners* (March 2002) 61. The Guide refers to these additional mental elements as 'ulterior intentions', and explains that they 'characteristically take the form of a prohibition against engaging in conduct *with intention to* achieve some further objective' (emphasis in original). It further explains that while liability in these crimes 'is determined by the offender's objective, the achievement of that objective is not itself a physical element of the offence.'
165. However, as noted above, given that Article 30 imposes such a demanding test for both intent and knowledge, it is unlikely that there is any room left for this category.
166. **Badar**, 'The Mental Element' (n 31) 484; Cassese, *International Criminal Law* (n 54) 66.
167. Triffterer (n 51) 703.
168. This was identified as a 'specific intent' requirement in Bemba Confirmation (n 15) paras 293-4.
169. This was identified as an 'additional subjective element', 'specific intent' or *'dolus specialis'* requirement in *Prosecutor v Al Bashir* (Decision on Application for an Arrest Warrant) ICC-02/05-01/09, PT Ch I (4 March 2009) para 139.
170. This was identified as a 'specific intent' or *'dolus specialis'* requirement in ibid para 141.
171. This was identified as a *'dolus specialis'* requirement in Katanga Confirmation (n 86) para 332, and a 'specific intent' or 'additional special intent' requirement in Bemba Confirmation (n 15) paras 320, 331.
172. For an example of the approach taken by a domestic legal system on this point, see Commonwealth Attorney-General's Department (Australia), *The Commonwealth Criminal Code: A Guide for Practitioners* (March 2002) 61. The Guide explains that, since 'ulterior intentions' are not defined in the Code, the content of the mental element in these contexts 'is determined by ordinary usage and common law'. The Guide notes, however, that the definition of 'intent' provided in the Code, while not directly applicable, would provide a 'persuasive analogy' (at 63).
173. Satzger (n 9) 269.
174. Cassese, *'Mens Rea'* (n 7) 1025.
175. Werle and Jessberger (n 8) 37.
176. Eser (n 10) 907.

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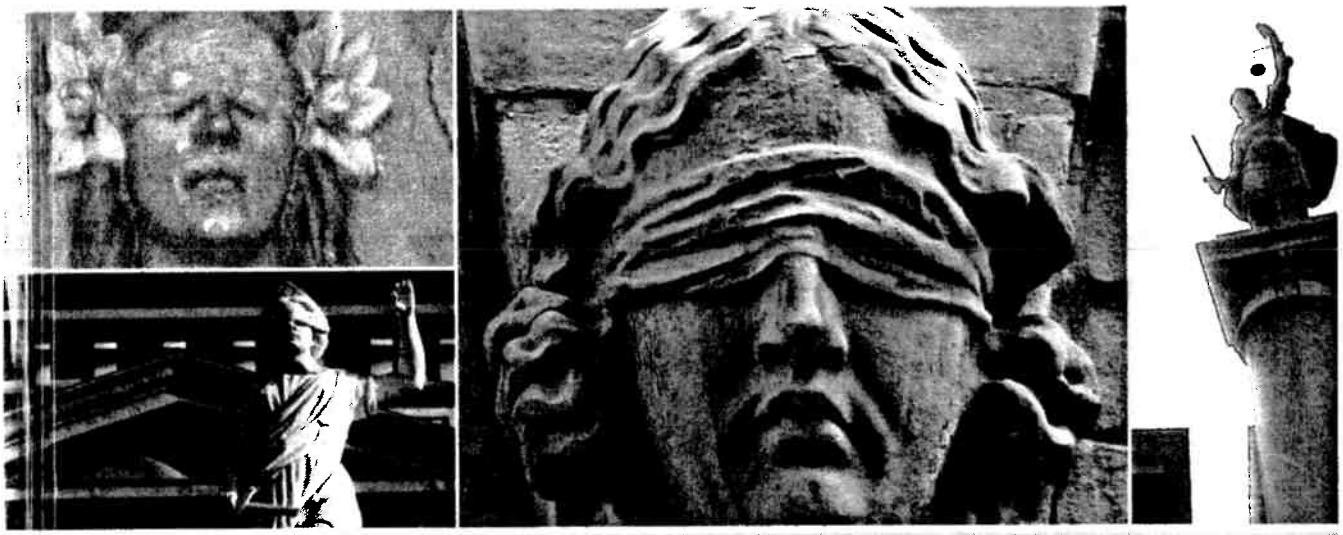

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Edited by

KEVIN JON HELLER AND MARKUS D. DUBBER

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THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

Kevin Jon Heller

I. INTRODUCTION

A. Historical Sketch

The Rome Statute of the International Criminal Court (ICC, also the Court) entered into force on 1 July 2002, less than four years after 120 countries voted in favor of its adoption.[1]

Kevin Jon Heller is a Senior Lecturer at Melbourne Law School. His recent publications include "The Cognitive Psychology of Mens Rea," 99 *Journal of Criminal Law and Criminology* 317 (2009), and "Mistake of Legal Element, the Common Law, and Article 32 of the Rome Statute: A Critical Analysis," 6 *Journal of International Criminal Justice* 419 (2008).

facts—convicting a defendant charged with committing war crimes, for example, of crimes against humanity instead. That right is common in inquisitorial systems but generally foreign to adversarial ones.[78]

II. GENERAL PART

Part 3 of the Rome Statute, titled "General Principles of Criminal Law," has been described as an "unsystematic conglomeration from a variety of legal traditions."[79] That description has a superficial plausibility, because the drafters deliberately avoided tradition-specific terminology, particularly that of the common law: the Statute defines crimes in terms of required "material elements" and "mental elements," not in terms of *actus reus* and *mens rea*; and it provides "grounds for excluding criminal responsibility" instead of defenses. In general, however, it is clear that the Statute's "two-pronged concept of crime"[80] is patterned after the common law, not the civil law. First, "it does not distinguish between the subjective/mental element of the offense, in the sense of a *Tatvorsatz* (*dolus*) and the blameworthiness of the act belonging to a separate and autonomous (third) level of culpability (*Schuld*)."[81] Second, the system "does not distinguish between wrongfulness/justification and culpability/excuse as the two- or three-fold structure of an offense as applied in the Germanic systems."[82]

A. Theories of Punishment

The Preamble to the Rome Statute affirms that "the most serious crimes of concern to the community must not go unpunished" and states the determination of the states parties "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes." Retribution and deterrence, therefore, are the Court's primary sentencing objectives.

In giving meaning to these objectives, the ICC's judges will no doubt be guided by the sentencing practices of previous international tribunals. Those tribunals have consistently emphasized the importance of retribution,[83] although they have been careful to insist that punishment imposed for retributive purposes "is not to be understood as fulfilling a desire for revenge, but as duly expressing the outrage of the international community at these crimes."[84] A sentence must, therefore, always be proportionate to the seriousness of the crime.[85]

International tribunals have also recognized the importance of deterrence.[86] They have normally insisted, however, that the deterrent effect of punishment "must not be accorded undue prominence" in sentencing decisions, because punishment is supposed to deter by "bringing about the development of a culture of respect for the rule of law and not simply the fear of the consequences of breaking the law."[87] Promoting deterrence through retributively disproportionate sentences is thus unacceptable.[88]

B. Liability Requirements

1. Objective/Actus Reus

As noted earlier, the drafters of the Rome Statute made a conscious decision to refer to "material elements" instead of to an *actus reus*. There is no general provision in the Statute

concerning material elements; instead, following the Model Penal Code, article 30 of the Statute ("Mental Element") simply refers to conduct elements, consequence elements, and circumstance elements.[89] The material elements of a crime are thus "those characteristics . . . of the actor's behavior that, when combined with the appropriate level of culpability, will constitute the offense."[90]

A *conduct* element specifies the positive act or omission prohibited by the crime in question. The war crime of unlawful deportation or transfer, for example, requires the perpetrator to have "deported or transferred one or more persons to another State or to another location."[91]

A *consequence* element specifies the required result of the prohibited conduct. That result may involve either actual harm, such as the crime against humanity of torture's requirement that "[t]he perpetrator inflicted severe physical or mental pain or suffering upon one or more persons,"[92] or simply the possibility of harm, such as the war crime of biological experiment's requirement that an experiment "seriously endangered the physical or mental health or integrity" of the victim.[93]

A *circumstance* element specifies an additional state of affairs that must exist for the prohibited conduct and consequence to be criminal. That state of affairs can be either factual or legal. For example, the war crime of using child soldiers requires the children to have been "under the age of 15 years,"[94] a factual circumstance, while the war crime of denying a fair trial requires the defendant to have been "protected under one or more of the Geneva Conventions of 1949,"[95] a legal circumstance.

i. Act

The Rome Statute does not specify what qualifies as an "act" for purposes of a conduct element. Nevertheless, because article 30 defines intent in relation to conduct as "mean[ing] to engage in the conduct," it is clear that a conduct element is satisfied as long as the person voluntarily committed the prohibited act.[96] Involuntary actions, such as those committed in a state of automatism, do not qualify.[97]

ii. Omission

Various provisions in the Rome Statute and the Elements of Crimes criminalize specific omissions. The war crime of starvation as a method of warfare, for example, prohibits "depriv[ing] civilians of objects indispensable to their survival."[98] Similarly, a military commander (or civilian superior) can be punished for failing to prevent his subordinates from committing international crimes or for failing to punish those crimes once they are brought to his attention.[99]

General liability for omissions, however, proved to be one of the most controversial issues during the drafting of the Rome Statute. Article 28 of the 1998 Draft ICC Statute, then still titled "Actus Reus," provided that "conduct for which a person may be criminally responsible and liable for punishment can constitute either an act or an omission, or a combination thereof." Most states supported the provision, but a "small minority," particularly France, insisted that liability for omissions should be limited to specific crimes. The Preparatory Committee initially compromised by replacing references to "an act or an omission" with the more vague "conduct." When even that compromise met with resistance, the

Diplomatic Conference decided to drop the *actus reus* article entirely.[100] It is will thus be up to the Court to determine—keeping in mind article 22's prohibition of extending the definition of crimes by analogy—whether omissions other than those specified in the Rome Statute and the Elements of Crimes are criminal.[101]

iii. Status

There are no status crimes in the Rome Statute, but the concept is not foreign to international criminal law. Control Council Law no. 10, enacted by the Allies after World War II, declared that "[m]embership in categories of a criminal group or organization declared criminal by the International Military Tribunal is recognized as a crime." A number of defendants in the various war-crimes trials held pursuant to Law No. 10 were later convicted of membership in the Schutzstaffel (SS), the Gestapo, or the Leadership Corps of the Nazi Party.[102]

2. *Subjective*/Mens Rea/*Mental Element*

The mental element of a crime is determined by article 30 of the Rome Statute, which provides in paragraph 1 that "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." Article 30 thus takes an "element analysis" approach to *mens rea* that is similar to, and almost certainly based on, the approach taken by the Model Penal Code.[103]

Despite the plain language of paragraph 1, however, article 30 does not actually apply the default "intent and knowledge" requirement to every kind of material element. As discussed in the following subsections, paragraphs 2 and 3 of article 30 make clear that the intent requirement applies only to conduct and consequence elements, while the knowledge requirement applies only to consequence and circumstance elements. Intent and knowledge are thus both required only for consequence elements.[104]

i. Intent

Article 30(2) defines intent differently depending on whether the material element in question involves conduct or a consequence. A perpetrator acts with intent in regard to a conduct element when he or she "means to engage in the conduct."[105] This definition, with its volitional emphasis, is functionally equivalent to "purpose" in the Model Penal Code[106] and to *dol général* in French criminal law.[107]

A perpetrator acts with intent in regard to a consequence element, by contrast, when he or she either "means to cause that consequence" or "is aware that it will occur in the ordinary course of events.[108] The first definition is explicitly volitional and corresponds to "purpose" and the civil law's *dolus directus* in the first degree.[109]

The correct interpretation of article 30's second definition of intent, which is cognitive instead of volitional, is controversial. Textually, the definition is equivalent to "knowledge" in the Model Penal Code, to the common law's "oblique intent," and to the civil law's *dolus directus* in the second degree, all of which require the perpetrator to recognize that it is virtually certain that his or her conduct *will* lead to the prohibited consequence.[110] The question is whether the definition also includes *dolus eventualis*, which is satisfied if the

perpetrator reconciles himself or herself to the possibility that his or her conduct *may* lead to the prohibited consequence.[111] The Pre-Trial Chamber has held that article 30's cognitive definition of intent includes *dolus eventualis*,[112] and a number of scholars agree.[113] That position, however, contradicts the plain language of the article: "[I]t is not enough for the perpetrator to merely anticipate the possibility that his conduct would cause the consequence. This follows from the words 'will occur'; after all, it does not say 'may occur.'"[114]

Finally, it is important to note that a number of crimes in the Rome Statute also require the perpetrator to act with specific intent or *dolus specialis*. Some of these "otherwise provided" requirements modify article 30's default "intent and knowledge" requirement with regard to a material element. A perpetrator is guilty of hostage taking, for example, only if he or she specifically intends his or her act to "compel a State . . . to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons";[115] knowledge of that consequence is not enough. Others supplement article 30 because they do not apply to the material elements of a crime. To commit the crime of genocide, for example, the perpetrator must not only have acted with intent and knowledge regarding the material elements of the crime, such as killing members of a protected group, but must also have acted with the specific intent "to destroy" that group "in whole or in part."[116]

ii. Knowledge

Article 30(3) provides two different definitions of knowledge. The first definition, which concerns consequence elements, is the same as article 30(2)'s definition of intent with regard to consequences: "awareness that . . . a consequence will occur in the ordinary course of events." The fact that both intent and knowledge are required for circumstance elements is thus effectively meaningless; in practice, knowledge is all that is required.

The second definition concerns knowledge in relation to circumstance elements. Here knowledge is defined as "awareness that a circumstance exists." This is a very high threshold, going beyond the Model Penal Code's definition of knowledge, which is satisfied as long as the perpetrator is "aware of a high probability of [a circumstance's] existence, unless he actually believes it doesn't exist."[117] It also seems to exclude willful blindness, even in Glanville Williams's restrictive formulation: "He suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge."[118]

iii. Recklessness

With one exception, common-law recklessness is never sufficient for criminal responsibility under the Rome Statute. Earlier drafts of article 30 included a definition of recklessness, but that provision was deleted when the drafters realized that the word *reckless* did not appear in any of the definitions of crimes.[119] Moreover, most of the states that were involved in drafting the article were reluctant to base criminal responsibility for serious international crimes on recklessness.[120]

The one exception concerns the responsibility of civilian superiors, a form of complicity. Article 28(b)(1) provides that a civilian superior is responsible for failing to prevent and/or punish crimes committed by subordinates if he or she "knew, or consciously disregarded information which early indicated, that the subordinates were committing or

about to commit such crimes." Scholars agree that the "consciously disregarded" language is equivalent to recklessness.[121]

iv. Negligence

The drafters of part 3 were equally reluctant to base criminal responsibility on negligence, in either its common-law or its civil law form.[122] Nevertheless, negligence appears both in the Rome Statute and in the Elements of Crimes as an "otherwise provided" mental element. Article 28(a)(1) of the Statute provides that a military commander is responsible for failing to prevent and/or punish crimes committed by his subordinate forces if he "knew or, owing to the circumstances at the time, should have known, that the forces were committing or about to commit such crimes." Moreover, the Elements apply a common-law negligence standard to a number of factual circumstances required by various war crimes. The war crime of improperly using the distinctive emblems of the Geneva Conventions, for example, requires that the perpetrator "knew or should have known of the prohibited nature of such use."[123]

3. Causation

There is no specific causation provision in the Rome Statute. The 1998 Draft Statute provided that "[a] person is only criminally responsible under this Statute for committing a crime if the harm required for the commission of a crime is caused by and [accountable] [attributable] to his or her act or omission," but that provision was deleted prior to the Diplomatic Conference.[124] Most scholars agree, however, that a causation requirement is implicit in the Rome Statute whenever a crime contains a consequence element.[125] Indeed, article 30 initially defined intent with regard to a consequence as "mean[ing] to cause that consequence." Causation requirements are also explicitly required by certain crimes, such as genocide by causing serious bodily or mental harm[126] and the war crime of willfully causing great suffering.[127]

4. Theories of Liability

Article 25 of the Rome Statute provides a comprehensive list of the possible modes of participation in the crimes within the jurisdiction of the Court. The article thus represents a significant advance over previous international tribunals, which "did not pay much attention to distinguishing different modes of participation . . . but rather applied a so-called unified perpetrator model. The guiding principle was that any support or promotion of the crime was to be considered criminal participation."[128] The Nuremberg Military Tribunals, for example, routinely convicted defendants because they were "principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, [or] were members of organizations or groups connected with, atrocities."[129]

Article 25 divides modes of participation into four categories: (1) commission,[130] (2) ordering and instigating,[131] (3) assistance,[132] and (4) contribution to a group crime.[133] Modes of participation in category 1 are forms of principal liability; modes in categories 2–4 are forms of accessory liability. What distinguishes principals from accessories is "control over the crime": principal perpetrators either "physically carry out the objective

elements of the offense" or "control or mastermind its commission."[134] The Rome Statute thus rejects both the common law's objective approach to principal liability, which emphasizes "presence" at the crime, and the subjective approach of the ad hoc tribunals, which emphasizes shared intent to commit the crime, in favor of the objective/subjective "act dominion" (*Tatherrschaft*) approach of German criminal law.[135]

i. Commission

The first category includes direct perpetration ("as an individual"), coperpetration ("jointly with another"), and perpetration by means ("through another person").

a. Direct Participation

A perpetrator who commits the material elements of a crime with the requisite mental state commits that crime "as an individual." Scholars have noted that this description is imprecise because it fails to make clear that the direct perpetrator acts alone, without the assistance of another person.[136]

b. Coperpetration

When two or more perpetrators exercise "joint control" over the commission of a crime, each individual is responsible for that crime as a coperpetrator. According to the Pre-Trial Chamber in *Lubanga*, coperpetration has two objective and three subjective elements:

1. *Agreement or common plan.* Because coordinated criminal activity is the hallmark of coperpetration, the crime must be committed pursuant to an agreement or common plan between two or more persons.[137]
2. *Essential contribution.* To qualify as a coperpetrator, a person must have "joint control" over the commission of the crime. A person has such control if he or she makes an "essential" contribution to the common plan. A contribution is essential if the crime could not be committed without it—if, in other words the person has "the power to frustrate the commission of the crime by not performing" his or her task.[138]
3. *Required mental state.* A coperpetrator must make his or her essential contribution to the common plan with the mental state required for the underlying crime, including any requisite *dolus specialis*.[139]
4. *Awareness and acceptance of the crime.* A coperpetrator must also be "aware of the risk that implementing their common play may result in the realization of the objective elements of the crime" and "accept such a result" by reconciling with or consenting to its possibility.[140] That awareness and acceptance, according to the Pre-Trial Chamber, justifies holding each coperpetrator liable for the completed crime.[141]
5. *Awareness of joint control.* Finally, a coperpetrator must be aware that his or her contribution to the common plan is essential—that the plan cannot succeed but for his or her participation in it.[142]

c. Perpetration by Means

A perpetrator who uses another person as a tool to commit a crime commits that crime "through another person." Although many national legal systems recognize perpetration

by means, the Rome Statute marks its first explicit appearance in international criminal law.[143] Unlike some national systems, however, article 25(3)(a) of the Rome Statute provides that a perpetrator by means is responsible for the crime committed by the direct perpetrator "regardless of whether that other person is criminally responsible."[144]

The Pre-Trial Chamber applied perpetration by means in the *Katanga* case, relying specifically on German criminal law.[145] According to the Pre-Trial Chamber, this form of participation is particularly relevant when the perpetrator behind the perpetrator—*Täter hinter dem Täter*—commits an international crime through another by means of his or her "control over an organized apparatus of power."[146] Objectively, such control has four elements. First, the apparatus must be "based on hierarchical relations between superiors and subordinates."[147] Second, the apparatus must be "composed of sufficient subordinates to guarantee that superiors' orders will be carried out, if not by one subordinate, then by another."[148] Third, each superior must exercise sufficient "authority and control" over the apparatus—normally because of his or her capacity to "hire, train, impose discipline, [or] provide resources"—that his or her orders will automatically produce their desired results.[149] Fourth, each superior must actually mobilize his or her authority and control over the apparatus to commit a crime within the jurisdiction of the Court.[150] Subjectively, perpetrators by means must not only act with the mental state necessary for the underlying crime[151] but must also "be aware of the character of their organizations, their authority within the organization, and the factual circumstances enabling near-automatic compliance with their orders."[152]

ii. Ordering and Instigating

a. Ordering

Article 25(3)(b) holds criminally responsible a person who "[o]rders . . . the commission of such a crime which in fact occurs or is attempted." Ordering presumes the existence of a superior-subordinate relationship: the superior uses his or her position of command to compel the subordinate to commit the crime.[153]

By virtue of its placement in paragraph b, ordering is a form of accessory liability. A number of scholars, however, have suggested that ordering is better understood as a form of perpetration by means, given that "exploiting a hierarchical power structure in terms of organizational predominance is typical of such intermediary perpetration."[154] Categorizing ordering as a form of accessory liability also fails to reflect the fact that the superior's culpability for the crime is greater than the subordinate's, because the superior not only violates his or her duty to control the subordinates but also misuses his or her power in order to ensure that the crime is committed.[155]

b. Soliciting and Inducing

Article 25(3)(b) also holds criminally responsible a person who "solicits or induces the commission of such a crime which in fact occurs or is attempted." No superior-subordinate relationship is necessary for soliciting or inducing; an instigator is simply someone who "prompts" another to commit an international crime,[156] usually by means of psychological pressure.[157] A causal link between the instigation and the crime is necessary, but it is sufficient if the instigation "substantially" contributes to the direct perpetrator's decision to act.[158] Subjectively, under article 30, the instigator must either intend that the direct

perpetrator commit the crime or recognize that the crime will be committed "in the ordinary course of events."

iii. Assistance

Article 25(3)(c) holds criminally responsible a person who, "[f]or 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." This category of accessory liability covers assistance that does not rise to the level of ordering and instigating but is more significant than mere contribution to a group crime. It includes, according to the ICTY, any "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."[159] Article 25(3)(c) does not itself require a "substantial effect," but most scholars believe that the requirement is implicit in the paragraph, given that the ILC's 1996 Draft Code of Crimes explicitly included it.[160]

Subjectively, the assistance must not only be intentionally provided, as required by article 30, but must also be provided "for the purpose" of facilitating the crime. This "otherwise provided" specific-intent requirement, which is borrowed from the Model Penal Code,[161] means that the perpetrator must have consciously intended the direct perpetrator to commit the crime[162]—a much higher standard than the one applied by the ICTY and the ICTR, which have held that aiding and abetting only requires the perpetrator to know that his or her assistance will facilitate the direct perpetrator's commission of the crime.[163]

iv. Contribution

Finally, article 25(3)(d) holds criminally responsible a person who "[i]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose." This provision, which is copied almost verbatim from the International Convention on the Suppression of Terrorist Bombings of 1997, resulted from contentious debates during the drafting over whether to include conspiracy in the Rome Statute.[164] It is a residual form of accessory liability that applies "to indirect forms of assistance—such as financing the group—that do not warrant liability for either co-perpetration or aiding and abetting, as they have no substantial effect on the commission of the crime under international law."[165] Subjectively, such assistance must be made either "with the aim of furthering" the group's criminal activity or "in the knowledge of the intention of the group to commit the crime."[166] The difference seems to be that the second standard requires the prosecution to prove that the person knew the specific crime the group intended to commit, whereas the first standard requires it to prove only that the person intended to further the group's general criminal activity.[167]

v. Inchoate Crimes

a. Conspiracy

Conspiracy is not criminal under the Rome Statute. Earlier versions of the Statute oscillated between the traditional common-law approach to conspiracy, which views conspiracy as an inchoate crime, and the civil law approach, which views conspiracy as a mode of participation in a crime.[168] The difficulty of reconciling those traditions ultimately led the drafters to compromise by replacing conspiracy with the idea of contribution to a group crime, art. 25(3)(d) of the Statute.[169]

b. Incitement to Genocide

Article 25(3)(e) holds criminally responsible a person who, "[i]n respect of the crime of genocide, directly and publicly incites others to commit genocide." This provision, which is borrowed from the Genocide Convention, is a purely inchoate crime: the incited genocide need not be carried out or even attempted.[170] A perpetrator incites "publicly" by "communicating the call for criminal action to a number of individuals in a public place or to members of the general public at large," usually through radio or television.[171] A perpetrator incites "directly" by "specifically urging another individual to take immediate criminal action rather than making a vague or indirect suggestion."[172] The later qualification obviously blurs the line between incitement and other forms of accessorial liability, such as solicitation and inducement.

Scholars agree that, subjectively, a perpetrator must intend to incite his or her listeners to commit an act of genocide, such as killing members of a protected group, with the specific intent to destroy that group in whole or in part.[173] They disagree, however, concerning whether the perpetrator must also possess that specific intent, as is the norm in national criminal codes.[174] It is difficult to imagine a situation in which a perpetrator who does not have genocidal intent would intentionally try to incite that intent in others. Nevertheless, because incitement to genocide does not "otherwise provide" a specific-intent requirement, unlike aiding and abetting and contributing to a group crime, the perpetrator would likely be guilty of incitement in such a situation.[175]

c. Attempt

Article 25(3)(f) holds criminally responsible a person who "[a]ttempts 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." General criminal responsibility for attempts is an innovation of the Rome Statute; previously, "neither a duly generalized nor an adequate concept of attempt" existed in international criminal law.[176]

Objectively, article 25(3)(f) represents an amalgamation of French law (*commencement d'exécution*) and the Model Penal Code ("substantial step").[177] Preparatory acts do not qualify as substantial steps because they do not represent a "commencement of execution." The perpetrator is not required, however, to fulfill one of the physical elements of the crime; most scholars agree that the attempt provision is patterned after German criminal law's concept of attempt, which equates commencement with acts committed "immediately proceeding to the accomplishment of the elements of the offense" (*unmittlebares Ansetzen zur Tatbestandverwirklichung*).[178]

d. Abandonment

Article 25(3)(f) also provides that "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." Although abandonment is likely a general principle of criminal law, it was included in the Rome Statute only at the last minute. The provision is based on the Model Penal Code[179] and is thus, by requiring the perpetrator to both

physically abandon the attempt and renounce his or her criminal intention, more strict than many national criminal codes.[180]

vi. Superior Responsibility

Superior responsibility is "an original creation of international criminal law."[181] At the broadest level, it holds military commanders and civilian superiors criminally responsible for failing to prevent their subordinates from committing international crimes or for failing to punish those crimes once they are brought to their attention.

The nature of superior responsibility is controversial. Some national legal systems treat it as a form of complicity, while others consider it an independent crime of omission akin to dereliction of duty.[182] Article 28 of the Rome Statute adopts the former approach, providing that a superior who fails to prevent or punish crimes committed by his or her subordinates "shall be criminally responsible" for those crimes.[183]

According to article 28, superior responsibility involves four elements. First, a superior-subordinate relationship must exist. The essence of that relationship is the superior's "effective control" over the direct perpetrators, understood as the "material ability to prevent and punish commission of the offenses."[184] Military commanders often possess effective control de jure, by virtue of their rank. Some civilian superiors, such as government officials, also exercise de jure control over their subordinates. De facto effective control is sufficient, however, in both the military and civilian contexts.[185]

Second, the superior must have the requisite mental element concerning his or her subordinates' crimes. Unlike the statutes of previous international tribunals, the Rome Statute holds military commanders and civilian superiors to different standards. A military commander is criminally responsible if he or she "either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes"[186]—a negligence-like standard that asks whether the commander, "in the proper exercise of his duties, would have gained knowledge" of the crimes.[187] A civilian superior, by contrast, is criminally responsible only if he or she "either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes"[188]—a standard that seems to include both recklessness and willful blindness.[189]

Third, the superior must have failed to take "necessary and reasonable measures" to either prevent or punish his or her subordinate's crimes. What measures qualify as necessary and reasonable must be determined on a case-by-case basis, taking into account the degree of the superior's effective control: the greater the control, the greater the superior's obligation to take preventive or punitive measures. Typical prevention measures include teaching subordinates about the principles of international humanitarian law and creating effective systems of supervision, reporting, and sanctioning. With regard to punishment, the Rome Statute specifically mentions submitting subordinates' crimes "to the competent authorities for investigation and prosecution."[190]

Fourth, and finally, the subordinates' crimes must "result" from the superior's failure to exercise proper control over them.[191] This is clearly a negative causality requirement: the superior can only be held responsible for his or her subordinates' crimes insofar as,

"but for his failure to fulfill his duty to act, the acts of his subordinates would not have been committed."[192]

vii. Corporate Criminal Liability

Article 25(1) of the Rome Statute provides that "[t]he Court shall have jurisdiction over natural persons pursuant to this Statute." Legal persons, therefore, cannot be held criminally responsible for crimes within the jurisdiction of the Court. This exclusion was a relatively late development: earlier versions of article 25 included an option to extend the Court's jurisdiction to legal as well as to natural persons.[193] That option was ultimately deleted at the Diplomatic Conference, largely because the idea of corporate criminal liability was simply alien to a number of national legal systems.[194]

C. Defenses

1. Types of Defense

As noted earlier, because they wanted to avoid tradition-specific language, the drafters of the Rome Statute chose to refer to "grounds for excluding criminal responsibility" instead of to "defenses." The Statute approaches those grounds in three different ways. First, articles 31–33 make certain defenses specifically available to a defendant. Some, such as self-defense, are traditionally categorized as justifications; others, such as mental disease or defect, are traditionally categorized as excuses. The Rome Statute, however, does not distinguish between the two.[195] Indeed, article 31(1)(d) collapses a justification (necessity) and an excuse (duress) into a single ground.

Second, article 31(2) provides that "[t]he Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it." If this provision simply authorizes the Court to prevent a defendant from raising a ground that is not supported by sufficient evidence, it is unproblematic. The provision will clearly run afoul of the principle of legality, however, if it authorizes the Court to exclude a ground for nonevidentiary reasons of "justice" or "fairness."[196] Unfortunately, the drafting history seems to support the latter interpretation.[197]

Third, and finally, article 31(3) gives the court the right to "consider a ground for excluding criminal responsibility other than those referred to . . . where such a ground is derived from applicable law as set forth in article 21." Such grounds will normally be found in customary international law.[198]

2. Burden of Proof

Article 66(2) of the Rome Statute provides that "[t]he onus is on the Prosecutor to prove the guilt of the accused." The relevant burden is—as it has been at every international tribunal since Nuremberg—proof beyond a reasonable doubt.[199] In addition, article 67(1)(i) guarantees a defendant the right "[n]ot to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal." The latter provision is particularly important, because it implies that the Rome Statute follows the Model Penal Code in requiring the prosecution to disprove the existence of grounds for excluding criminal responsibility proffered by the defendant, at least insofar as those grounds are supported by sufficient evidence.[200] That is the position taken by Roger Clark,[201] one of the most important drafters of

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Gaston Stefani

Georges Levasseur
Professeur honoraire à l'Université de droit,
d'économie et de sciences sociales de Paris

Bernard Bouloc
Professeur à l'Université Panthéon-Sorbonne (Paris I)

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CHAPITRE 2
L'ÉLÉMENT MORAL

253 ***Nécessité de l'élément moral*** ◇ Pour que l'infraction existe juridiquement, il ne suffit pas qu'un acte matériel (élément matériel), prévu et puni par la loi pénale ait été commis, il faut encore que cet acte matériel ait été l'œuvre de la volonté de son auteur. Ce lien entre l'acte et l'auteur, que le droit anglais appelle la *mens rea* (la volonté criminelle) par opposition à l'*actus reus* (acte criminel), constitue *l'élément moral* [1]. Il faut que l'élément moral se joigne à l'élément matériel (qu'il apparaisse avant, après, ou au même moment) pour que l'infraction soit constituée [2].

Le législateur en effet ne punit que les conséquences antisociales d'un acte volontaire. En l'absence de volonté, en cas de force majeure par exemple, il n'y a pas d'infraction. Cela est vrai non seulement pour les infractions dites intentionnelles, telles que les crimes et la majorité des délits, mais encore pour les infractions appelées non intentionnelles comme par exemple les délits d'imprudence et la plupart des contraventions de police [3].

Sans doute on a prétendu, et même jugé, que les contraventions de police étaient des infractions purement matérielles qui se trouvaient réalisées du seul fait de l'accomplissement de l'acte prohibé par la loi ou le

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1. Pour quelques auteurs, l'élément moral n'est pas un élément constitutif de l'infraction, mais une condition psychologique de la culpabilité de l'auteur d'une infraction, objectivement constituée (MERLE et VITU « Traité de droit criminel », 7e éd., n° 572 et ss. ; Comp. G. LEVASSEUR « Étude de l'élément moral de l'infraction », *Annales de la Faculté de droit de Toulouse*, t. XVIII, fac. 1, p. 81 et ss.). Pour d'autres, une fois l'imputabilité établie, il faut rechercher si la société reproche une « réaction hostile aux règles sociales », (A.C. DANA, Essai sur la notion d'infraction pénale, p. 343). Quelques auteurs estiment qu'il y a essentiellement l'acte et que les aspects psychologiques intéressent la responsabilité de l'agent (PRADEL, 12e éd., n° 493). A vrai dire, l'élément moral est bien un composante de l'infraction puisque, en son absence, le juge d'instruction est en droit de rendre une décision de non-lieu, et le juge de jugement une décision de relaxe ou d'acquittement.

2. Dans les comportements qui se poursuivent dans le temps, et constituent des infractions successives, la *mala fides superviens* pouvait rendre délictueux à partir d'un certain moment un comportement qui jusque-là était licite. Tel était le cas pour le recel, par exemple, lorsque le détenteur apprend l'origine de la chose (Crim. 22 juin 1972, *Gaz. Pal.*, 1972.1.842 et la note, *Bull.* n° 220 ; Crim. 15 juin 1973, *D.* 1973, *Inf. Rap.*, p. 158). Mais un revirement de jurisprudence s'est produit : Crim. 24 nov. 1977, *D.* 1978, J. p. 42, note KEHRIG « L'acquéreur d'un bien mobilier ne saurait être déclaré coupable de recel, lorsque la régularité de la possession et la bonne foi impliquent la réunion des conditions d'application de l'article 2279 C. civil », c'est-à-dire lorsqu'il est propriétaire de ce bien ; on ne peut être receleur de sa propre chose. V. aussi Crim. 24 janv. 1978, *Bull. crim.* n° 27 ; Crim. 3 déc. 1984, *Bull. crim.* n° 381.

3. Sur les adages concernant la nécessité d'une volonté coupable en droit romain et sous l'ancien droit, voir LAINGUI, *Rev. sc. crim.*, 1986, p. 38 et ss.

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règlement [1]. Mais la loi admet qu'une contravention puisse ne pas exister en cas de force majeure [2], et l'on reconnaît que les causes subjectives de non-culpabilité prévues par l'art. 122-1 à 122-3 C. Pén. font disparaître l'infraction, même en cas de simple contravention.

C'est dire que l'infraction, qu'il s'agisse d'un crime d'un délit ou d'une contravention, n'est constituée et donc punissable que si un auteur a eu la volonté ou la conscience de violer la loi pénale. Cette volonté ou conscience constitue l'élément commun à toutes les infractions. C'est donc à tort que l'on parle souvent « d'infraction involontaire ». L'expression « atteinte involontaire à la vie » par laquelle le Code pénal désigne l'homicide et les blessures par imprudence (art. 221-6 et 222-19) ne signifie nullement que ces délits ne sont pas l'œuvre d'une volonté (l'acte d'imprudence a été voulu) mais seulement que leurs conséquences n'ont pas été voulues.

Toujours nécessaire à l'existence de l'infraction — tous les actes délictueux sont volontaires — la volonté n'a cependant pas toujours le même rôle, ni la même étendue [3]. Tantôt elle ne porte que sur l'acte lui-même ; tantôt elle porte à la fois sur l'acte et sur ses conséquences. Lorsque l'auteur a voulu l'acte et ses conséquences et qu'il a accompli l'acte pour les produire, on dit qu'il y a intention criminelle ou dol pénal (meurtre, assassinat, vol, etc.). Quand l'auteur a voulu l'acte mais sans en vouloir les conséquences, qu'il aurait dû prévoir et pu éviter, on dit qu'il y a faute pénale (atteinte involontaire à la vie ou à l'intégrité physique, la plupart des contraventions).

254 ***Intention et faute*** ◇ Cette distinction de l'intention criminelle et de la faute n'est pas nettement posée dans notre législation. Les mots « intention » ou « dol » et « faute » étaient rarement employés par l'ancien Code pénal ou les lois postérieures. On trouvait plutôt les mots « préméditation, frauduleusement, sciemment, à dessein » ou même « volontairement ». Par ailleurs, le terme « faute »ne figurait guère dans les textes ; pour désigner la faute, le législateur parlait de « maladresse, d'imprudence ou de négligence » ou « de défaut d'adresse ou de précaution » (art. 320 C. pén). Quelquefois même, il passait complètement sous silence l'existence de l'intention ou de la faute, et c'est la jurisprudence qui indiquait si l'infraction nécessitait une faute prouvée [4] ou une faute

1. V. à propos de la contravention de dégradation de chemins publics (anc. art. R. 34-11°) : Crim. 7 mars 1918, S. 1921.I.89 note ROUX.

2. Crim. 15 mai 1926, S. 1928.I.33, note ROUX.

3. Sur l'élément moral en droit comparé, cf. BROSENS, « L'élément moral dans les infractions et le futur code pénal belge », *Rev. dr. pén. crimin.*, 1980, p. 407.

4. Depuis la loi du 29 déc. 1977 (art. 2), la Cour de Cassation décide qu'en matière de fraudes fiscales (art. 1741 et 1743 C.G.I.), il incombe au Ministère public et à l'administration, parties poursuivantes, de rapporter la preuve du caractère intentionnel soit de la soustraction soit de la tentative de soustraction à l'établissement ou au paiement des impôts : Crim. 5 juin 1979, *J.C.P.*, 1979.IV.263, *Rev. soc.*, 1980, p. 1980, p. 106, note B. BOULOC ; Crim. 8 juin 1979, D. 1979, *Inf. Rap.*, 527 ; Crim. 17 oct. 1983, *Rev. soc.*, 1985, p. 149 note B. BOULOC ; Crim. 29 juin 1987, *Bull.*

présumée [1], ou bien si l'élément moral devait obligatoirement consister dans une intention criminelle.

Et cependant, en ce qui concerne l'élément moral, la distinction de l'intention et de la faute est si importante que plusieurs législations étrangères en ont fait la base de leur division des infractions. A la classification tripartite de notre droit, en crimes, délits et contraventions, fondée apparemment sur la peine mais en réalité sur la gravité objective de l'acte, elles ont substitué une classification bipartite, en délits (crimes et délits), c'est-à-dire infractions intentionnelles d'une part, et contraventions, c'est-à-dire infractions non intentionnelles d'autre part (C. pén. norvégien de 1902, C. pén. italien de 1930, C. espagnol de 1944). Satisfaisante pour l'esprit, cette division serait difficile à appliquer dans notre droit positif, où tous les délits ne sont pas intentionnels (il y a, en effet, des délits d'imprudence), et où il existe des contraventions intentionnelles telles le dommage volontairement causé à la propriété mobilière ou immobilière d'autrui et la contravention de coups et blessures volontaires. De plus, cette division bipartite bouleverserait notre organisation judiciaire répressive, et la compétence respective des cours d'assises (crimes), des tribunaux correctionnels (délits) et des tribunaux de police (contraventions). Le droit français qualifiait cependant différemment les mêmes agissements selon qu'ils ont eu lieu de façon intentionnelle (auquel cas il y a crime ou délit) ou non intentionnelle (auquel cas il y a simplement contravention [2]).

Les rédacteurs du nouveau Code pénal ont, ce point, adopté une règle plus claire. Selon l'art. 121-3, « il n'y a pas de crime ou de délit sans intention de le commettre ». Le principe est donc que les infractions graves (crimes ou délits) sont naturellement intentionnelles. Toutefois, ils ont prévu, lorsque la loi en disposerait ainsi, qu'il y aurait délit en cas de mise en danger délibérée de la personne d'autrui et également en cas d'imprudence ou de négligence. Ainsi, une faute peut suffire en matière de délits. Par ailleurs, l'art 339 de la loi d'adaptation 16 décembre 1992 a entendu régler la question pour les délits matériels résultant de textes antérieurs au nouveau Code pénal. Ceux-ci ne peuvent être constitués qu'en cas d'imprudence, de négligence ou de mise en danger délibérée de la personne d'autrui. Cette disposition impose donc la constatation d'une faute pour les délits non intentionnels régis par des lois spéciales [3]. Quant aux contraventions, elles

n° 269. En matière de délit d'émission de chèques sans provision, la Cour de Cassation avait décidé, après la loi du 3 janvier 1975 et avant celle du 31 décembre 1991, que l'intention requise consiste dans la conscience de ce que le chèque sera impayé et dans la volonté de le laisser impayé (Crim. 3 avril 1979, *Bull. crim.* n° 133 ; Crim. 5 oct. 1983, *D.* 1984, p. 461). En matière de défense faite au tiré de payer (délit dit de blocage de la provision), l'intention de porter atteinte aux droits d'autrui n'existait pas s'il y avait contestation sur le montant de la créance : Crim. 13 avril 1983, *Bull. crim.* n° 102, *D.* 1984, p. 461 note B. BOULOC.

1. Elle faisait état, non plus d'infraction non intentionnelle, mais d'*infraction matérielle*, voir Crim. 28 avr. 1977, *D.* 1978, J. 149, note M.L. RASSAT, (pollution des cours d'eau).

2. V. par exemple en matière de fraude (L. 1er août 1905, art. 1 et ss. et 13 et ss. ; B. BOULOC, « La loi du 1er août 1905 en tant qu'instrument de la sécurité du consommateur » *in* ouvrage collectif sur la sécurité des consommateurs, L.G.D.J. 1987) ; ou de circulation routière (art. L. 10 et R. 241 code route : Crim. 28 févr. 1973, *Bull.* n° 101).

3. Certains auteurs ont prétendu que ce texte contredirait l'art. 121-3 C. Pén. et que la circulaire serait d'une obscure clarté (SOYER, droit pénal et proc. pénale, 14e éd., nos 202 à 205). A

peuvent comporter un élément intentionnel, ou une faute, mais celle-ci ne peut pas être retenue en cas de force majeure.

Il importe dès lors d'étudier, tout d'abord l'intention ou dol criminel (section 1) la faute pénale (section 2) et enfin la distinction des infractions intentionnelles et des infractions non intentionnelles (section 3).

SECTION 1. L'INTENTION OU DOL CRIMINEL

111 L'intention ou dol criminel constitue l'élément moral (sans doute est-il préférable de parler d'*élément psychologique*) dans les crimes, la plupart des délits [1] et exceptionnellement certaines contraventions [2]. Cette intention ne peut évidemment se concevoir que dans la mesure où la personne est dotée de conscience ; c'est pourquoi chez le dément, la question de l'existence de l'intention ne se pose même pas. En revanche, dans l'hypothèse de la contrainte, l'agent a conscience, et même a voulu l'acte, mais il n'était pas libre d'agir différemment, de sorte que sa responsabilité pénale sera écartée, bien que l'infraction ait été pleinement constituée.

la vérité, l'art. 339, d'origine législative est une mesure d'adaptation des solutions anciennes à la loi nouvelle, et signifie qu'une faute doit être établie pour qu'il soit possible de reconnaître la culpabilité de l'agent. Saisie de ce problème à propos d'infractions jugées avant le 1er mars 1994, la Cour de cassation a décidé que la constatation de la violation en connaissance de cause d'une prescription légale ou réglementaire impliquait l'intention coupable : Crim. 25 mai 1994, *Bull.* n° 203, *Rev. sc. crim.* 1995, p. 97, obs. BOULOC (vente sans facture) ; Crim. 12 juillet 1994, *Bull.* n° 280 (construction) ; Crim. 28 nov. 1994, *Bull.* n° 380 *Rev. sc. crim.* 1995, p. 570, obs. BOULOC (contributions indirectes) ; Crim. 14 déc. 1994, *Bull.* n° 415 (publicité trompeuse). V. aussi Crim. 25 oct. 1995, *Bull.* n° 322 ; Crim.26 oct. 1999, *Bull.* n° 233.

1. Bien que l'art. 121-3 C. Pén. exige en principe une intention, de nombreux textes croient nécessaire de faire état de la fraude ou de l'action volontaire (V. art. 311-1, 223-5, 313-4...). En matière de publicité trompeuse, depuis la loi du 27 décembre 1973, la mauvaise foi de l'agent n'est plus exigée : Crim. 8 mars 1978, *J.C.P.* 1979.*II*.19019 note FOURGOUX ; Crim. 4 déc. 1978, *D.* 1979, *Inf. Rap.*, 186 note ROUJOU DE BOUBÉE ; Crim. 13 mars 1979, *J.C.P.*, 1979.IV.179 ; Crim. 3 janvier 1984, *Bull.* n° 450 ; Crim. 5 avril 1995, *Bull.* n° 151.

2. Il faut tenir compte du fait que, même lorsqu'elle proclame que l'élément moral d'une infraction est un dol (intention criminelle), la jurisprudence se contente parfois, en pratique, d'un comportement qui ne dépasse guère la faute d'imprudence ; tel est le cas en matière de recel, de fraudes sur la qualité de la marchandise vendue, etc. La Cour de Cassation estime par ailleurs, que l'existence d'une intention coupable est implicitement contenue dans les constatations des juges du fait concernant l'élément matériel. Il en est ainsi depuis longtemps en matière de diffamation, de fraude dans les ventes (Crim. 21 juillet 1977, *D.* 1978, I.R. 111, note PUECH ; Crim. 11 oct. 1989, *Bull.* n° 355) ou le détournement dans le délit d'abus de confiance (Crim. 4 juill. 1972, *Bull.* n° 228 ; Crim. 5 avril 1973, *Bull.* n° 177, *D.* 1973, *Inf. Rap.*, p. 113 ; Crim. 9 avr. 1973, *Bull.* n° 179, *D.* 1973, *Inf. Rap.*, p. 133 ; Crim. 16 mars 1987, *Bull.* n° 122). En matière de pollution de cours d'eau, le prévenu ne peut être exonéré que par la force majeure (Crim. 28 avr. 1977, *D.* 1978, J. 149, note M.L. RASSAT, *J.C.P.* 1978.*II*.18931 note Mme DELMAS-MARTY). En matière de délits de société : V. Crim. 7 nov. 1983, *Rev. soc.*, 1984, p. 327, note BOULOC ; mais voir : Crim. 17 oct. 1983, *Bull. crim.* n° 246 et surtout Crim. 19 déc. 1973, *Rev. soc.*, 1974, p. 363, note BOULOC (abus de biens sociaux), et Crim. 1 mars 2000, *Bull.* n° 101 (nécessité de recherche l'interêt personnel du dirigeant).

§ 1. Définition et notion de l'intention criminelle

256 Au sens étymologique, l'intention *(intendere)* est la volonté tendue vers un certain but ; c'est une volonté dirigée. En droit pénal, l'intention criminelle qu'on appelle aussi le dol criminel est donc la volonté tendue à dessein vers un but interdit par la loi pénale (tuer ou s'approprier le bien d'autrui). Si le but recherché, quoique contraire en soi à l'ordre social, n'est pas défendu par un texte légal, la volonté de l'atteindre ne constitue pas une intention criminelle.

Partant de ce sens très général, deux notions très différentes de l'intention criminelle ont été dégagées : une notion classique et abstraite à laquelle s'oppose une notion positiviste et concrète.

A. La doctrine classique

257 D'après E. Garçon [1] et la plupart des *criminalistes classiques*, l'intention criminelle réside dans la connaissance ou la conscience chez l'agent qu'il accomplit un acte illicite [2]. D'une façon plus complète et plus précise (car pour qu'il y ait intention il ne suffit pas de connaître, il faut aussi vouloir), elle est la volonté d'accomplir un acte que l'on sait défendu par la loi pénale (homicide, vol, etc.) ou de s'abstenir d'un acte que l'on sait ordonné par la loi (omission volontaire de porter secours à une personne en péril, art. 223-6 C. Pén.).

Il est vrai qu'en raison de la règle *nemo censetur ignorare legem* et de la présomption de connaissance de la loi qu'elle fait peser sur chacun de nous, il n'est pas besoin, pour établir l'intention, de prouver que l'agent connaissait la loi pénale, mais seulement qu'il a eu la volonté de commettre l'acte défendu par la loi. La preuve de l'intention incombe normalement au ministère public [3]. Cependant la jurisprudence admet que, pour certaines infractions, l'existence de l'élément moral résulte de la seule constatation de l'élément matériel [4], ce qui n'est pas contraire à la présomption

1. Code pénal annoté, 1ère éd. art. I, n° 77.

2. Sur des espèces où la jurisprudence a admis l'absence d'intention, cf. Poitiers 7 févr. 1974, *D.* 1974.693, note PRADEL et ALAPHILIPPE (chantage du commerçant qui exige une somme très supérieure à la valeur de l'objet volé) ; Paris 22 juin 1974, *Gaz. Pal.*, 1974.2. Somm. 290 (abandon de famille).

3. *V. Procédure pénale*, 17e éd., n° 129.

4. C'est le cas pour le délit d'excitation de mineurs à la débauche (art. 334-1, dernier alinéa C. Pén.), pour le délit de contrefaçon d'une œuvre littéraire ou artistique (art. 425 C. Pén., cf. Crim. 15 mai 1934, D. H. 1934, p. 350 ; Crim. 12 juin 1976, *Bull.* n° 209), pour le délit de contrefaçon de marque (Crim. 26 avril 2000, *Bull.* n° 166) et pour le délit de diffamation (Crim. 3 janv. 1970, *D.* 1970, somm. 68 « Les imputations diffamatoires sont réputées faites avec intention coupable et portent elles-mêmes l'intention de nuire » ; Crim. 12 juin 1987, *B.* n° 247 ; Crim. 14 avril 1992, *B.* n° 162 ; Crim. 29 nov. 1994, *Bull.* n° 382). Voir : A. TOULEMON, « L'intention coupable en matière de diffamation » *J.C.P.* 1970.I.1230 ; CONTE, *Mélanges* Chavanne p. 49. Il est possible néanmoins au prévenu de démontrer sa bonne foi, et par suite l'absence d'élément moral, mais la charge de la preuve lui en incombe et le doute ne suffit pas, contrairement

d'innocence dès lors que l'intéressé a la possibilité de rapporter la preuve contraire [1].

Dans cette conception, l'intention existe du moment que celui qui a accompli l'acte délictueux est une personne vivante, douée de raison et de volonté. Les animaux, les morts et les déments ne peuvent avoir une intention criminelle et par suite ne peuvent tomber sous le coup de la loi pénale. En revanche, dès que la volonté d'accomplir un acte illicite existe, l'infraction intentionnelle se trouve réalisée [2] et la peine doit frapper sans distinction et sans merci, celui qui a commis cet acte, quelles que soient les raisons (mobiles ou motifs) pour lesquelles il l'a voulu [3]. Il importe peu qu'il ait agi par haine, par cupidité, par convoitise, par passion amoureuse ou politique, par fanatisme, par pitié ou sous l'influence de la misère ou de la nécessité. C'est cette conception qu'adopte la Cour de cassation depuis la mise en vigueur du nouveau Code pénal, notamment en ce qui concerne les délits matériels [4].

B. La conception réaliste

138 A cette notion classique s'oppose la *notion réaliste* de l'intention qui a été dégagée par les positivistes, en particulier par Enrico FERRI [5]. Pour ceux-ci, l'intention n'est pas une volonté abstraite, mais une volonté déterminée par un motif ou un mobile. Il faut donc analyser le mobile, rechercher s'il est social ou antisocial ; un fait n'est punissable que s'il a été voulu dans un but contraire à l'ordre social (cf. art. 63 du C. pén. suisse de 1937 ; art. 133 du C. pén. italien de 1930).

Entre la conception classique et la conception réaliste, le droit pénal français a choisi la conception classique : l'intention est tout à fait distincte des mobiles. Aussi, est punissable celui qui a recours à des moyens frauduleux pour tenter de rentrer en possession d'un bien lui appartenant, ou celui

au droit commun (Crim. 16 mai 1973, *Bull.* n° 225, *D.* 1973, *Inf. Rap.*, p. 136). La Cour de Cassation a de même répété fréquement qu'en matière d'abus de confiance, la mauvaise foi peut résulter nécessairement de la constatation du détournement (Crim. 5 nov. 1975, *Bull.* n° 237 ; Crim. 17 mai 1976, *Bull.* n° 159, *D.* 1976, *Inf. Rap.*, p. 177 ; Crim. 12 févr. 1979, *D.* 1979, *Inf. Rap.*, p. 482 ; Crim. 16 mars 1987, *Bull.* n° 122 ; Crim. 3 juillet 1997, *Bull.* n° 265). A propos du délit de pollution des cours d'eau, elle a jugé que « le fait d'avoir laissé s'écouler dans une rivière des substances toxiques implique une faute dont la preuve n'a pas à être spécialement rapportée par le ministère public et dont le prévenu ne peut être exonéré que par la force majeure » (Crim. 28 avr. 1977, *Bull.* n° 148, *D.* 1978.149, note critique M.L. RASSAT). Le droit anglo-américain connaît une solution assez voisine avec l'application de l'adage « *res ipsa loquitur* ».

1. V. Crim. 17 déc. 1991, *B.* n° 481, *Rev. sc. crim.*, 1993, p. 89 obs. BOULOC ; Crim. 1 février 2000, *Bull.* n° 51.

2. V. en matière de fraude fiscale : Crim. 11 janvier 1996, *Bull.* n° 19.

3. En matière de mise en danger délibérée, l'intention résulte du caractère délibéré de la violation d'une obligation particulière de prudence ou de sécurité : Crim. 9 mars 1999, *Bull.* n° 34.

4. V. en matière de construction sans permis : Crim. 25 mai 1994, *Bull.* n° 203 ; Crim. 12 juillet 1994, *Bull.* n° 280 ; Crim. 10 janv. 1996, *Bull.* n° 13. En matière de publicité illicite pour le tabac : Crim. 30 oct. 1995, *Bull.* n° 335.

5. *Sociologie criminelle*, p. 628 et ss. ; Crim. 10 mai 1976, *Bull.* n° 149, *D.* 1976, *Inf. Rap.*, 169.

qui cherche à empêcher la réalisation d'interruptions volontaires de grossesse en usant de menaces à l'encontre du personnel médical (art. L. 162-15 C. santé publique).

§ 2. Intention et mobile

259 Dans la conception positiviste, l'intention criminelle se confond avec le motif ou tout au moins est conditionnée par lui. D'après la conception classique, au contraire, qui ne voit dans l'intention criminelle qu'une volonté abstraite, l'intention et le mobile sont nettement distincts. Alors que l'intention, qui n'est autre que la volonté consciente d'accomplir un acte illicite est toujours la même, le mobile, c'est-à-dire l'intérêt ou le sentiment qui a déterminé l'action, ou encore « la cause impulsive et déterminante de l'acte criminel » est, par contre, essentiellement variable avec les individus et les circonstances.

Fidèle à cette conception classique, le Code pénal français ne considère que l'intention ; il ne tient aucun compte du mobile [1]. En règle générale, celui-ci est indifférent tant en ce qui concerne l'*existence* de l'infraction que la *répression* de celle-ci.

A. Le mobile et l'existence de l'infraction

260 ***Le principe : le mobile est indifférent*** ◇ En principe, l'infraction intentionnelle est constituée, dès l'instant qu'il y a intention criminelle, quel que soit le mobile de cette infraction [2]. Dans certains cas cependant, la considération du motif peut faire considérer comme licite un acte qui par ses éléments extérieurs participe à la nature d'un délit et inversement faire considérer illicite, un acte, qui sans le mobile qui l'a inspiré, ne le serait pas.

C'est ainsi, prétend-on, qu'il n'y a pas infraction, bien qu'il y ait intention, lorsque l'acte délictueux a été commis en état de légitime défense (art. 122-5 C. Pén.) ou sur

1. Voir : Angers 30 janv. 1969, *Gaz. Pal.*, 1969.I.291 ; Crim. 18 juill. 1973, *Gaz. Pal.*, 1973.2.709, note J.P.D. ; Crim. 13 mars 1974, *Bull.* n° 107, *Gaz. Pal.*, 1974.I.421 ; Crim. 24 févr. 1976, *Bull.* n° 69, *D.* 1976, *Inf. Rap.*, p. 126 (violences volontaires et dégradation de véhicules). Cf. MIMIN, « L'intention et le mobile », *Mélange Patin*, p. 113.

2. Crim. 21 oct. 1969, *Bull.* n° 258 ; Crim. 18 juill. 1975, *Gaz. Pal.*, 1975.II.661 ; Crim. 8 févr. 1977, *Bull.* n° 52, obs. LEVASSEUR, *Rev. sc. crim.*, 1977, p. 590, n° 3 : la destruction de fleurs sur une tombe constitue le délit de vol « quels qu'en soient les mobiles » ; Crim. 8 déc. 1998, *Bull.* n° 336 ; Crim. 19 mai 1983, *Bull. crim.* n° 150, *Rev. sc. crim.*, 1984, p. 736, obs. LARGUIER : les juges ne peuvent se déterminer par des considérations étrangères au principe de la légalité des délits et des peines et tirées de l'allégation d'un mobile subjectif ; en l'espèce, la raison d'ordre idéologique invoquée par un maître-assistant des facultés de droit pour écarter un délit de fraude fiscale, n'a pas été retenue ; Crim. 7 juin 1988, *Bull.* n° 289 arrêt n° 1, obs. LEVASSEUR, *Rev. sc. crim.*, 1989.107 (plaisanterie) ; Crim. 8 janvier 1992, *Bull.* n° 5 (vente de bois par des ouvriers forestiers pour se payer des salaires non perçus par la suite d'une grève) ; Crim. 21 oct. 1998, *Bull.* n° 273 (refus de vente de produits contraceptifs en raison de convictions personnelles, et non d'une indisponibilité matérielle des produits).

l'ordre de la loi et le commandement de l'autorité légitime (art. 122-4 C. Pén.) ou en état de nécessité parce qu'en ce cas le mobile de l'agent n'est pas antisocial. Il nous paraît plus exact de dire que dans tous ces cas l'acte se trouve justifié par la loi et qu'il ne constitue plus une infraction en raison de la disparition de l'élément légal [1].

S'il est douteux que le mobile à lui seul fasse disparaître l'infraction, il est, en tout cas, certain qu'il est parfois un élément constitutif de l'infraction.

441 ***L'exception : la prise en considération du mobile*** ◇ L'intention criminelle, considérée comme une volonté abstraite, ne suffit plus alors à constituer l'infraction ; celle-ci n'existe qu'en raison du mobile qui l'a inspirée. Ainsi, la loi du 28 juillet 1894 ne réprimait les menées anarchistes que si elles avaient été faites « dans un *but* de propagande anarchiste» (art. 1 et 2). En cas d'atteinte au crédit de l'État, la loi du 12 février 1924 ne frappait que ceux qui avaient agi « dans un but de spéculation ou de dépréciation de la monnaie ».

La considération du but pour l'incrimination apparaît aussi dans certaines atteintes aux intérêts fondamentaux de la Nation. Il est aussi présent dans les actes de terrorisme (art. 421-1 C. Pén.).

La diffamation de certains groupes sociaux n'était réprimée avant la loi du 1er juillet 1972, que si elle avait pour *but* d'exciter à la haine entre les citoyens (loi 29 juill. 1881, art. 32 modifié par décret-loi 21 avril 1939). De même, l'infraction prévue par l'article 434-25 C. Pén. n'est réalisée que si l'auteur commentant la décision judiciaire a cherché à porter atteinte à l'autorité de la Justice [2]. La provocation à l'abandon d'un enfant né ou à naître, comme l'entremise apportée pour faire recueillir ou adopter un enfant, ne sont punissables que si l'agent a agi « dans un esprit de lucre » (art. 227-12 C. pén.). La banqueroute n'est punissable, dans certains cas, que si l'agent a fait des achats en vue d'une revente au-dessous du cours ou a employé des moyens ruineux pour se procurer des fonds, et ce dans l'intention d'éviter ou de retarder l'ouverture de la procédure de redressement judiciaire (art. 197-1, loi du 25 janv. 1985).

Enfin, le délit d'organisation de sa propre insolvabilité, institué par l'art. 1er de la loi du 8 juill. 1983 (art. 314-7 C. Pén.) requiert de l'agent qu'il ait eu en vue de se soustraire à l'exécution d'une condamnation pécuniaire prononcée par une juridiction répressive ou, en matière délictuelle, quasi-délictuelle ou d'aliments, par une juridiction civile.

Ce ne sont là que des cas exceptionnels. En principe, le mobile n'intervient pas dans la constitution du délit ; celui-ci est réalisé par la seule volonté criminelle, abstraction faite du mobile qui l'a déterminée.

1. Crim. 24 févr. 1976, *Inf. Rap.*, 126 et 127, relatif à un délit de dégradation volontaire de véhicules ; Crim. 15 mars 1977, *Bull.* n° 94, *D.* 1977, *Inf. Rap.*, 28, concernant le délit de coups et blessures volontaires. Ces délits sont constitués dès lors qu'il existe un acte volontaire, quel que soit le mobile qui les ait inspirés, et alors même que leur auteur n'aurait pas voulu le dommage qui en est résulté. Il en est de même, nous semble-t-il, dans le cas de justification prévu par l'ordonnance du 6 juillet 1943, dont l'article 1 a déclaré légitimes « tous les actes accomplis postérieurement au 10 juin 1940, *dans le but* de servir la cause de la libération de la France », quand bien même ils auraient constitué des infractions au regard de la législation appliquée à l'époque.

2. Crim. 27 févr. 1964, *D.* 1964.623.

Sans influence sur l'existence ni la qualification de l'infraction, le mobile a influe pas davantage sur la peine ; il peut, au contraire, jouer un rôle sur le terrain de la compétence et de la procédure.

B. Le mobile et la répression de l'infraction

262 Sans doute, l'article 224-4 du nouveau Code pénal, punit de la peine de la réclusion criminelle de 30 ans, non seulement l'enlèvement d'une personne comme otage, mais encore l'enlèvement accompli *en vue* de se faire payer une rançon, ou d'obtenir l'exécution d'un ordre ou d'une condition. Mais, en règle générale, la loi ne tient pas compte des motifs. Elle prévoit toujours la même peine, *quel qu'ait été le mobile de l'acte*. L'assassin, qu'il ait tué par vengeance, par haine, par pitié (euthanasie) ou par amour (crime passionnel) est punissable de la réclusion criminelle à perpétuité (art. 221-3 C. Pén.). De même qu'il ait volé par cupidité, par convoitise, par habitude, par manie (kleptomane) ou par misère, l'auteur d'un vol simple est toujours exposé à la peine de prison édictée par l'article 311-3 C. Pén.

263 Toutefois si, *en droit*, le mobile n'a aucun effet sur la peine, *en fait* il en est autrement. En vue de corriger la rigueur excessive et automatique de la loi, le juge tient souvent compte des mobiles dans l'application judiciaire de la peine. Les cours d'assises acquittent fréquemment, trop souvent peut-être, les criminels passionnels. Quand le mobile ne lui paraît pas répréhensible, le juge répressif n'hésite pas à acquitter, en déclarant que le prévenu n'est pas coupable et qu'il a agi sans intention délictueuse, ce qui suppose une confusion regrettable entre l'intention et le mobile. Et même, lorsqu'il condamne, en considération du motif qui a inspiré l'auteur, il condamne celui-ci à une peine inférieure au maximum légal, car la loi lui permet de tenir compte des circonstances de l'infraction et de la personnalité de son auteur (art. 132-24 C. Pén.) [1].

Or plutôt que d'acquitter ou de condamner à une peine moins sévère, ne conviendrait-il pas, dans un but de défense sociale, puisque aussi bien un acte antisocial a été commis, d'en punir toujours l'auteur, mais de lui appliquer une sanction d'un caractère différent (déshonorant ou non) suivant le motif qui l'a fait agir ? C'est le système des *peines parallèles*, en vertu duquel le juge, en tenant compte du mobile, peut prononcer soit une peine humiliante et infamante (la réclusion), soit une peine « honorable » (la détention). Sous l'influence de la doctrine néo-classique, le Code pénal italien de 1889 l'avait admis pour certaines infractions (avortement, infanticide, abandon d'enfant nouveau-né) accomplies pour un « mobile d'honneur » ; le Code pénal italien de 1930 n'a pas reproduit ce parallélisme des peines, qui a trouvé son application la plus large dans le Code pénal norvégien de 1902 (art. 24) et l'ancien code pénal de Cuba de 1936 (art. 55).

Il existe bien en droit français une double échelle de peines : peines de droit commun et peines politiques, mais cette double échelle n'existe que pour les crimes,

1. Par exemple pour une modération de la peine : Crim. 25 mars 1998, Dr. pén. 1998 n° 112 obs. Veron.

et par ailleurs le critère de la distinction des infractions de droit commun et des infractions politiques repose plutôt sur la nature objective de l'acte que sur la considération du mobile politique de l'auteur [1]. Ce n'est donc pas le système des peines parallèles ; et c'est regrettable, car si, quel qu'ait été le motif qui ait poussé à commettre un acte délictueux, une sanction s'impose, en cas de motif honorable cette sanction pourrait ne pas être infâmante.

C. Le mobile et la procédure

264 Le mobile est pris en considération par la jurisprudence pour décider que deux infractions sont unies par un lien d'indivisibilité. Il en est ainsi lorsque les différents faits ont été « commis dans le même trait de temps, dans le même lieu et ayant été déterminés par le même mobile ». En pareil cas, cette indivisibilité agit d'ailleurs non seulement sur la compétence, mais même sur le caractère intentionnel ou non des divers agissements reprochés [2].

Par ailleurs, depuis la loi du 9 septembre 1986, le droit pénal prend en compte le mobile pour soumettre les infractions de terrorisme à certaines règles dérogatoires de procédure pénale, et en particuler à la compétence de la Cour d'assises sans jurés (V. art. 421-1 C. Pén. et art. 706-16 et ss. C.P.P.). Il s'agit, rappelons-le, d'actes « en relation avec une entreprise individuelle ou collective *ayant pour but* de troubler gravement l'ordre public par l'intimidation ou la terreur ».

§ 3. Les modalités et les degrés de l'intention criminelle

265 Bien qu'elle soit une volonté abstraite indépendante des motifs qui l'ont déterminée, l'intention criminelle n'est pas cependant uniforme ; elle peut comporter des modalités différentes et des degrés divers [3]. Le droit pénal classique distingue, en effet, le *dol général et le dol spécial, le dol simple et le dol aggravé, le dol déterminé et le dol indéterminé, et enfin le dol direct et le dol éventuel.*

1. Voir *supra,* n° 190 ; Comp. Crim. 28 sept. 1970. *D.* 1971, p. 36, note F. CHABAS, qui a assimilé à une infraction politique en ce qui concerne la contrainte par corps, le délit de dégradation d'un monument d'utilité publique par une inscription d'un libellé objectivement politique. Et même, pendant quelques années, en vertu d'un décret du 16 septembre 1971 (art. D. 496. C.P.P., qui a été abrogé par un décret du 23 octobre 1975), ont pu bénéficier d'un régime spécial de détention, les personnes qui, lorsqu'elles ont commis leur infraction, étaient animées par des mobiles présentant un caractère politique.

2. Crim. 28 juill. 1969, *Gaz. Pal.*, 1969.2.364, note J.P. DOUCET, obs. LEVASSEUR, *Rev. sc. crim.*, 1970, p. 96.

3. Cf. BERNARDINI, « L'intention coupable en droit pénal », thèse Nice, 1976, 2 vol. (ronéo) ; A. HAUTEVILLE, « La gradation des fautes pénales », in *Réflexions sur le nouveau Code pénal,* Pédone 1995, p. 31.

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A. Dol général et dol spécial

266 Le *dol général* consiste selon E. Garçon [1] dans la volonté d'accomplir un acte que l'on sait défendu par la loi [2] et il n'est pas toujours suffisant. Quelquefois, la loi subordonne l'existence de l'infraction à une volonté criminelle plus précise qu'on appelle le *dol spécial* ou dol spécifique [3]. C'est ainsi qu'en plus de la volonté consciente de violer la loi pénale, elle exige, en outre, soit l'intention de donner la mort (art. 221-1 N. C. pén.) [4], soit la volonté de s'approprier la chose d'autrui (en cas de vol par exemple, art. 311-1 C. Pén.), soit la volonté de causer un préjudice individuel ou social (en cas de faux documentaire, art. 441-1 C. Pén.), En cas de diffamation, la volonté de nuire à l'honneur ou à la considération d'une personne (art. 29 loi du 29 juillet 1881) [5] est exigée, tandis qu'en matière de chèque émis au mépris d'une interdiction, la loi impose que l'agent ait eu l'intention de porter atteinte aux droits d'autrui [6].

B. Dol simple et dol aggravé

267 Le dol est par ailleurs susceptible de degrés, dont la considération peut influer sur la qualification et la répression [7],

A cet égard, au dol simple qui entraîne la peine ordinaire, on oppose le dol aggravé ou *préméditation* [8], qui entraîne une peine plus sévère, en cas d'homicide et de coups et blessures (art. 221-3, 222-12, 222-13 C. Pén.). Ainsi, le meurtre avec préméditation constitue un assassinat, punissable de la réclusion criminelle à perpétuité, au lieu de la réclusion criminelle de trente ans.

1. Voir *supra*, n° 257.

2. L'existence même du dol général est contestée par A.C. DANA, au moins sur le plan conceptuel. A ses yeux la volonté de l'agent est absorbée par l'imputabilité et la conscience de l'illicéité par la légalité pénale.

3. Pour A.C. DANA, le dol spécial consiste dans la volonté utilisée dans le but de nuire à une valeur sociale déterminée ; le comportement de l'agent est une réaction d'hostilité, et non de simple indifférence.

4. Crim. 9 janv. 1990, obs. LEVASSEUR, *Rev. sc. crim.*, 1990, p. 337 ; Crim. 23 janvier 1990, *Dr. pén.* juillet 1990, n° 215 obs. VÉRON ; obs. LEVASSEUR, *Rev. sc. crim.*, 1990, p. 784 ; Crim. 13 novembre 1990, obs. LEVASSEUR, *Rev. sc. crim.*, 1991, p. 345.

5. V. Crim. 23 mars 1978, *J.C.P.* 1978.IV.168 ; Crim. 15 oct. et 19 nov. 1985, *Bull. crim.* n^{os} 315 et 363 ; Crim. 28 février 1989, *Bull.* n° 98 ; Crim. 29 nov. 1994, *Bull.* n° 382.

6. V. Crim. 13 avril1983 et 5 oct. 1983, *D.* 1984, p. 461 note BOULOC ; Crim. 21 oct. 1985, *D.* 1986, *Inf. Rap.*, 406 obs. ROUJOU DE BOUBÉE ; Crim. 22 mai 1989, *Bull.* n° 210. V. aussi Crim. 4 janvier 1996, *Bull.* n° 3.

7. L'ancien Code pénal faisait de la provocation en matière d'atteintes à l'intégrité physique, une cause d'atténuation de la peine, sans doute parce que la volonté de l'agent avait été influencée. Le nouveau Code pénal n'a pas retenu cette excuse, qui est mentionnée cependant à l'art. R. 621-2 (injure non publique).

8. Le guet-apens comporte nécessairement un dessein formé à l'avance et par conséquent la préméditation : Crim. 22 févr. 1989, *Bull.* n° 89, comp. obs. LEVASSEUR, *Rev. sc. crim.*, 1989, p. 737. Le nouveau Code pénal ne fait plus état du guet-apens.

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La préméditation qui consiste dans le dessein formé avant l'action de commettre un crime (ou un délit) déterminé constitue une circonstance aggravante de l'homicide volontaire [1]. Aussi bien, cette circonstance aggravante doit faire l'objet d'une question posée à la Cour d'Assises [2]. Bien qu'elle puisse n'exister que chez l'auteur lui-même, la jurisprudence a souvent considéré qu'elle constituait une circonstance aggravant la criminalité de l'acte, et l'appliquait au complice de l'assassin [3].

C. Dol déterminé et dol indéterminé

168 Si l'on envisage la volonté non plus dans ses degrés et son intensité, mais dans ses résultats, on est amené à distinguer le dol *déterminé* et le dol *indéterminé*.

Le dol est déterminé lorsque l'agent a voulu d'une façon précise commettre tel crime ou tel délit (tuer ou voler) et à l'encontre de telle personne déterminée. Il l'est également quand l'agent a voulu le résultat, mais n'a pas connu l'identité de la victime, car la détermination du dol dépend d'abord de l'étendue de la volonté par rapport au résultat de l'infraction. En revanche, il est indéterminé lorsque l'agent n'a pas voulu l'acte délictueux d'une façon précise en ce qui concerne soit la gravité du résultat, soit l'identité de la victime [4].

Ainsi, celui qui volontairement donne des coups peut provoquer chez la victime une douleur passagère, des ecchymoses, une incapacité temporaire, une incapacité permanente (perte d'un œil, de l'usage d'un membre), soit même la mort. L'auteur de ces coups va-t-il être puni d'après la gravité du résultat produit, mais qu'il n'a pas précisément voulu *(dolus indeterminatus determinatur eventu)* ? C'est la solution consacrée pour les coups et blessures volontaires par les art. 222-7, 222-9, 222-11 et R. 625-1 C. Pén., et pour l'incendie volontaire par les art. 322-9 et 322-10 C. Pén. En général, la peine est proportionnée à la gravité du dommage éprouvé par la victime.

De même, lorsque l'indétermination porte sur l'identité de la victime, la loi considère que l'agent avait l'intention de créer un danger pour les personnes qui en seront les victimes (art. 322-6 C. Pén.) ; elle assimile

1. Voir *infra*, n° 343. Aussi, doit-elle faire l'objet d'une question distincte dans une accusation pour homicide volontaire : Crim. 19 oct. 1977, *D.* 1978, *Inf. Rap.*, 52 ; Crim. 15 déc. 1982, *Bull.* n° 294.

2. V. en ce qui concerne la circonstance aggravante de préméditation : Crim. 4 janv. 1978. *J.C.P.* 1978.IV.77 ; Crim. 2 avr. 1979, *D.* 1979, *Inf. Rap.*, 548.

3. Crim. 5 juin 1956, *D.* 1956.576 ; Crim. 27 déc. 1960, *B.* n° 621 ; Crim. 12 mai 1970, *D.* 1970.515, qui ont étendu au complice la circonstance aggravante de la préméditation. V. *infra*, n° 343.

4. Sur l'indétermination de la victime, en cas de piège à feu, voir : Crim. 17 mai 1977, *J.C.P.* 1978.II.18869, note BOUZAT ; Troyes, 24 mai 1978, *J.C.P.*, 1979.II.19046, note BOUZAT ; Reims, 8 nov. 1978, *D.* 1979.92, note PRADEL, *J.C.P.*, 1979.II.19046, note BOUZAT.

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encore le dol indéterminé au dol déterminé, car il y a eu volonté de produire les résultats nuisibles [1].

269 ***Dol éventuel*** [2] ◇ Mais, lorsque l'agent, sans vouloir en aucune façon le résultat dommageable qui s'est produit, ou même aucun résultat, l'a simplement prévu comme possible, on parle alors de dol éventuel. C'est le cas du directeur d'une compagnie de transport aérien qui fait partir un avion qu'il sait ne pas être en parfait état de navigabilité. Si des passagers sont tués au cours de ce transport, peut-on dire qu'il soit coupable d'un homicide volontaire ? C'est également le cas de l'automobiliste imprudent qui double d'autres voitures au sommet d'une côte et provoque la mort d'un automobiliste venant en sens inverse. Peut-il être poursuivi comme auteur d'un homicide volontaire ? Le résultat délictueux n'est-il pas plutôt la conséquence d'une faute d'imprudence ?

Du point de vue psychologique, le dol éventuel se situe entre l'intention proprement dite et la faute d'imprudence ou de négligence, qui ne suppose ni l'acceptation éventuelle du résultat illicite, ni la recherche d'un tel résultat. Aussi, la plupart des auteurs et même la jurisprudence [3] considèrent-ils le dol éventuel comme une simple faute. Si probable qu'ait été le résultat, le fait d'avoir agi sans l'avoir voulu, constitue une faute d'imprudence, fût-elle lourde, mais en tout cas non intentionnelle [4], car pour qu'il y ait intention, il faut qu'il y ait eu prévision et acceptation au moins éventuelle du résultat [5].

Toutefois, la solution contraire, qui assimile le dol éventuel au dol direct et le punit comme une intention criminelle, a trouvé son application légale dans le cas où un incendie volontairement provoqué a entraîné accidentellement la mort ou les blessures d'une ou plusieurs personnes (art. 322-10 C.P.). D'après ce texte, l'auteur de cet incendie est punissable de réclusion criminelle à perpétuité, comme s'il avait eu l'intention de tuer les victimes accidentelles [6]. De même, aux termes de l'article 222-14 du nouveau Code pénal, les auteurs de violences habituelles sur des enfants de moins de 15 ans, sont punissables de trente ans de réclusion criminelle, — dès lors que ces mauvais traitements ont entraîné la mort — même si les blessures, les coups ou la privation d'aliments n'ont pas été accomplis dans l'intention de la donner.

1. Crim. 4 mai 1984, obs. LEVASSEUR, *Rev. sc. crim.*, 1984, p. 737 ; Crim. 21 oct. 1998, *Bull.* n° 269.

2. DUVAL, « Le dol éventuel » thèse Paris 1900 ; JIMENEZ DE ASUA, « La faute consciente et le dolus eventualis », *Rev. crim.*, 1959-1960, p. 603 ; J. CÉDRAS « Le dol éventuel : aux limites de l'intention », *D.* 1995, ch. 18.

3. Crim. 27 mars 1902, *Bull.* n° 128.

4. On rappellera que le nouveau Code pénal inclut dans les délits non intentionnels, les cas d'imprudence ou de négligence mais aussi « la mise en danger délibérée de la personne d'autrui » dont la sanction est plus forte que celle de la simple imprudence.

5. Sur le dol éventuel en droit belge, cf. J. VERHAEGEN, *Liber Amicorum H. BEKAERT*, p. 437.

6. Crim. 2 juillet 1986, *Bull. crim.*, n° 229, obs. LEVASSEUR, *Rev. sc. crim.*, 1987, p. 202.

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170 *La mise en danger délibérée* ◇ Les rédacteurs du nouveau Code péna ont entendu aussi prendre en compte le dol éventuel lorsqu'ils ont retenu comme élément moral « la mise en danger délibérée de la personn d'autrui » (art. 121-3, al. 2 C. Pén.) [1]. Ainsi, en cas de manquement déli béré à une obligation de sécurité ou de prudence, l'homicide involontaire es puni plus sévèrement (art. 221-6 C. Pén.), comme d'ailleurs les blessure involontaires (art. 222-19, al. 2 C. Pén.). De même, il existe quelques incri minations de mises en danger de la personne (art. 223-1 et ss. C. Pén.) Dans ces différentes situations, la loi n'a pas assimilé le dol éventuel au do direct, mais elle a considéré qu'il s'agissait d'une faute aggravée se rappro chant de l'intention. On pouvait craindre que cet échelon intermédiaire n soit source d'arbitraire [2].

Mais la Cour de cassation a veillé à ce qu'une obligation particulière d sécurité et de prudence préexiste [3], ce qui est souvent le cas en matière d circulation routière [4], ou de navigation maritime [5]. De plus, elle a jugé que l faute constitutive de la mise en danger est caractérisée par la violatio manifestement délibérée de l'obligation imposée par la loi ou le réglemen sans que l'agent ait eu connaissance du risque particulier causé par so manquement [6].

171 *Le résultat excédant les prévisions de l'agent* ◇ Du dol éventuel, o rapproche généralement l'*infraction praeterintentionnelle* dans laquelle l résultat produit dépasse le but que se proposait l'agent, et est beaucoup plu grave qu'il ne l'avait voulu. Il en est ainsi lorsque, par exemple, celui qui ava simplement l'intention de blesser a tué. Faut-il punir l'auteur de ces coup mortels par leur résultat, comme s'il avait eu l'intention de tuer, comme u meurtrier ? Ou bien, puisqu'il n'a eu que l'intention de blesser, comm l'auteur d'un homicide par imprudence ?

Dans le délit praeterintentionnel, comme dans le dol éventuel, le résulta tel qu'il s'est réalisé, n'a pas été voulu ; dans les deux cas, l'intention n'a p

1. V. ACCOMANDO et GUÉRY, « Le délit de risque causé à autrui ou de la malencontre l'art. 223-1 N.C. Pén. », *Rev. sc. crim.* 1994, p. 68 ; M. PUECH « De la mise en danger d'autrui », 1994, chr. 153 ; V. aussi A. d'HAUTEVILLE, « La gradation des fautes » in *Réflexions sur le nouve Code pénal*, Pédone 1995, p. 40 et ss.

2. V. pour une vitesse de 200 km/h sur autoroute : Douai 26 oct. 1994, *D.* 1995, p. 174 nc COUVRAT et MASSÉ (pas de mise en danger) ; TGI Saint-Etienne 4 et 10 août 1994, *Gaz. P.* 1994.II.773 et 775 ; Paris, 9 nov. 1995, *Dr. pén.* 1996, n° 57, obs. VÉRON ; Paris, 27 oct. 1995, *D pén.* 1996, n° 5 *D.* 1996 p. 445 note COCHE (vitesse excessive).

3. Crim. 25 juin 1996, *Bull.* n° 274, *Rev. sc. crim.* 1997, p. 106 obs. Y. MAYAUD et p. 390 ol J.H. ROBERT.

4. Crim. 12 mars 1997, *Bull.* n° 102 ; Crim. 12 nov. 1997, *Bull.* n° 384 ; Crim. 11 mars 19 *Bull.* n° 99 ; *J.C.P.* 1998.II.10064, note HOYEZ.

5. Crim. 11 févr. 1998, *Bull.* n° 55, *J.C.P.* 1998.II.10084 note J.Y. COCHE, *Rev. sc. crim.* 19 p. 545 obs MAYAUD rejetant le pourvoi c/ Rennes 26 sept. 1996, *J.C.P.* 1997.II.22902 note J CHEVALLIER.

6. Crim. 16 fév. 1999, *Bull.* n° 24 ; Crim. 9 mars 1999, *Bull.* n° 34 (pratique du ski sur u piste interdite).

porte sur le résultat effectivement produit. Mais — et c'est là la différence — tandis que dans le dol éventuel, le résultat qui n'a pas été prévu ou l'a été simplement comme possible, n'a été voulu ni sous la forme dans laquelle il s'est réalisé, ni sous une forme moins grave, dans le délit praeterintentionnel, au contraire, le résultat a été partiellement voulu. Par là, le délit praeterintentionnel se rapproche du délit intentionnel, où le résultat qui s'est produit a été voulu ; il s'en distingue cependant en ce que l'intention n'a porté que sur un résultat moins grave que le résultat réalisé. C'est pour cette raison que le Code pénal (art. 222-7), édicte seulement la peine de la réclusion criminelle à temps de quinze ans, et non pas la peine de la réclusion criminelle de trente ans (applicable au meurtrier volontaire) contre l'auteur de coups et blessures volontaires ayant entraîné la mort sans intention de la donner.

En réalité, le dol éventuel, la mise en danger délibérée et l'infraction praeterintentionnelle constituent une catégorie intermédiaire entre l'intention criminelle et la faute. Avec eux, on se trouve aux limites de l'intention, et très proche de la simple faute pénale.

SECTION 2. LA FAUTE PÉNALE

272 Dans toutes les infractions, même dans les infractions non intentionnelles (délits d'imprudence, ou involontaires [1], délits punissables malgré la bonne foi de leur auteur [2], la plupart des contraventions de police [3]) qui ne supposent pas une intention criminelle, il existe un élément moral. Cet élément consiste dans une simple faute : la faute pénale. Mais celle-ci n'a pas la même nature, ni les mêmes caractères suivant qu'il s'agit d'un délit d'imprudence ou d'une contravention [4].

§ 1. La nécessité d'une faute dans les infractions non intentionnelles

272 L'existence d'une faute, qui n'a jamais été contestée pour les délits d'imprudence, l'a été en revanche pour quelques délits correctionnels et la plupart des contraventions qui n'exigent pas une intention coupable et sont punis-

1. Cas des homicides et blessures par imprudence (art. 221-6, 222-19 et R. 625-1 C. Pén.)

2. Par exemple : délits en matière de chasse ou de pêche.

3. A l'exception de celles pour lesquelles la loi exige un élément moral analogue au dol général ou spécial, connue par exemple l'art. R. 635-1, R. 623-1, R. 625-1 C. Pén. (coups et blessures volontaires, dégradation volontaire du bien d'autrui).

4. Pour A.C. Dana il s'agit cependant dans les deux cas d'une réaction d'indifférence du délinquant à l'égard des valeurs sociales, ce qu'il appelle la « faute normative ». Celle-ci implique la culpabilité sans recherche sur la psychologie de l'agent. La faute serait tout fait de l'homme défaillant par rapport à une norme de conduite (*op. cit.* p. 542). On remarquera que cette conception donne plus d'importance à la recherche du lien de causalité avec le dommage subi par la victime.

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sables du fait même de leur commission. On a prétendu, l'on a même jugé [1] que ces infractions purement *matérielles* se trouvaient réalisées par le seul fait de leur commission, indépendamment de la volonté de leur auteur. En d'autres termes, à la différence des crimes et de la grande majorité des délits qui supposent trois éléments, les contraventions et les délits contraventionnels ne comporteraient que l'élément légal et l'élément matériel ; l'élément moral en serait exclu. A suivre cette opinion, l'auteur d'une contravention ou d'un délit contraventionnel, du moment qu'il a commis l'acte matériel, devrait toujours être puni non seulement lorsqu'il a été de bonne foi, mais même s'il a agi sous l'empire de la démence ou de la force majeure. Telle n'est pas la position de notre droit, qui a tenu, avec le nouveau Code pénal à affirmer le principe même de la responsabilité de son propre fait (art. 121-1), et à soumettre les « délits matériels » à la constatation d'une faute (art. 339 loi du 16 déc. 1992) [2].

114 La *jurisprudence* décide qu'en cas de force majeure la contravention n'est pas punissable [3], solution qui se trouve confirmée par l'art. 121-3, al. 5 C. Pén. Par ailleurs, de nombreux criminalistes admettent que les faits justificatifs (légitime défense, ordre de la loi, état de nécessité) et les causes de non-imputabilité (démence et contrainte) qui suppriment la faute pénale, font en même temps disparaître la contravention. Sans faute, pas d'infraction *(Nulla poena sine culpa)* [4]. Telle est semble-t-il, la position qui résulte du nouveau Code pénal, dont les dispositions sur les causes d'irresponsabilités ne sont pas limitées aux crimes et aux délits.

Ce qui a pu faire croire que la faute n'était pas nécessaire en matière de contravention, c'est que la faute contraventionnelle n'a généralement pas à être prouvée et que, d'autre part, la preuve de l'absence de faute ne libère pas le contrevenant [5]. Or cela tient à ce que dans la plupart des contraventions, la faute n'a pas du tout la même nature que dans les délits d'imprudence.

§ 2. Distinction de la faute d'imprudence et de la faute contraventionnelle

A. Particularités de ces deux fautes

115 ***Notion de faute d'imprudence*** ◇ La faute d'imprudence, qui n'est pas définie d'une façon générale par le Code pénal, consiste d'après les articles 221-6, 222-19 et R. 625-2 du nouveau Code pénal « en une maladresse, imprudence, inattention, négligence ou manquement à une obliga-

1. Crim. 7 mars 1918, S. 1921.I.89, note ROUX.
2. V. en matière de fraude (art. L. 213-4 C. Cons.) : Crim. 22 août 1995, *Bull.* n° 268 : V. aussi *supra* n° 254.
3. Crim. 15 mai 1926, S. 1929.I.33, note ROUX.
4. LÉGAL,« La responsabilité sans faute et les délits matériels », *Mélanges* Patin, p. 129.
5. V. Crim. 16 nov. 1976, *Bull.* n° 325.

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tion de prudence ou de sécurité imposée par la loi ou les règlements ». En outre, le manquement délibéré à une obligation de sécurité ou de prudence imposée par la loi ou le règlement est pris en compte par le nouveau Code pénal, ce qui constitue soit une infraction autonome, soit une circonstance aggravante. Dans ce dernier cas, il y a mise en danger, qui constitue une faute aggravée, mais la sanction dépendra encore du résultat produit et non vraiment voulu.

Commet en tout cas une faute d'imprudence, l'automobiliste qui, par son manque d'habileté ou par la violation d'une disposition du Code de la route [1] (vitesse excessive, non-respect d'un stop, franchissement d'une ligne continue), tue ou blesse quelqu'un. De même, une faute pénale d'imprudence peut être reprochée au chirurgien ou à l'anesthésiste qui ne prend pas avant, pendant ou même après une opération, les précautions conformes aux données acquises de la science contre les risques prévisibles de mort de l'opéré [2].

Bien que le résultat n'en ait été ni voulu ni même prévu, cette faute qui est semblable à la faute d'imprudence ou de négligence de l'art. 1383 C. civ., n'engage pas seulement la responsabilité civile de son auteur (obligation de réparer le dommage), mais aussi sa responsabilité pénale, car elle entraîne, pour la sécurité publique, des dangers qu'il faut réprimer et prévenir par la menace d'une peine.

En vue, cependant, de limiter certains excès révélés par des poursuites récentes, une loi du 13 mai 1996 avait modifié l'art. 121-3 C. Pén. Selon ce texte, il n'y a pas faute si l'auteur des faits a accompli les diligences normales compte tenu de la nature des missions ou des fonctions, des compétences, du pouvoir et des moyens dont il disposait.

En conséquence de cette précision qui concerne toute personne, des dispositions particulières ont été insérées dans le Code général des collectivités territoriales pour prohiber la condamnation d'un maire, d'un président de Conseil général ou d'un président de Conseil régional ou des personnes ayant reçu délégation pour des faits non intentionnels commis dans l'exercice des fonctions s'il est établi que l'élu a

1. Cette violation du Code de la route peut être retenue, même si elle n'a pas été poursuivie : Crim. 21 févr. 1996, *Bull.* n° 83 ; V. aussi Crim. 28 juin 1995, *Bull.* n° 242.

2. Trib. Montpellier 21 déc. 1970, *D.* 1971.637, note CHABAS ; Cour de Montpellier, 5 mai 1971, *J.C.P.* 1971.II.16783, obs. LEVASSEUR, *Rev. sc. crim.*, 1971, p. 681, n° 1-II ; Crim. 22 juin 1972, *Bull.* n° 217 ; Toulouse, 24 avril 1973, *Gaz. Pal.*, 1973.I.401, obs. LEVASSEUR, *Rev. sc. crim.*, 1973, p. 900, n° 2.IV-A (toutes intervenues dans l'affaire Albertine SARRAZIN) ; Crim.22 juin 1972, *Bull.* n° 218, obs. LEVASSEUR, *Rev. sc. crim.*, 1973, p. 902, n° 2-IV-b ; Crim. 18 nov. 1976, *Bull.* n° 333, obs. LEVASSEUR, *Rev. sc. crim.*, 1977, p. 336, n° 2-III ; Crim. 26 janv.1977, *Bull.* n° 38, obs. LEVASSEUR, *Rev. sc. crim.*, 1977, p. 577 ; Marseille, 24 févr. 1977, *Gaz. Pal.*, 29 janv. 1978, obs. LEVASSEUR, *Rev. sc. crim.*, 1978, n° 2 ; Paris, 5 mai 1977, *Gaz. Pal.*, 12 févr. 1978, obs. LEVASSEUR, *eod. loc.* ; Crim. 9 juin 1977, *J.C.P.* 1978.II.18839, note R. SAVATIER, obs. LEVASSEUR, *Rev. sc. crim.*, 1978, n° 1 ; Crim. 9 nov. 1977, *Bull.* n° 346, *D.* 1978, *Inf. Rap.*, 71, obs. ROUJOU DE BOUBÉE, *J.C.P.*, 1978.IV.12, *Gaz. Pal.*, 19 avr. 1978 ; Crim. 9 juill. 1979, *J.C.P.*, 1980.II.19272 note CHABAS ; Crim. 10 mai 1984, *Bull. crim.*, n° 167 ; Crim. 23 nov. 1994, *Dr. pén.* 1995, n° 88, obs. VÉRON ; Crim. 19 février 1997, *Bull.* n° 67, *J.C.P.* 1997.II.22889 note J.Y. CHEVALLIER, *D.* 1998, p. 236 note LEGROS.

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accompli des « diligences normales », compte tenu de ses compétences, des pouvoirs et des moyens dont il disposait ainsi que des difficultés propres aux missions confiées (cf. art. 2123-34, 3123-28, 4135-28 et 4422-10-1 C.G. coll. terr.). Les fonctionnaires et les agents non titulaires de droit public sont soumis à un régime identique (cf. art. 11 bis A loi du 13 juillet 1983). On pouvait se demander si la loi nouvelle était de nature à endiguer les excès [1]. De fait, si l'agent a été diligent, aucune faute ne peut lui être reprochée. Inversement s'il a commis une imprudence, le respect des diligences normales n'évitera pas la poursuite [2]. Une faute imputable au prévenu suffit [3], la loi du 13 mai 1996 n'ayant pas instiué un fait justificatif nouveau [4].

13-1 ***La précision de la définition de la faute non-intentionnelle*** ◇
Malgré l'apport de la loi su 13 mai 1996, des groupes d'étude ont tenté de rechercher le moyen de limiter la responsabilité pénale des élus et des fonctionnaires (commission MASSOT). Finalement, un proposition de loi du Sénateur FAUCHON, après modifications et aménagements, a abouti à la loi 2000-647 du 10 juillet 2000, qui aménage l'alinéa 3 de l'art. 121-3 du C. Pén., et ajoute un alinéa 4 au même article.

En ce qui concerne l'alinéa 3 de l'art. 121-3, la faute s'entend toujours de l'imprudence, de la négligence ou du manquement à une obligation de prudence ou de sécurité prévue par la loi ou le règlement. Mais au lieu d'écarter l'incidence de cette faute, en cas de diligences normales (« sauf si »), le texte nouveau indique que la faute requiert que l'agent n'ait pas accompli les diligences normales, compte tenu de la nature des missions, des fonctions ou des compétences, ou du pourvoi ou des moyens dont il disposait. Eu égard aux solutions intervenues depuis la loi du 13 mai 1996, le dispositif nouveau ne paraît pas de nature à limiter la notion de faute pénale, car l'imprudence découle souvent du défaut de diligences normales.

En revanche, beaucoup plus novatrice est la disposition de l'art. 121-3 al. 4 C. Pénal. Dans l'hypothèse d'une imprudence, les personnes physiques qui n'ont pas causé directement le dommage mais qui ont créé ou contribué à créer la situation ayant permis la réalisation du dommage ou n'ont pas pris les mesures permettant de l'éviter, ne sont responsables pénalement que s'il est établi qu'elles ont, soit violé de façon manifestement délibérée, une obligation particulière de prudence ou de sécurité prévue par la loi ou le réglement, soit commis une faute caractérisée, exposant autrui à un risque d'une particulière gravité qu'elles ne pouvaient ignorer. Sous réserve de l'interprétation des tribunaux, les fautes lointaines ne seront source de responsabilité pénale que si elles sont dument établies ; bref si ce sont des fautes lourdes. La faute légère lointaine ne sera plus une faute pénale, mais elle demeurera éventuellement une faute civile.

1. V. M.L. RASSAT, *Dr. pén.* 1996, chr. 28.
2. V. d'ailleurs : Crim. 2 avril 1997, *Bull.* n° 132 ; Crim. 17 et 24 juin 1997, *Bull.* n° 237 et 251 ; Crim. 29 juin 1999, *Bull.* n° 163 ; Crim. 9 nov. 1999, *Bull.* n° 250.
3. Crim. 5 mars 1997, *Bull.* n° 89.
4. Crim. 14 octobre 1997, *Bull.* n° 334, *Rev. sc. crim.* 1998 p. 328, obs. Y. MAYRAUD, RTD Com. 1998 p. 431 obs. BOULOC.

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Il faut noter que les art. 221-6, 222-19 et 222-20 C. Pén. sont harmonisés avec le nouvel art. 121-3 C. P., ainsi d'ailleurs que les différents textes concernant les maires, président de conseil général ou de conseil régional (art. L. 2123-34, 3123-28 et 4135-28 C.G. Coll. Terr.). Les fonctionnaires, agents publics non titulaires et militaires sont traités comme les élus (cf. art. 11 bis A loi du 13 juillet 1983 et art. 16-1 loi du 13 juillet 1972), tous devant bénéficier de la protection de la collectivité ou de l'État, en cas de poursuites pénales pour des faits n'ayant pas le caractère de faute détachable de l'exercice des fonctions.

276 *L'identité de la faute pénale et de la faute civile d'imprudence* ◇

Après avoir pendant longtemps distingué la faute pénale et la faute civile et consacré la thèse de la dualité des fautes, la jurisprudence, depuis 1912 [1], adoptant la thèse contraire de l'unité des fautes, décide que la faute pénale d'imprudence est identique à la faute civile. Il en résulte que celui qui est déclaré coupable d'une faute pénale d'imprudence peut être condamné non seulement à une peine, mais aussi à des dommages-intérêts envers la victime. Mais à l'inverse, celui qui est reconnu non coupable de cette faute par le tribunal correctionnel, ne peut être condamné ni à une peine, ni à des dommages-intérêts sur la base d'une faute civile des articles 1382 et 1383 du Code civil. Il reste toutefois possible, malgré l'absence de faute pénale d'imprudence, de le faire condamner par le tribunal civil à payer une réparation à la victime de l'accident, sur la base de l'article 1384, alinéa 1 du Code civil ou de la loi sur les accidents de la circulation, car la présomption de responsabilité édictée par ces textes à l'encontre du gardien d'une chose inanimée ou du conducteur qui a causé un dommage, est entièrement distincte de la faute pénale. Afin de protéger les victimes, la loi du 8 juillet 1983 a autorisé les tribunaux correctionnels ou de police à accorder, d'après les règles du droit civil, la réparation de tous dommages résultant des faits ayant fondé la poursuite (art. 470-1 C.P.P.), à la condition que le tribunal ait été saisi, à l'initiative du parquet ou sur renvoi d'une juridiction d'instruction, de poursuites exercées pour une infraction non intentionnelle au sens des al. 2 et 3 de l'art. 121-3 C. Pén., et qu'il ait prononcé une relaxe [2]. En tout cas, la Cour de Cassation avait pris nettement parti en faveur du maintien du principe d'unité de la faute pénale et de la faute civile d'imprudence, malgré l'intervention de la loi de 1983 [3].

La loi du 10 juillet 2000 en limitant la responsabilité pénale des personnes physiques n'ayant pas causé directement le dommage, en l'absence de faute caractérisée ou de violation manifestement délibérée d'une obligation particulière de prudence ou de sécurité, a entendu revenir sur la jurisprudence

1. Civ. 19 déc. 1912, S. 1914.1.249, note MOREL. Cette jurisprudence a été maintenue après la loi du 8 juillet 1983, voir : Crim. 18 nov. 1985, *Bull. crim.*, n° 343, obs. LEVASSEUR, *Rev. sc. crim.*, 1987, p. 427.

2. Le juge ne saurait en faire application d'office (crim. 12 février 1997, *Bull.* n° 56). Cf. *Précis de Procédure Pénale*, 17e éd. n°s 211 et 892.

3. Crim. 18 nov. 1986, *Bull.* n° 343, *Rev. sc. crim.*, 1987.426, obs. LEVASSEUR ; BOUILLANE DE LACOSTE, *Gaz. Pal.*, 1987.1 Doc. 392.

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de la Cour de cassation. L'art 4-1 nouveau C.P.P. prévoie que l'absence de faute pénale non intentionnelle ne fait pas obstacle à l'exercice, devant un juge civil, d'une action en réparation d'un dommage, fondée sur l'art. 1383 du C. civ. ou sur l'art. L. 452-1 C. Séc. Soc. La faute pénale serait donc plus importante que la faute civile d'imprudence ou la faute inexcusable. Corrélativement, le juge pénal saisi d'une poursuite pour infraction non intentionnelle engagée par le ministère public ou sur renvoi d'une juridiction d'instruction, demeure compétent, malgré une relaxe, pour statuer sur la réparation due à la victime, selon les règles du droit civil (art. 470-1 C.P.P. modifié). Il semble que cette faculté s'appliquera plutôt dans l'hypothèse prévue par l'art. 121-3 al. 4, et à la condition que la faute indirecte soit en relation causale avec le dommage invoqué.

277 ***Notion de faute contraventionnelle*** ◇ En revanche, la faute contraventionnelle ne peut être assimilée à la faute pénale ou civile d'imprudence. A la différence de la faute d'imprudence, la faute en matière de contravention non intentionnelle (sauf s'il s'agit d'une contravention d'imprudence – art. R. 625-2 et R. 625-3 C. pén.) n'exige même pas une imprudence ou une négligence ; elle résulte du seul fait de la violation de la prescription légale ou réglementaire. Il importe peu, sauf pour certaines contraventions, que cette violation ait été intentionnelle, volontaire, commise par imprudence ou de bonne foi, dans l'ignorance du règlement. Pour un certain nombre de délits, l'élément moral consiste, parfois, en une faute contraventionnelle [1].

Toutefois, même les fautes contraventionnelles ne peuvent engager la responsabilité de leur auteur que si celui-ci a une volonté libre. C'est pourquoi le fait cesse d'être punissable si l'agent peut invoquer un cas de force majeure [2], un état de démence ou de nécessité [3], l'absence de maturité, etc [4].

B. Conséquences de la différence de nature

278 ***Sur le plan de la preuve*** ◇ De la différence de nature entre la faute d'imprudence et la faute contraventionnelle, il résulte tout d'abord une différence importante *au point de vue de la preuve*. Tandis que la faute pénale des articles 221-6 et 222-19 du nouveau Code pénal doit, comme l'intention dans les infractions intentionnelles, être prouvée par l'accusation, la

1. V. par exemple : Crim. 4 janv. 1973, *Bull.* n° 6, *D.* 1973, *Inf. Rap.*, p. 18 (infraction à la police de la navigation) ; Crim. 28 avr. 1977, *Bull.* n° 148, *D.* 1978.149, note M.L. RASSAT, *J.C.P.*, 1978.II.18931, note Mme DELMAS-MARTY (délit de pollution des cours d'eaux) ; Crim. 16 nov. 1976, *Bull.* n° 325 (l'excuse tirée de la bonne foi ne fait pas disparaître la contravention dès lors que le fait punissable est régulièrement constaté) ; T.G.I. Nancy, 6 janv. 1978, *D.* 1978.447, note M.L. RASSAT (même solution) ; Crim. 22 décembre 1987, *Bull.* n° 482, affichage irrégulier. Sur les délits dits « contraventionnels », cf. *infra*, n° 282.

2. Crim. 31 juill. 1937, *D.H.* 1937, p. 523.

3. Trib. pol. Verdun 20 mars 1987, *Gaz. Pal.*, 18 juill. 1987.

4. Tel est bien l'avis de A.C. DANA. « En tant qu'action humaine l'infraction est un tout indivisible. Elle est la traduction d'une volonté consciente et libre. Elle existe ou elle n'existe pas » (p. 273).

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faute contraventionnelle (sauf s'il s'agit d'une contravention d'imprudence ou volontaire) n'a pas à être prouvée par le ministère public. Cette dispense de preuve est pour la majorité des auteurs la conséquence d'une présomption de faute en matière de contravention. Pour quelques autres (notamment Legros, « *L'élément moral dans les infractions* ») elle résulte de ce que le seul fait de commettre une contravention constitue par lui-même une faute. Du moment que le fait matériel est établi, la faute contraventionnelle existe ; en prouvant le fait, on prouve par là même la faute *(res ipsa loquitur)*.

279 ***Conséquence quant à la nécessité d'un dommage*** ◇ La différence de nature entre la faute d'imprudence et la faute contraventionnelle commande aussi une autre différence en ce qui concerne la nécessité de l'*existence d'un dommage.*

A cet égard, *la faute d'imprudence* se rapproche de la faute civile. De même que la faute civile n'engage la responsabilité que s'il en résulte un dommage, la faute pénale d'imprudence — et par là, le délit pénal d'imprudence s'apparente au délit civil [1] — n'entraîne la responsabilité pénale de son auteur que lorsqu'un préjudice physique (homicide, blessure) a été réalisé.

De plus, comme en droit civil, le préjudice doit résulter de la faute pénale qui a été commise (lien de causalité entre la faute et le dommage) [2]. A cet égard, une première théorie consiste à retenir toutes les conditions, positives ou négatives, qui ont produit le résultat incriminé (théorie de l'équivalence des conditions), tandis que d'autres systèmes soutiennent qu'il convient de ne prendre que les causes les plus proches de l'événement, ce qui limite la chaîne de causalité.

280 De manière générale, la *jurisprudence* adoptait plutôt la théorie de l'équivalence des conditions. En matière d'imprudence [3], elle décidait que les articles 221-6 et 222-19 du nouveau Code pénal n'exigent pas, pour recevoir application, un lien de causalité direct et immédiat entre le comportement de l'agent et le résultat dommageable [4], ni même que la faute ait été la cause

1. A telle enseigne qu'il n'y a pas de faute pénale en cas de force majeure, comme en droit civil : Crim. 18 déc. 1978, *J.C.P.*, 1980.II.19263.

2. La Cour de cassation contrôle la qualification du lien de causalité entre la faute et le dommage : Crim. 2 mars 1994, *Bull.* n° 85.

3. La solution est différente en cas de coups mortels : Crim. 8 janvier 1991, *Bull.* n° 14, obs. LEVASSEUR, *Rev. sc. crim.* 1991, p. 760.

4. Crim. 19 mai 1958, *Bull.* n° 395 ; Crim. 14 janv. 1971, *D.* 1971.164, rapport J. ROBERT ; Crim. 7 févr. 1973, *Bull.* n° 72, *D.* 1973, *Inf. Rap.*, p. 45 ; Crim. 28 mars 1973, *Bull.* n° 157, *D.* 1973, *Inf. Rap.*, p. 115 ; Crim. 21 mai 1974, *Bull.* n° 187, *D.* 1974 I.R., p. 155 ; Crim. 19 juin 1974, *Bull.* n° 228, *D.* 1974 I.R. p. 195 ; Crim. 8 août 1977, *Bull.* n° 277, *D.* 1977, *Inf. Rap.*, 493 ; Crim. 16 mars 1977, *Bull.* n° 98, *D.* 1977.469, note critique MORANGE ; Crim. 8 août 1977, *D.* 1977, I.R. 493 ; Crim. 19 mai 1978, *D.* 1978, *Inf. Rap.*, 345, obs. ROUJOU DE BOUBÉE, *D.* 1980, J. 3 note Mme GALIA-BEAUCHESNE.

Cependant il faut que le lien de causalité entre la faute du prévenu et le décès ou les blessures de la victime soit *certain*, pour que le prévenu puisse être condamné. Crim. 6 oct. 1977, *D.* 1977, *Inf. Rap.* ; 417 Paris, 20 avril 1977, *Gaz. Pal.*, 1977.2.575, obs. LEVASSEUR, *Rev. sc. crim.*, 1978, p. 98 ;

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unique des blessures ou de l'homicide [1] ; elle retient le délit pénal même si la faute n'a été que la cause médiate [2]. Il suffit que le lien de causalité soit certain [3]. Cette conception jurisprudentielle devrait être remise en cause du fait de la loi du 10 juillet 2000 qui procède à une distinction entre les personnes qui ont causé directement le dommage et les autres. La théorie de la causalité adéquate devrait limiter le nombre des personnes susceptibles de répondre pénablement d'une imprudence ou négligence.

Enfin, comme en droit civil où la réparation est proportionnée à l'étendue du dommage, la sanction de la faute pénale d'imprudence dépend de la gravité du dommage. Cette faute a-t-elle provoqué la mort, elle constitue un délit correctionnel passible de trois ans d'emprisonnement (art. 221-6). En cas de simples blessures, elle constitue, soit un délit correctionnel punissable de deux ans d'emprisonnement, si ces blessures ont entraîné une incapacité totale de travail personnel de plus de trois mois (art. 222-19 C. Pén.), soit une contravention de police, punissable d'une amende de 10 000 F, si l'incapacité totale de travail en résultant n'excède pas trois mois (art. R.625-2 C. Pén.) [4].

281 En matière de contravention au contraire — réserve faite des contraventions qui supposent une intention [5] ou une faute d'imprudence [6] et qui ne peuvent être réprimées que s'il en est résulté un préjudice physique ou matériel — d'une façon générale, l'*existence d'un dommage* n'est pas nécessaire à la répression. La faute contraventionnelle est punie pour elle-même, indépendamment de tout résultat dommageable. Cela tient à ce que la contravention consiste le plus souvent dans une désobéissance à une mesure de police, à une règle jugée nécessaire au maintien de l'ordre et destinée à prévenir des atteintes à la sécurité ou à éviter des dommages (art. R. 610-5 C. Pén.) Au lieu de se projeter sur le plan de la conscience juridique ou

Crim. 6 oct. 1977, *D.* 1977, *Inf. Rap.* ; 417 ; Crim. 9 juill. 1979, *J.C.P.*, 1980.II.19272 note F. CHABAS ; Crim. 7 janv. 1980, *Bull.* n° 10 ; Crim. 27 nov. 1984, *Bull.* n° 369 ; Crim. 14 févr. 1996, *Bull.* n° 78.

1. Crim. 13 oct. 1980, *Bull.* n° 256 ; Crim. 25 mai 1982, *Bull.* n° 134 ; Crim. 24 janvier 1989, *Bull.* n° 27.

2. Crim. 18 nov. 1927, S. 1928.I.192 ; Crim. 14 mars 1956, *J.C.P.*, 1956.IV.61. V. également, Tribunal pour enfant de Marseille, 11 juin 1964, *D.* 1965.381, note G. V. Et, à propos d'un homicide involontaire reproché à un chirurgien et un anesthésiste, les arrêts rendus dans l'Affaire Albertine SARRAZIN, cités *supra* n° 265 ; Crim. 9 mars 1977, *D.* 1978, *Inf. Rap.* ; 71 ; Crim. 9 juin 1977 ; *J.C.P.* 1978.II.18839, note SAVATIER ; Crim. 11 juill. 1977, *Bull.* n° 261, obs. LEVASSEUR, *Rev. sc. crim.*, 1978, p. 100 ; Crim. 5 janv. 1988, *Bull.* n° 7 (action dangereuse menée en commun).

3. Crim. 20 mai 1980, *D.* 1981, I.R. 257 obs. PENNEAU ; Crim. 10 janv. 1991, *dr pén.* 1991, p. 69, *Rev. sc. crim.*, 1992, p. 77, obs. G. LEVASSEUR.

4. En cas de manquement délibéré à une obligation de sécurité ou de prudence imposée par un texte, les peines sont aggravées soit 5 ans de prison au lieu de trois (art. 221-6 C. Pén.), 3 ans au lieu de deux (art. 222-19) ; et la contravention de l'art. R. 625-2 devient alors le délit de l'art. 222-20 C. Pén.

5. Art. R. 625-1, R. 635-1, R. 654-1, R. 655-1.

6. Art. R. 625-2, R. 625-3, R. 653-1.

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morale, la contravention n'est que la lésion d'intérêt administratifs ; c'est on l'a dit, « du droit pénal de bagatelles ».

En résumé, si dans toutes les infractions, il existe un élément mora (l'intention dans les infractions intentionnelles, la faute dans les infrac tions non intentionnelles), dans les infractions non intentionnelles, tantô la faute doit être soutenue par le préjudice (en cas de délit d'imprudence) tantôt elle est réprimée du fait seul de la violation de la prescription légale o réglementaire établie dans l'intérêt de la sécurité publique même s'il n'y pas dommage (dans le cas de la plupart des contraventions de police).

SECTION 3. LA DISTINCTION DES INFRACTIONS INTENTIONNELLES ET NON INTENTIONNELLES

Suivant que l'élément moral consiste dans l'intention ou dans une simpl faute, on distingue l'infraction intentionnelle et l'infraction non intention nelle.

§ 1. Principe de la distinction

282 Les infractions intentionnelles dans la catégorie desquelles rentrent le crimes, les délits correctionnels et même quelques contraventions de polic supposent une intention coupable ; elles ne sont punissables que si cett intention est établie [1].

Les infractions non intentionnelles au contraire — qui comprennent le délits d'imprudence, la plupart des contraventions de police et même cer tains délits correctionnels punissables malgré la bonne foi de leur auteu

1. En cas de fraude dans les ventes de marchandises (loi du 1er août 1905) qui est un dél intentionnel, la preuve de l'intention coupable est rapportée dès qu'il est établi que le prévenu sc connaissait la fraude, soit était sans excuse (parce que spécialiste), d'en avoir ignoré les circon tances constitutives. Ainsi, « le seul fait par un commerçant spécialisé dans la vente de véhicul d'occasion, sans en avoir vérifié le degré d'usure et en laissant croire que ce véhicule n'ava parcouru qu'un nombre de kilomètres inférieur au nombre réel ; ce fait constitue d'une part, le fa matériel de tromperie sur les qualités substantielles de la marchandise vendue et d'autre part, suff à caractériser, au sens de la loi du 1er août 1905, l'élément intentionnel du délit ». (Crim. 21 jui 1977, *D.* 1978, *Inf. Rap.*, 111, observations PUECH ; Crim. 17 oct. 1991, *Bull.* n° 356).

De même, en cas de délit de publicité mensongère, qui n'exige pas la mauvaise foi (loi du 27 dé 1973, art. 44-1) mais comporte toujours un élément intentionnel, la preuve de cet élément mor est établie, dès l'instant que le prévenu ne pouvait ignorer que la marchandise, qu'il vendait sou telle appellation, était bien différente de celle qui bénéficiait de cette appellation (Paris, 13 m 1977 et 18 nov. 1977, *D.* 1978, *Inf. Rap.* ; 72, note ROUJOU DE BOUBÉE ; V. aussi Crim. 8 mai 197 *Bull.* n° 167 ; Crim. 3 janvier 1984, *Bull. crim.* n° 1 ; Crim. 4 févr. 1986, *Bull. crim.* n° 45 ; Crir 8 déc. 1987, *Bull.* n° 456).

L'emploi d'un travailleur étranger en situation irrégulière est un délit intentionnel (Crir 1er oct. 1987, *Bull.* n° 327).

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(délits de pêche, de chasse, en matière de douanes [1], de contributions indirectes, certaines infractions à la législation pharmaceutique, à la législation économique, délit de pollution des cours d'eau) — impliquent simplement une faute (V. art. 339, loi du 16 déc. 1992), qui peut consister dans la seule violation de la prescription légale ou réglementaire et dont la preuve, parfois même, n'est pas à la charge du ministère public [2]. L'ignorance de la loi ou du règlement peut constituer, en soi, la faute indispensable.

§ 2. Intérêts de la distinction

343 De ce que l'intention criminelle requise pour les premières ne l'est pas pour les secondes, il résulte que toutes les règles du droit pénal qui se rattachent à l'existence de l'intention criminelle ne peuvent s'appliquer aux infractions non intentionnelles. C'est ainsi que la *tentative*, toujours punissable en matière de crimes et parfois en matière de délits correctionnels (lorsque la loi l'a prévue), n'est pas punissable en matière de délits d'imprudence ni de contraventions.

De même, l'*erreur de fait* qui, dans les infractions intentionnelles, peut faire disparaître l'intention et muer celle-ci en une faute d'imprudence (changer un crime de meurtre en un délit d'homicide par imprudence), est sans effet dans les infractions non intentionnelles [3]. Quant à l'erreur de droit de l'art. 122-3 C. Pén., elle paraît ne devoir être admise qu'en cas d'agissement volontaire. Enfin, la légitime défense n'est pas acceptée par la jurisprudence dans l'hypothèse d'infraction non intentionnelle commise par l'agresseur [4].

En matière de *complicité*, la distinction du délit intentionnel et du délit non intentionnel ne présente plus d'intérêt, car la complicité réprimée en cas de crimes et de délits intentionnels mais non en cas de contraventions, sauf en cas de provocation (art. 121-7 et R. 610-2 C. Pén.), est, d'après la jurisprudence et quelques dispositions légales [5], punissable même en cas de délits non intentionnels [6], et de délits d'imprudence [7].

1. V. de GARDIA, « L'élément intentionnel dans les infractions douanières », *Rev. sc. crim.*, 1990, p. 487 ; note BERR sous crim. 26 mars 1989, *D.* 1989.515 ; note PANNIER sous crim. 1er oct. 1990, *Gaz. Pal.*, 11 mai 1990.

2. Lorsque l'élément moral d'une infraction consiste dans une faute, dont la preuve n'a pas à être spécialement rapportée par l'accusation, et que le prévenu n'est exonéré de toute responsabilité pénale que s'il démontre la force majeure, la Cour de Cassation qualifie cette infraction de « matérielle » (Voir en particulier, à propos du délit de pollution des cours d'eaux de l'art. L. 232-2 du N. Code rural : Crim. 28 avr. 1977, *D.* 1978, J. 149, note M.L. RASSAT).

3. Voir *infra*, n° 440.

4. Crim. 16 février 1967, *Bull.* n° 70, *J.C.P.* 1967.II.25034, note COMBALDIEU ; Crim. 28 nov. 1991, *Bull.* n° 446, *Rev. sc. crim.*, 1992.751, obs. LEVASSEUR.

5. En ce qui concerne le délit de publicité mensongère, la loi du 27 déc. 1973 (art. 44) prévoit que la « complicité est punissable dans les conditions du droit commun ».

6. Crim. 14 nov. 1924, S. 1925.I.232.

7. Chambéry, 9 mars 1956, *J.C.P.*, 1956.I.9224, note VOUIN. Cette solution est cependant contestée par de nombreux auteurs.

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Draft articles on
Responsibility of States for Internationally Wrongful Acts, with commentaries

2001

Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, as corrected.

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Commentary

(1) Article 16 deals with the situation where one State provides aid or assistance to another with a view to facilitating the commission of an internationally wrongful act by the latter. Such situations arise where a State voluntarily assists or aids another State in carrying out conduct which violates the international obligations of the latter, for example, by knowingly providing an essential facility or financing the activity in question. Other examples include providing means for the closing of an international waterway, facilitating the abduction of persons on foreign soil, or assisting in the destruction of property belonging to nationals of a third country. The State primarily responsible in each case is the acting State, and the assisting State has only a supporting role. Hence the use of the term "by the latter" in the *chapeau* to article 16, which distinguishes the situation of aid or assistance from that of co-perpetrators or co-participants in an internationally wrongful act. Under article 16, aid or assistance by the assisting State is not to be confused with the responsibility of the acting State. In such a case, the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act. Thus, in cases where that internationally wrongful act would clearly have occurred in any event, the responsibility of the assisting State will not extend to compensating for the act itself.

(2) Various specific substantive rules exist, prohibiting one State from providing assistance in the commission of certain wrongful acts by other States or even requiring third States to prevent or repress such acts.[273] Such provisions do not rely on any general principle of derived responsibility, nor do they deny the existence of such a principle, and it would be wrong to infer from them the non-existence of any general rule. As to treaty provisions such as Article 2, paragraph 5, of the Charter of the United Nations, again these have a specific rationale which goes well beyond the scope and purpose of article 16.

(3) Article 16 limits the scope of responsibility for aid or assistance in three ways. First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.

(4) The requirement that the assisting State be aware of the circumstances making the conduct of the assisted State internationally wrongful is reflected by the phrase "knowledge of the circumstances of the internationally wrongful act". A State providing material or financial assistance or aid to another State does not normally assume the risk that its assistance or aid may be used to carry out an internationally wrongful act. If the assisting or aiding State is unaware of the circumstances in which its aid or assistance is intended to be used by the other State, it bears no international responsibility.

(5) The second requirement is that the aid or assistance must be given with a view to facilitating the commission of the wrongful act, and must actually do so. This limits the application of article 16 to those cases where the aid or assistance given is clearly linked to the subsequent wrongful conduct. A State is not responsible for aid or assistance under article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State. There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act.

(6) The third condition limits article 16 to aid or assistance in the breach of obligations by which the aiding or assisting State is itself bound. An aiding or assisting State may not deliberately procure the breach by another State of an obligation by which both States are bound; a State cannot do by another what it cannot do by itself. On the other hand, a State is not bound by obligations of another State *vis-à-vis* third States. This basic principle is also embodied in articles 34 and 35 of the 1969 Vienna Convention. Correspondingly, a State is free to act for itself in a way which is inconsistent with the obligations of another State *vis-à-vis* third States. Any question of responsibility in such cases will be a matter for the State to whom assistance is provided *vis-à-vis* the injured State. Thus, it is a necessary requirement for the responsibility of an assisting State that the conduct in question, if attributable to the assisting State, would have constituted a breach of its own international obligations.

(7) State practice supports assigning international responsibility to a State which deliberately participates in the internationally wrongful conduct of another through the provision of aid or assistance, in circumstances where the obligation breached is equally opposable to the assisting State. For example, in 1984 the Islamic Republic of Iran protested against the supply of financial and military aid to Iraq by the United Kingdom, which allegedly included chemical weapons used in attacks against Iranian troops, on the ground that the assistance was facilitating acts of aggression by Iraq.[274] The Government of the United Kingdom denied both the allegation that it had chemical weapons and that it had supplied them to Iraq.[275] In 1998, a similar allegation surfaced that the Sudan had assisted Iraq to manufacture chemical weapons by allowing Sudanese installations to be used by Iraqi technicians for steps in the production of nerve gas. The allegation was denied by Iraq's representative to the United Nations.[276]

(8) The obligation not to use force may also be breached by an assisting State through permitting the use of its territory by another State to carry out an armed attack against a third State. An example is provided by a statement made by the Government of the Federal Republic of Germany

[273] See, e.g., the first principle of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 1970, annex); and article 3 (*f*) of the Definition of Aggression (General Assembly resolution 3314 (XXIX) of 14 December 1974, annex).

[274] *The New York Times*, 6 March 1984, p. A1.

[275] *Ibid.*, 5 March 1984, p. A3.

[276] *Ibid.*, 26 August 1998, p. A8.

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Draft Code of Crimes against the Peace and Security of Mankind

1996

Text adopted by the International Law Commission at its forty-eighth session, in 1996, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (at para. 50). The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission, 1996*, vol. II (Part Two).

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Draft Code of Crimes against the Peace and Security of Mankind (1996)

PART ONE
GENERAL PROVISIONS

Article 1
Scope and application of the present Code

1. The present Code applies to the crimes against the peace and security of mankind set out in part two.

2. Crimes against the peace and security of mankind are crimes under international law and punishable as such, whether or not they are punishable under national law.

Article 2
Individual responsibility

1. A crime against the peace and security of mankind entails individual responsibility.

2. An individual shall be responsible for the crime of aggression in accordance with article 16.

3. An individual shall be responsible for a crime set out in article 17, 18, 19 or 20 if that individual:

(*a*) intentionally commits such a crime;

(*b*) orders the commission of such a crime which in fact occurs or is attempted;

(*c*) fails to prevent or repress the commission of such a crime in the circumstances set out in article 6;

(*d*) knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission;

(*e*) directly participates in planning or conspiring to commit such a crime which in fact occurs;

(*f*) directly and publicly incites another individual to commit such a crime which in fact occurs;

(*g*) attempts to commit such a crime by taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions.

Article 3
Punishment

An individual who is responsible for a crime against the peace and security of mankind shall be liable to punishment. The punishment shall be commensurate with the character and gravity of the crime.

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Article 4
Responsibility of States

The fact that the present Code provides for the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of States under international law.

Article 5
Order of a Government or a superior

The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility, but may be considered in mitigation of punishment if justice so requires.

Article 6
Responsibility of the superior

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all necessary measures within their power to prevent or repress the crime.

Article 7
Official position and responsibility

The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.

Article 8
Establishment of jurisdiction

Without prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17, 18, 19 and 20, irrespective of where or by whom those crimes were committed. Jurisdiction over the crime set out in article 16 shall rest with an international criminal court. However, a State referred to in article 16 is not precluded from trying its nationals for the crime set out in that article.

Article 9
Obligation to extradite or prosecute

Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in article 17, 18, 19 or 20 is found shall extradite or prosecute that individual.

Article 10
Extradition of alleged offenders

1. To the extent that the crimes set out in articles 17, 18, 19 and 20 are not extraditable offences in any extradition treaty existing between States Parties, they shall be deemed to be included as such

therein. States Parties undertake to include those crimes as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may at its option consider the present Code as the legal basis for extradition in respect of those crimes. Extradition shall be subject to the conditions provided in the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize those crimes as extraditable offences between themselves subject to the conditions provided in the law of the requested State.

4. Each of those crimes shall be treated, for the purpose of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territory of any other State Party.

Article 11
Judicial guarantees

1. An individual charged with a crime against the peace and security of mankind shall be presumed innocent until proved guilty and shall be entitled without discrimination to the minimum guarantees due to all human beings with regard to the law and the facts and shall have the rights:

(*a*) in the determination of any charge against him, to have a fair and public hearing by a competent, independent and impartial tribunal duly established by law;

(*b*) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(*c*) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(*d*) to be tried without undue delay;

(*e*) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him and without payment by him if he does not have sufficient means to pay for it;

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

(*g*) to have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(*h*) not to be compelled to testify against himself or to confess guilt.

2. An individual convicted of a crime shall have the right to his conviction and sentence being reviewed according to law.

Article 12
Non bis in idem

1. No one shall be tried for a crime against the peace and security of mankind of which he has already been finally convicted or acquitted by an international criminal court.

2. An individual may not be tried again for a crime of which he has been finally convicted or acquitted by a national court except in the following cases:

(*a*) by an international criminal court, if:

(i) the act which was the subject of the judgement in the national court was characterized by that court as an ordinary crime and not as a crime against the peace and security of mankind; or

(ii) the national court proceedings were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted;

(*b*) by a national court of another State, if:

(i) the act which was the subject of the previous judgement took place in the territory of that State; or

(ii) that State was the main victim of the crime.

3. In the case of a subsequent conviction under the present Code, the court, in passing sentence, 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 13
Non-retroactivity

1. No one shall be convicted under the present Code for acts committed before its entry into force.

2. Nothing in this article precludes the trial of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or national law.

Article 14
Defences

The competent court shall determine the admissibility of defences in accordance with the general principles of law, in the light of the character of each crime.

Article 15
Extenuating circumstances

In passing sentence, the court shall, where appropriate, take into account extenuating circumstances in accordance with the general principles of law.

PART TWO
CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

Article 16
Crime of aggression

An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression.

Article 17
Crime of genocide

A crime of genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

(*a*) killing members of the group;

(*b*) causing serious bodily or mental harm to members of the group;

(*c*) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(*d*) imposing measures intended to prevent births within the group;

(*e*) forcibly transferring children of the group to another group.

Article 18
Crimes against humanity

A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group:

(*a*) murder;

(*b*) extermination;

(*c*) torture;

(*d*) enslavement;

(*e*) persecution on political, racial, religious or ethnic grounds;

(*f*) institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population;

(*g*) arbitrary deportation or forcible transfer of population;

(*h*) arbitrary imprisonment;

(*i*) forced disappearance of persons;

(*j*) rape, enforced prostitution and other forms of sexual abuse;

(*k*) other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.

Article 19
Crimes against United Nations and associated personnel

1. The following crimes constitute crimes against the peace and security of mankind when committed intentionally and in a systematic manner or on a large scale against United Nations and associated personnel involved in a United Nations operation with a view to preventing or impeding that operation from fulfilling its mandate:

(*a*) murder, kidnapping or other attack upon the person or liberty of any such personnel;

(*b*) violent attack upon the official premises, the private accommodation or the means of transportation of any such personnel likely to endanger his or her person or liberty.

2. This article shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.

Article 20
War crimes

Any of the following war crimes constitutes a crime against the peace and security of mankind when committed in a systematic manner or on a large scale:

(*a*) any of the following acts committed in violation of international humanitarian law:

(i) wilful killing;

(ii) torture or inhuman treatment, including biological experiments;

(iii) wilfully causing great suffering or serious injury to body or health;

(iv) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) unlawful deportation or transfer of unlawful confinement of protected persons;

(viii) taking of hostages;

(*b*) any of the following acts committed wilfully in violation of international humanitarian law and causing death or serious injury to body or health:

(i) making the civilian population or individual civilians the object of attack;

(ii) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;

(iii) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;

(iv) making a person the object of attack in the knowledge that he is hors de combat;

(v) the perfidious use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other recognized protective signs;

(*c*) any of the following acts committed wilfully in violation of international humanitarian law:

(i) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies;

(ii) unjustifiable delay in the repatriation of prisoners of war or civilians;

(*d*) outrages upon personal dignity in violation of international humanitarian law, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(*e*) any of the following acts committed in violation of the laws or customs of war:

(i) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(ii) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(iii) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings or buildings or of demilitarized zones;

(iv) seizure of, destruction of or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(v) plunder of public or private property;

(*f*) any of the following acts committed in violation of international humanitarian law applicable in armed conflict not of an international character:

(i) violence to the 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;

(ii) collective punishments;

(iii) taking of hostages;

(iv) acts of terrorism;

(v) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(vi) pillage;

(vii) 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 generally recognized as indispensable;

(g) in the case of armed conflict, using methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population and such damage occurs.

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International Criminal
CASES & COMMENTARY

Antonio Cassese, Guido Acquaviva,
Mary Fan, and Alex Whiting

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AIDING AND ABETTING

Although aiding and abetting as a mode of liability addresses the most marginal form of criminal participation, it can be a powerful weapon in the international prosecutor's arsenal. Considerable attention has been paid to the potentially broad reaches of joint criminal enterprise liability, or even co-perpetration, but aiding and abetting also has the particular ability to touch conduct at the edges of criminal activity. Because of the lower showing required (depending on the court) both for the *actus reus* and the *mens rea* of aiding and abetting, this mode of liability can capture the acts of perpetrators who play a more peripheral, but nonetheless important, role in the commission of atrocities.

Perhaps a better way to think about aiding and abetting, though, is not as a mode of liability that operates at the periphery, but rather as one that has the potential to fill gaps in the liability scheme. While other modes of liability directly address the conduct of those at the top of a criminal organization (who order, plan or organize criminal conduct) or that of direct perpetrators at the bottom of the group (who commit the acts), aiding and abetting can reach the participation of actors *in between*: those many individuals who contribute in small but cumulatively essential ways to the commission of mass crimes. In the excerpts below, the courts frequently show an acute understanding of how large-scale international crimes occur; they require not just planners and perpetrators, but numerous actors who participate – sometimes simply by doing their 'job' or because they want to get along or are unwilling to object to those more powerful – and who together make it possible for the crime to occur on a massive level. Thus, through the analysis of the most exiguous mode of liability, courts grapple with some of the hardest and most essential questions about the responsibility of small and ordinary actors in international crimes.

Aiding and abetting can fill other gaps as well. Sometimes senior leaders will participate in the commission of crimes simply by giving their tacit approval and encouragement, conduct that may best be characterized as aiding and abetting. Additionally, aiding and abetting can sometimes fill evidentiary gaps. Investigators and prosecutors of massive crimes often have limited access to evidence and few investigative tools (particularly as compared to domestic authorities). Accordingly, even with regard to more central participants, sometimes the *available* evidence will support no more than a charge of aiding and abetting.

The evolution of the concept of aiding and abetting has seen expansion followed by some arguable retrenchment, as one can note in the excerpts below. The World War II cases applied the concept of aiding and abetting as accessory liability, but did not fully articulate its contours and sometimes applied it unevenly. The modern ad hoc international tribunals fully fleshed out the concept, ultimately holding that an aider and abetter is one who makes a *substantial* contribution to the commission of a crime, with the *knowledge* that his or her acts will assist in the commission of the crime in question, but not necessarily with an *intent* to promote the crime. This articulation of the concept was particularly useful to prosecutors because it perfectly captured the conduct of actors who participated in crimes because doing so fitted in with their bureaucratic or organizational function, but without

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any actual desire or intent to further the crimes. Additionally, intent can often be the most difficult element to prove, since it usually must be inferred, and so the diminished intent requirement of aiding and abetting at the ad hoc tribunals allowed it to serve as a useful backup charge to charges of more direct and intentional participation in crimes.

The ICCSt., however, appears to have retreated somewhat from the broad concept developed at the ad hoc tribunals. Article 25(3)(c) assigns liability to a person who, '[f]or the purpose of facilitating the commission of [...] a crime [under the Statute], aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission'. On its face, this formulation does not include a requirement that the contribution be 'substantial', but it appears to require that an aider and abettor not simply have 'knowledge' of the main perpetrator's intent, but share it. While the ICC has yet to litigate the concept of aiding and abetting, it appears that this version may allow for a more minimal *actus reus* but require a higher *mens rea* than at the ad hoc tribunals. On the other hand, Article 25(3) further contains section (d) which, while not called 'aiding and abetting', might capture conduct (particularly in its subsection (ii)) that would fall under aiding and abetting liability at the ad hoc tribunals:

> (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.

These questions await the further elucidation by future decisions of the ICC.

Cases

Federal Republic of Germany, S. and others (Hechingen and Haigerloch Deportation case), *Tribunal (Landgericht) Hechingen, Judgment of 28 June 1947*[1]

Five accused in this case were charged with assisting the Gestapo with the deportation of Jews from two towns in Germany, Hechingen and Haigerloch, to concentration camps in 1941–42. One of the accused was acquitted while four were convicted. None of these four accused devised or ordered the deportations. The principal accused was S., who was a senior administrative and police official who transmitted orders that he received from the Gestapo on to those responsible in the villages, while the other three – H., Ho. and K – were women who held no official positions but who were required to search the deportees to determine if they were holding any valuables. The first excerpt is from the trial judgment. The second excerpt is from the Court of Appeal which reversed the convictions of the three women and granted a new trial to S. In the second trial, S. was acquitted.

[1] English translation in (2009) 7 JICJ 131.

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[. . .] On the basis of the trial and the hearing of the evidence, the following is established:

(a) The accused S., as then *Landrat* ['county president', senior administrative and police official of a County] of Hechingen, received the order of 14 August 1942 of the Stuttgart Head Office of the Gestapo [abbreviation of Geheime Staatspolizei, Secret State Police – the German text uses the full form throughout]. On 17 August 1942, he gave the mayors of Haigerloch and Hechingen the necessary instructions in writing for carrying out this order, in particular to have the Jews directed to 'deportation' and their luggage searched in the prescribed manner, and to ready these persons for transport on 19 August 1942. He further instructed persons officially subordinate to him to cooperate in the physical search of the persons to be deported; he gave this instruction to, among others, co-defendant Ms Ho., who carried it out on 19 August 1942 together with Mrs M., appointed for the purpose by the mayor of Haigerloch, in relation to the Jewish women concerned. These findings are based, to the extent that they relate to the accused Mr S., on his own statements; otherwise they result from the statements of co-defendant Ms Ho. The detail of how the physical search of the Jewish women by Ms Ho. occurred will be presented below in another context.

(b) A total of 138 people, 136 from Haigerloch and 2 from Hechingen, were affected by this fourth deportation. These 138 people were transported under police escort on 19 August 1942 from Haigerloch to Stuttgart, nine of the particularly infirm in road vehicles, the rest by rail. In Stuttgart they were brought to the Gestapo collecting point, and from there transported to Theresienstadt. Of the 138 people deported, only a single victim remained alive and returned to Haigerloch; all the others, it must be regarded as certain, either died or were killed during the deportation. Information on the circumstances in Theresienstadt has been provided by the testimony of Senior State Attorney Mr D. of Stuttgart. [. . .]

(2) The accused S., by executing himself in part the orders that reached him from the Gestapo and in part having them executed by people under him, participated in persecution on racial grounds and thus in a crime against humanity.

(a) Accused S. objectively, to be sure, acted neither as perpetrator (*Täter*) nor co-perpetrator (*Mittäter*) but as accessory (*Gehilfe*), since his participation was confined to executing the orders of the Gestapo in his capacity as *Landrat* of *Kreis* Hechingen, to the detriment of the Jews concerned, without departing from these orders on the basis of decisions of his own.

The consideration that the Gestapo orders would have been executed even if accused S. had not been involved in their execution, that is, the consideration that his participation was not causal for their success, does not exonerate the accused. The causality concept (*Ursachenbegriff*) in legal science is not – unlike that in natural science – mechanistically oriented, but teleologically, in the sense of the purpose of the legal system. Accordingly, no accessory can escape penal responsibility by showing that the main perpetrator (*Haupttäter*) could have carried out the act even without his assistance. In the great mechanism of the persecution of the Jews, every single cog was interchangeable at all times. Were one, given that fact, to seek to exclude the criminal responsibility of each interchangeable participant because of the absence of causality of his participation, then ultimately only the main perpetrators would be liable; all accessories would get off scot-free, even if they had acted on racial grounds, for even in the latter case their participation would, on a mechanistic view, not have been causal.

The accused S. has further appealed to the fact that it could not be within the intention of Control Council Law No. 10 to punish absolutely all participation in the carrying out of persecution of the Jews; for instance, a typist typing out the Gestapo deportation orders and posting them, or the driver of a locomotive pulling the train the deported Jews were to be transported by, could not be punishable. This consideration is just as wrong as the previous one, though in the opposite direction; while the previous consideration couched the concept of causality too narrowly, it is now too broad. From the impunity of participation by a typist

or train driver, the impunity of the *Landrat*'s participation does not follow; to that extent, his argument does not prove what it is supposed to prove. The range of duties (*Pflichtenkreis*) of a typist or train driver is quite different from a *Landrat*'s. A typist's official duty is fulfilled in her accurately and punctually typing what she is asked to; a train driver's in bringing the rail transport punctually and safely to its destination; neither the one nor the other commits a breach of duty if their activity happened to be part of the persecution of the Jews. Things are quite different with a *Landrat*. As the senior administrative and police official of the *Kreis*, he is entrusted with the administrative and police protection of its population against unlawful interference with their liberty and property; he infringes his set of duties if he participates in interference with the very legal goods he is called on to protect.

(b) In subjective respects, the punishability of accused S. depends on his having acted intentionally as an accessory. Intent as an accessory (*Gehilfenvorsatz*) requires, first, that the accused knew what act he was furthering by his participation; he must have been aware that the actions ordered from him by the Gestapo served persecution on racial grounds. He had this awareness, as the Court hereby finds, as the outcome of the trial and taking of evidence, on the basis of the wording and content of the Gestapo orders he received, even if, as he has credibly assured, he did not reckon on the possibility that the deported Jews might be killed. The accused may also be believed to have assumed that the forced deportation of the Jews was in the interest of the defence of the Reich, and that he formed a too favourable conception of the fate awaiting the Jews after deportation ('resettlement') and was strengthened therein by hopes expressed by some of the Jews concerned themselves. The fact nonetheless remains that the forced deportation of the Jews as such, taken together with the confiscation and seizure of their assets, was seen by the accused as 'persecution on racial grounds'. The accused himself stated at the trial that he regarded the Gestapo measures as 'unjust' to the Jews, and struggled with himself whether to carry out the measures or not; these statements by the accused himself enable and support the finding made above.

Intent as an accessory (*Gehilfenvorsatz*) requires, second, that the accused knew that through his participation he was furthering the principal act. He had this awareness too, as the Court hereby finds, as an outcome of the trial and taking of evidence. This awareness is not excluded by the consideration brought up by the accused that if he himself had refused to execute the Gestapo measures someone else would have carried them out in his place, but on the contrary shown to be present; for this consideration shows that the accused took it upon himself, for reasons the scope of which is still to be discussed, to carry out the Gestapo orders himself instead of leaving it to someone else.

Intent as an accessory does not, by contrast, require the accused himself to have acted from racial considerations or from inhumane attitudes at all. Nor is it required that the accused had an awareness of the illegality of his action, since Control Council Law No. 10 declares persecution on racial grounds punishable irrespective of whether it infringes the national law of the country in which it was committed; it is thus immaterial what notion the person had as to the legality of his actions. That, finally, the fact that the accused was acting on orders does not exclude penal responsibility as an accessory is explicitly stated in Article II(4)(b) of Control Council Law No. 10.

(3) It remains to be discussed whether accused S. can appeal to grounds excluding guilt or punishment.

(a) Accused S. has asserted that he weighed against each other the facts that he could not prevent the carrying out of the Gestapo measures; that these measures would be carried out all the same even if he refused to do so; that his participation in these measures would accordingly not spare any of the Jews concerned the evils threatening them; and on the other the facts that his participation in these measures enabled him to remain in his post as *Landrat*, that

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remaining in office was both in the interest of the Jewish population to the extent that he could mitigate some things, and in the interest of the non-Jewish part of the population with a negative attitude to National Socialism, in so far as he could uphold or procure facilitations for this part of the *Kreis* population too; from this weighing up, he had arrived at the conclusion that preponderant interests justified his carrying out, in order to remain in office, the orders of the Gestapo; he was strengthened in this view by the fact that his remaining in office was desired both on the Jewish side and by respectable figures in the non-Jewish part of the *Kreis* population, and even explicitly asked for: if in this weighing up he had based himself on inaccurate expectations or if the weighing up as such was incorrect, this was at most a political error, not a criminal fault.

That accused S., and with him the circles supporting him in his resolution, were making a severe political mistake in this consideration, even if the premises of the weighing up be supposed to be correct, is plain. During the rule of National Socialism, the temptation was – it may be admitted – indeed great to come to terms with the unbearable, whether out of fear of worse yet to come or in the hope of being able to maintain for oneself and others a 'party-free' reservation – however small. This fear and this hope, both of these elements in the thinking of accused S., were very well recognized by National Socialism, which used them and abused them as a psychological and political factor. Inside the official apparatus, in general only the key positions were occupied by ideologically committed and reliable party comrades. That was quite enough. The rest of the officials could be left with the illusion of freedom in little things, indeed even a certain actual freedom; that was a cheap price to pay for their compliance in all important matters, and they were willing to pay it for they knew very well that all those who – like accused S. – pursued opportunist policies in order to maintain their freedom of action ultimately became prisoners of their own policies.

Thus it could not fail to happen, and, as this case showed actually did happen, that part of the civil service bowed to immoral and illegal impositions; what began as a political error ended as moral and criminal guilt. When politics comes into conflict with law and morality, this conflict can be solved only in the sense that law and morality must never be adjusted to politics, but politics must always be to law and morality. This principle applies to the State as a whole; it applies to every official as an individual. Each citizen has a right to have an official, from whom an immoral and illegal action is demanded, refrain from that action; each citizen must be protected against officials, irrespective of the considerations they base themselves on, committing such acts. An official who fails to see this is acting not simply unwisely politically because he is undermining trust in the lawfulness of the administration, but at the same time unlawfully. That is why accused S. must be refused the appeal to the balancing of interests he did; an error as to the admissibility of this balancing of interests counts against him. [. . .]

(2) The accused Ho., K. and B., by undertaking the search of the Jewish women for deportation, objectively took part, specifically as accessories (*Gehilfen*), in a persecution on racial grounds and thus in a crime against humanity within the meaning of Article II(1)(c), (2)(b) and (3) of Control Council Law No. 10. Their involvement was admittedly, considered in the context of the whole, only of a subordinate nature, and the three accused did not, by contrast with co-defendant S., infringe any special set of duties. What nonetheless makes their involvement punishable is the fact that the body search taken together with the removal of the valuables found thereby was particularly degrading for the Jewish women affected. In subjective respects, the punishability of the three accused depends on whether they deliberately (*vorsätzlich*) acted as accessories (*Gehilfen*). This condition is met for all three of these accused. The accused recognized (accused K. and B. at the latest by the time they were at the station in Haigerloch and accused Ho. earlier, when she received the order given to her) that they were being called on to take part in a persecution on racial grounds; this finding is hereby made on the basis of the oral proceedings. That these three accused did not know the contents

of the Gestapo decrees and could not therefore fully perceive what measures of persecution the Jews would individually be exposed to is irrelevant; what they did know, namely that Jews were being forcibly deported and in this connection searched and made to hand over jewelry, suffices to establish intention in their cases. This knowledge (*Wissen*) was also inevitably associated with the insight that through their actions the accused were furthering the principal offence. Intentionality as accessory (*Gehilfenvorsatz*) did not require that the accused acted from racial motives and further did not require that they had an awareness of the illegality (*Bewusstsein der Rechtswidrigkeit*) of their actions, as has already been explained in the judgment on accused S. It is similarly irrelevant that if an individual accused or all the accused had refused their participation, the search would still have been carried out by the remaining accused, or by other persons.

Federal Republic of Germany*, S. and others (Hechimgen and Haigerloch Deportation case), *Court of Appeal* (Oberlandesgericht) *Tübingen, Judgment of 20 January 1948

The Court of Appeal found that the Trial Court made inadequate findings with respect to the letter ordering S. to facilitate and implement the deportation, and therefore it ordered that S. be granted a new trial. It addressed therefore the scope of accessory liability, and in particular the required *mens rea*, in the context of the case against the three women.

Persecution on political, racial and religious grounds is listed in Article II(1)(c) of the Law as the last explanatory example of a crime against humanity. This crime too must accordingly be carried out inhumanely. The perpetrator must have acted out of an inhumane mindset, derived from a politically, racially or religiously determined ideology [...]

[Control Council] Law No. 10, in Article II(2)(a)–(e), equates all conceivable forms of commission or participation. It does not distinguish between perpetration (*Täterschaft*) and participation (*Teilnahme*). The accessory (*Gehilfe*) to a crime against humanity is 'regarded as guilty of a crime against humanity, without regard to the capacity in which he acted' (Clause 2 of the Introductory Act). From this complete equation with the perpetrator it follows that the accessory must have acted from the same mindset as the perpetrator himself, that is, from an inhumane mindset and in persecutions under politically, racially or religiously determined ideologies. The Criminal Division rightly took it that as regards the punishability of participation, Law No. 10 is of plain interpretation.

The trial court plainly struggles with the limits of accessory liability. While it eloquently articulates why 'cogs' in the machine of mass crime must be held to account, it also recognizes the potential breadth of this approach and seeks to find a line between the 'typist' and the 'senior administrative and police official' who both assist in the execution of a criminal scheme. With respect to S., the court seizes on the question of 'duty', finding that S.'s transmission of Gestapo orders amounted to accessory liability because he had a duty to protect the people of his village. This distinction falls away, however, when it comes to the responsibility of the three women who had no duty. Nonetheless the trial court finds that they are different from the 'typist', it seems, because of their physical and proximate (and degrading) participation in the deportation itself. For the Court of Appeal, though the line was elsewhere; only those who assisted the crime *and* shared the intent of the main perpetrators could be held liable. This question of where to draw the line of liability is a central theme in the ongoing debates on aiding and abetting.

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US Military Tribunal Sitting in Nuremberg*, US *v.* Ernst von Weizsäcker et al., (Ministries *case*), *Judgment of 11–13 April 1949

This case is primarily known for its holding on the crime of aggression, and is excerpted in the chapter (Part I(4)) dealing with aggression, but in addition all but 2 of the 21 defendants were convicted of war crimes and crimes against humanity. The following excerpt pertains to the responsibility of two officials in the German Foreign Office for the deportation of 6,000 Jews from France in March 1942: Ernst von Weizsaecker, the State Secretary of the Foreign Office, and Ernst Woermann, the Ministerial Director and Chief of the Political Division of the German Foreign Office. Both Accused were sentenced to a term of imprisonment of seven years.

On 9 March 1942 [Adolf] Eichmann of the SS wrote [to] the Foreign Office [saying] that it was intended to deport to Auschwitz 1,000 French and stateless Jews who had been arrested in France in 1941, asking if there was any objection.

On 11 March the SS again wrote [to] the Foreign Office [saying] that it was desired to include 5,000 more Jews from France. On the same day [Hans] Luther [Under Secretary in charge of Deutschland] wired the German Embassy in Paris, forwarding the request and asking for comment, and Paris replied, "No objection."

On 20 March [Franz] Rademacher [subordinate to Luther], by order, informed the SS that the Foreign Office had no objections to these 6,000 Jews being deported. This was initialed by Woermann and von Weizsaecker, and contains the latter's comment, "to be selected by the police."

There remains no shadow of doubt that both Woermann and von Weizsaecker were informed of this nefarious plan and that it received their official approval. There is nothing in the record to show that they questioned its propriety, objected to or protested against it, or availed themselves of the opportunity to suggest to von Ribbentrop that even from the viewpoint of German foreign policy its execution would be a catastrophic mistake in that it would not only alienate public sentiment in France, but would arouse a wave of horror and resentment throughout the world. Neither claims that there was any legal justification for this deportation or suggests it was other than a flagrant violation of international law and of the provisions of the Hague Convention.

Woermann's excuse is that he was not able to do anything and that his cosignature meant that he saw no valid political reason which could be urged against it and that the reason that the Foreign Office communication was signed by the State Secretary and by two other state secretaries, including himself, was that it was an important matter.

However, his own witness, Lehmann, an old civil servant in the Foreign Office, called as an expert on Foreign Office practice, does not bear him out. He testified, somewhat reluctantly, that when a Foreign Office official initialed a draft he thereby outwardly approved it, even though he may have had mental reservations as to its propriety.

The defendant Woermann knew that there were cogent reasons of a political nature why the measure should be disapproved; he knew that it was in violation of every principle of international law and in direct contradiction of the Hague Convention.

Von Weizsaecker asserts that this occurred at a time of repeated attempted attacks on members of the Wehrmacht and Hitler had ordered frequent shootings of hostages in France; that these Jews were already interned and were in danger, and one could very easily come to the conclusion that the deportations to the East might involve less danger to them than remaining where they were; that the name Auschwitz did not mean anything to anybody at

that time. He does not state that this was, in fact, his reason for not objecting, but that it was probably his reason. He further asserts that the Foreign Office did not instigate or execute these measures and its point of view or opinion could not prevent them. The latter contention, however, is hardly tenable, in view of the fact that Eichmann of the SS made specific inquiries as to whether the Foreign Office had objections.

While we are ready and anxious to accord to every defendant the benefit of any reasonable doubt to which he may be entitled, it is difficult to find any such doubt here, even though we assume that neither defendant, at that time, had knowledge that Auschwitz was a death camp. Nevertheless they knew and were well informed of the fate of any Jew who came into the tender hands of the SS and Gestapo; they knew what had been the fate of the Jews of Poland, the Baltic states, and Russia; they knew what had been the horrible fate of German Jews.

While admitting that many things passed over his desk and received his initials of approval as to which he harbored mental reservations and objections, he states he remained in office for two reasons: first, that he might thereby continue to be at least a cohesive factor in the underground opposition to Hitler by occupying an important listening post, maintaining members of the opposition in strategic positions, distributing information between opposition groups in the Wehrmacht, the various governmental departments, and in civil life; and second, that he might be in a position to initiate or aid in attempts to negotiate peace. We believe him, but this, while it may and should be considered in mitigation, cannot constitute a defense to charges of war crimes or crimes against humanity. One cannot give consent to or implement the commission of murder because by so doing he hopes eventually to be able to rid society of the chief murderer. The first is a crime of imminent actuality while the second is but a future hope.

When the SS inquired whether the Foreign Office had any objections, it was the defendant's duty to point them out. That is the function of a political department and a state secretary of a foreign office. It is not performed by saying or doing nothing. Even the defendant's witness, von Schlabrendorff, himself an active leader in the resistance movement, and a participant in the plot of 20 July 1944, testified that being a member of that movement did not justify one in becoming a party to the program of the murder of Jews. As to these and like instances, we find the defendants von Weizsaecker and Woermann guilty.

COMMENTARY

The court here finds that Woermann and von Weizsaecker had a legal and political duty to object to the deportation plan and that their failure to object, even if they were not aware of the ultimate fate of the deportees and did not instigate the plan or share its aims, amounted to aiding and abetting the crime of deportation. Although the accused in fact *approved* the plan, the court suggests that the result would have been the same had they simply done nothing in the face of the deportation proposal. The court, therefore, seems to embrace the notion of aiding and abetting through omission whereby an individual becomes liable if he fails to fulfil a duty that is his, acts with the requisite intent (either knowledge that his failure allows for the crime to occur or for the purpose of furthering the crime), and thereby allows for, or contributes to, the commission of a crime. The court's analysis – and the fact that it was carried out by US Judges – raises interesting questions about contemporary debates (for example in the United States) concerning the responsibility of government officials, and in particular legal advisers, to act affirmatively to stop the conduct of government actors that might amount to international crimes.

The court in the *Ministries* case was arguably not completely consistent, however, in its application of the notion of aiding and abetting. Another defendant was Karl Rasche, a member and later speaker of the *Vorstand* (management board) of the Dresdner Bank

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...al issue was whether he could be held criminally liable for approving loans that he knew ...ould be used by the SS to finance enterprises that used slave labour:

> [Rasche's] 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[e] 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.

Although the court's approach seems different with respect to Rasche as compared to von Weizsaecker and Woermann, perhaps the distinction is that Rasche, acting in his capacity as a banker, owed no duty to any person to ensure that the funds he was responsible for loaning were not being used for any criminal purpose.

A French court had, however, a different approach in the *Röchling* case, in which five German industrialists were tried for their role in aggressive war, war crimes and crimes against humanity. It found the accused Hans Lothar von Gemmingen-Hornberg, the President of the Board of Directors of the Röchling steel plants and a plant manager, guilty of inhuman treatment because of the horrific conditions faced by the foreign workers and prisoners of war forced to work in the plants. The court found that although the Gestapo was principally responsible for the conditions and treatment of the workers, von Gemmingen-Hornberg's high position in the corporation and his close relationship to Röchling himself (von Gemmingen-Hornberg was Röchling's son-in-law) gave the accused 'sufficient authority to obtain an alleviation in the treatment of these workers'. The court concluded that there is 'cause under these circumstances to hold von Gemmingen-Hornberg responsible for the inhuman treatment of the foreign workers and prisoners of war in the firm of Röchling, which he aided by his negligence and his lack of courage towards the Gestapo'.[2]

Therefore, while the World War II courts embraced the concept of aiding and abetting liability (while not always identifying it in those terms), they did not necessarily reach a uniform definition of the concept. The modern tribunals took further steps to define the notion as demonstrated in the following excerpt.

[redacted]

[2] General Tribunal at Rastadt of the Military Government for the French Zone of Occupation of Germany, 16 June 1948, English summary in *Annual Digest 1948*, 398–404.

ICTY*, Prosecutor *v.* Furundžija, *Trial Chamber, Judgment of 10 December 1998

Anto Furundžija was the commander of a special unit, known at the 'Jokers', of the Bosnian-Croat army (the HVO). He was tried and convicted of the war crimes of torture and outrages on personal dignity, including rape. Specifically, Furundžija was accused of interrogating a Muslim woman while a fellow officer first rubbed his knife all over her body and thigh, threatening to cut out her private parts if she did not cooperate, and then raped her. Furundžija was convicted of being a co-perpetrator of torture and aiding and abetting outrages on personal dignity and sentenced to 10 years. The excerpt below is from the trial judgment.

D. Aiding and Abetting

1. Introduction

190. The accused is charged with torture and outrages upon personal dignity, including rape. For the purposes of the present case however, it is necessary to define "aiding and abetting" as used in Article 7(1) of the Statute.

191. Since no treaty law on the subject exists, the Trial Chamber must examine customary international law in order to establish the content of this head of criminal responsibility. In particular, it must establish both whether the accused's alleged presence in the locations where Witness A was assaulted would be sufficient to constitute the *actus reus* of aiding and abetting, and also the relevant *mens rea* required to accompany this action for responsibility to ensue.

2. Actus Reus

192. With regard to the *actus reus*, the Trial Chamber must examine whether the assistance given by the aider and abettor need be tangible in nature or may consist only of encouragement or moral support. The Trial Chamber must also examine the proximity required between the assistance provided and the commission of the criminal act. In particular, it will have to consider whether the actions of the aider and abettor need to have a causal effect, so that without his contribution the offence would not be committed, or whether the acts of the aider and abettor need simply facilitate the commission of the offence in some way.

(a) International Case Law

(i) Introduction

193. Little light is shed on the definition of aiding and abetting by the international instruments providing for major war trials: the London Agreement, the Charter of the International Military Tribunal for the Far East, establishing the Tokyo Tribunal, and Control Council Law No. 10. It therefore becomes necessary to examine the case law.

194. For a correct appraisal of this case law, it is important to bear in mind, with each of the cases to be examined, the forum in which the case was heard, as well as the law applied, as these factors determine its authoritative value. In addition, one should constantly be mindful of the need for great caution in using national case law for the purpose of determining whether customary rules of international criminal law have evolved in a particular matter.

195. First of all, there are the cases stemming from US military commissions or, in territories occupied by US forces, by courts and tribunals set up by the military government. While the

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military commissions operated under different directives within each theatre of US military operations, each applied a provision identical to that of the London Agreement with relation to complicity. In occupied territories, the courts and tribunals operated under the terms of Control Council Law No. 10.

196. The Trial Chamber will also rely on case law from the British military courts for the trials of war criminals, whose jurisdiction was based on the Royal Warrant of 14 June 1945, which provided that the rules of procedure to be applied were those of domestic military courts, unless otherwise specified. In fact, unless otherwise provided, the law applied was domestic, thus rendering the pronouncements of the British courts less helpful in establishing rules of international law on this issue. However, there is sufficient similarity between the law applied in the British cases and under Control Council Law No. 10 for these cases to merit consideration. The British cases deal with forms of complicity analogous to that alleged in the present case. The term used to describe those liable as accomplices (in killing) is that they were "concerned in the killing".

197. Cases heard under Control Council Law No. 10, either by the German Supreme Court in the British Occupied Zone, or by German courts in the French Occupied Zone are also material to the Trial Chamber's analysis.

198. Finally, the International Tribunal has on a previous occasion examined the question of complicity under its Statute, namely in the Opinion and Judgment of 7 May 1997 in the case of *Prosecutor v. Duško Tadić*, hereafter "*Tadić Judgement*".

(ii) Nature of Assistance

199. The Trial Chamber will first examine the nature of the assistance required to establish *actus reus*. The cases which follow indicate that in certain circumstances, aiding and abetting need not be tangible, but may consist of moral support or encouragement of the principals in their commission of the crime.

200. In the British case of *Schonfeld*, four of the ten accused were found guilty of being "concerned in the killing of" three Allied airmen, who had been found hiding in the home of a member of the Dutch resistance. All four claimed that their purpose in visiting the scene had been the investigation and arrest of the Allied airmen. One admitted to shooting the three airmen but claimed it was in self-defence; he was found guilty and sentenced to death. The roles of the three others were less direct. One drove a car to the scene and was the first to enter the house. Another had obtained the original information, searched a different house for the airmen earlier and claimed to have stood guard at the back entrance to the house along with the fourth convicted person. All except one denied having fired any shots themselves.

201. The court did not make clear the grounds on which it found these three to have been "concerned in the killing". However, the Advocate General, citing the position in English law, outlined the role of an accessory who is not present at the scene but procures, counsels, commands or abets another to commit the offence, and that of an aider and abettor, either of which could have formed the basis of the court's decision. In doing so he gave an example of how an individual may participate without giving tangible assistance:

> if he watched for his companions in order to prevent surprise, or remained at a convenient distance in order to favour their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, he was, in contemplation of law, present, aiding and abetting.

202. Again, in giving "additional confidence to his companions" the defendant facilitates the commission of the crime, and it is this which constitutes the *actus reus* of the offence.

203. In the British case of *Rohde* six persons were found guilty of being "concerned in the killing" of four British women prisoners in German hands. The women were executed by lethal injection and their bodies disposed of in the prison camp crematorium. In defining the term "concerned in the killing", the Judge Advocate explained that actual presence at the crime scene was not necessary to be "concerned in the killing". He gave the example of a lookout who would be "concerned in the killing" by providing a service to the commission of the crime in the knowledge that the crime was going to be committed.

204. In the case of one of the accused, assistance *ex post facto* was found to be sufficient for criminal responsibility. As this was not the position under English law, the inference is warranted that the court applied a different law to these international crimes. The service provided by the cremator may be analogous to that of the lookout, in that the knowledge that the bodies will be disposed of, in the same way that the knowledge that they will be warned of impending discovery in the lookout scenario, reassures the killers and facilitates their commission of the crime in some significant way.

205. Guidance can also be derived from the following cases, which were heard under the terms of Control Council Law No. 10. In the *Synagogue* case, decided by the German Supreme Court in the British Occupied Zone, one of the accused was found guilty of a crime against humanity (the devastation of a synagogue) although he had not physically taken part in it, nor planned or ordered it. His intermittent presence on the crime-scene, combined with his status as an "*alter Kämpfer*" (long-time militant of the Nazi party) and his knowledge of the criminal enterprise, were deemed sufficient to convict him.

206. The accused was convicted at first instance of a crime against humanity under the provision on co-perpetration of a crime ("*Mittäterschaft*") of the then German penal code (Art. 47 *Strafgesetzbuch*). The conviction was confirmed on appeal. The appellate decision noted that the accused was a militant Nazi. The court went on to find that he knew of the plan at least two hours before the commission of the crime.

207. It may be inferred from this case that an approving spectator who is held in such respect by the other perpetrators that his presence encourages them in their conduct, may be guilty of complicity in a crime against humanity.

208. The *Synagogue* case may be contrasted with the *Pig-cart parade* case, also from the German Supreme Court in the British Occupied Zone. The accused, P, had attended, as a spectator in civilian dress, a SA (*Stürmabteilung*) "parade" in which two political opponents of the NSDAP (*Nationalsozialistische Deutsche Arbeiterpartei*) were exposed to public humiliation. P had followed the "parade" without taking any active part. The court found that P,

> followed the parade only as a spectator in civilian clothes, although he was following a service order by the SA for a purpose yet unknown... His conduct cannot even with certainty be evaluated as objective or subjective approval. Furthermore, silent approval that does not contribute to causing the offence in no way meets the requirements for criminal liability.

P was found not guilty. He may have lacked the necessary *mens rea*. But in any event, his insignificant status brought the effect of his "silent approval" below the threshold necessary for the *actus reus*.

209. It appears from the *Synagogue* and *Pig-cart parade* cases that presence, when combined with authority, can constitute assistance in the form of moral support, that is, the *actus reus* of the offence. The supporter must be of a certain status for this to be sufficient for criminal responsibility. This emphasis on the accused's authority was also affirmed in *Akayesu*. Paul Akayesu was the *bourgmestre*, or mayor, of the Commune in which atrocities, including rape and sexual violence, occurred. That Trial Chamber considered this position of authority highly significant for his criminal liability for aiding and abetting: "The Tribunal finds

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...le 6(1) of its Statute, that the Accused, having had reason to know that sexual violence ...s occurring, aided and abetted the following acts of sexual violence, by allowing them to ...e place on or near the premises of the bureau communal and by facilitating the commission ...ch sexual violence through his words of encouragement in other acts of sexual violence ...ch, *by virtue of his authority*, sent a clear signal of official tolerance for sexual violence, ...thout which these acts would not have taken place: [...]". Furthermore, it can be inferred ...m this finding that assistance need not be tangible. In addition, assistance need not consti...te an indispensable element, that is, a *conditio sine qua non* for the acts of the principal.

...0. Mention should also be made of several cases which enable us to distinguish aiding and ...etting from the case of co-perpetration involving a group of persons pursuing a common ...esign to commit crimes.

...1. The *Dachau Concentration Camp* case was held before a US Tribunal under Control ...ouncil Law No. 10. All the accused held some position in the hierarchy running the Dachau ...oncentration camp. While allegations of direct participation in instances of ill-treatment were ...ade against certain accused, and allegations of command responsibility against others, ...e real basis of the charges was that all the accused had "acted in pursuance of a common ...esign" to kill and mistreat prisoners, and hence to commit war crimes.

...2. The organised and official nature of the system by which war crimes were perpetrated ...n this case adds a specific element to the "complicity" of the accused. The report of the case ...y the United Nations War Crimes Commission isolates three elements necessary to establish ...uilt in each case. The first was the existence of a system to ill- treat the prisoners and commit ...e various crimes alleged; the second was the accused's knowledge of the nature of this sys...em, and the third was that the accused "encouraged, aided and abetted or participated" in ...nforcing the system. Once the existence of the system had been established, a given accused ...as potentially liable for his participation in this system. The roles of the accused ranged from ...amp commanders to guards and prisoner functionaries and all were found guilty, with the ...fference in the levels of participation reflected in the sentences. It would seem that the hold...ng of any role in the administration of the camps was sufficient to constitute encouraging, ...ding and abetting or participating in the enforcement of the system.

...3. The prosecution in the *Dachau Concentration Camp* case, did not base its case on the ...rect participation of the accused in the crime. Regardless of whether the accused themselves ...d beaten or murdered the concentration camp inmates, the assistance they afforded to ...ose who did, or the system, formed the basis of their guilt. The level of assistance required ...as low: any participation in the enterprise was sufficient, although as the accused were all ...embers of staff of the camps, their contribution to the commission of the crimes was tan...ble – the carrying out of their respective duties – so that none were convicted on the basis ...f having lent moral support or encouragement alone. [...]

(iii) Effect of Assistance on the Act of the Principal

...7. Back to aiding and abetting, in the *Einsatzgruppen* case, heard by a US Military Tribunal ...ting at Nuremberg, all of the accused except for one (Graf) were officers charged with war ...imes and crimes against humanity pursuant to Control Council Law No. 10. The Tribunal held ...at the acts of the accomplices had to have a substantial effect on those of the principals to ...onstitute the *actus reus* of the war crimes and crimes against humanity charged. This conclu...ion is illustrated by the cases of four of the accused: Klingelhoefer, Fendler, Ruehl and Graf. ...lingelhoefer held a variety of positions, the least important of which was that of interpreter. ...he court said that even if this were his only function,

> ...t would not exonerate him from guilt because in locating, evaluating and turning over lists ...f Communist party functionaries to the executive of his organisation he was aware that ...he people listed would be executed when found.

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218. Fendler served in one of the *Kommandos* of the *Einsatzgruppen* for a period of seven months. The prosecution case against him was not that he himself conducted an execution but rather "that he was part of an organisation committed to an extermination programme". The Court noted that:

> The defendant knew that executions were taking place. He admitted that the procedure which determined the so-called guilt of a person which resulted in him being condemned to death was "too summary". But, there is no evidence that he ever did anything about it. As the second highest ranking officer in the *Kommando*, his views could have been heard in complaint or protest against what he now says was a too summary procedure, but he chose to let the injustice go uncorrected.

Both of these defendants were found guilty.

219. The cases of Ruehl and Graf provide a contrast which helps delineate the *actus reus* of the offence. The Tribunal held that both had the requisite knowledge of the criminal activities of the organisations of which they were a part. Ruehl's position, however, was not such as to "control, prevent, or modify" those activities. His low rank failed to "place him automatically into a position where his lack of objection in any way contributed to the success of any executive operation". He was found not guilty.

220. Graf was a non-commissioned officer. The court held that:

> Since there is no evidence in the record that Graf was at any time in a position to protest against the illegal actions of the others, he cannot be found guilty as an accessory under counts one and two [war crimes and crimes against humanity] of the indictment.

221. It is clear, then, that knowledge of the criminal activities of the organisation combined with a role in that organisation was not sufficient for complicity in this case and that the defendants' acts in carrying out their duties had to have a substantial effect on the commission of the offence for responsibility to ensue. This might be because their failure to protest made some difference to the course of events, or, in the case of Klingelhoefer, that his transmission of the lists of names led directly to the execution of the members of those lists.

222. In the British case of *Zyklon B*, the three accused were charged with supplying poison gas used for the extermination of allied nationals interned in concentration camps, in the knowledge that the gas was to be so used. The owner and second-in-command of the firm were found guilty; Drosihn, the firm's first gassing technician, was acquitted. The Judge Advocate set out the issue of Drosihn's complicity as turning on,

> whether there was any evidence that he was in a position either to influence the transfer of gas to Auschwitz or to prevent it. If he were not in such a position, no knowledge of the use to which the gas was put could make him guilty.

223. This clearly requires that the act of the accomplice has at least a substantial effect on the principal act – the use of the gas to murder internees at Auschwitz – in order to constitute the *actus reus*. The functions performed by Drosihn in his employment as a gassing technician were an integral part of the supply and use of the poison gas, but this alone could not render him liable for its criminal use even if he was aware that his functions played such an important role in the transfer of gas. Without influence over this supply, he was not guilty. In other words, *mens rea* alone is insufficient to ground a criminal conviction.

224. In *S. et al.*, hereafter "*Hechingen Deportation*", heard by a German court in the French occupied zone, five accused were charged with complicity in the mass deportation of Jews in 1941 and 1942 as a crime against humanity under Control Council Law No. 10. The accused S, was the local administrative authority responsible for organising the execution of Gestapo orders. He had complied with a Gestapo decree concerning the deportations. The court [illegible]

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first instance found S guilty of aiding and abetting the Gestapo in its criminal activity. His objection that his conduct in no way contributed to the crimes, because others would have taken his place if he had refused to comply with the Gestapo decree, was dismissed. The court pointed out that the culpability of an aider and abettor is not negated by the fact that his assistance could easily have been obtained from another. [...]

The court reviewed relevant 'international instruments' and found that both the 1996 Draft Cod[e] of Crimes against Peace and Security of Mankind, drafted by the International Law Commission, and the Rome Statute supported the notion that aiding and abetting could include either physical or moral support and that the assistance need only be substantial or facilitating but not necessary or essential.

(c) Conclusion

232. On the issue of the nature of assistance rendered, the German cases suggest that the assistance given by an accomplice need not be tangible and can consist of moral support in certain circumstances. While any spectator can be said to be encouraging a spectacle – an audience being a necessary element of a spectacle – the spectator in these cases was only found to be complicit if his status was such that his presence had a significant legitimising or encouraging effect on the principals. This is supported by the provisions of the International Law Commission Draft Code. In view of this, the Trial Chamber believes the use of the term "direct" in qualifying the proximity of the assistance and the principal act to be misleading as it may imply that assistance needs to be tangible, or to have a causal effect on the crime. This may explain why the word "direct" was not used in the Rome Statute's provision on aiding and abetting.

233. On the effect of the assistance given to the principal, none of the cases above suggests that the acts of the accomplice need bear a causal relationship to, or be a *conditio sine qua non* for, those of the principal. The suggestion made in the *Einsatzgruppen* and *Zyklon B* cases is that the relationship between the acts of the accomplice and of the principal must be such that the acts of the accomplice make a significant difference to the commission of the criminal act by the principal. Having a role in a system without influence would not be enough to attract criminal responsibility, as demonstrated by the case of the defendant Ruehl in the *Einsatzgruppen* case. This interpretation is supported by the German cases cited.

234. The position under customary international law seems therefore to be best reflected in the proposition that the assistance must have a substantial effect on the commission of the crime. This is the position adopted by the Trial Chamber.

235. In sum, the Trial Chamber holds that the *actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.

3. Mens Rea

(a) International Case Law

236. With regard to *mens rea*, the Trial Chamber must determine whether it is necessary for the accomplice to share the *mens rea* of the principal or whether mere knowledge that his actions assist the perpetrator in the commission of the crime is sufficient to constitute *mens rea* in aiding and abetting the crime. The case law indicates that the latter will suffice.

237. For example in the *Einsatzgruppen* case, knowledge, rather than intent, was held to be the requisite mental element.

238. The same position was taken in *Zyklon B* where the prosecution did not attempt to prove that the accused acted with the intention of assisting the killing of the internees. It was

accepted that their purpose was to sell insecticide to the SS (for profit, that is a lawful goal pursued by lawful means). The charge as accepted by the court was that they knew what the buyer in fact intended to do with the product they were supplying.

239. Two of the not guilty verdicts in *Schonfeld* also provide an indication of the *mens rea* necessary to amount to being "concerned in the killing". Both concerned drivers who claimed to have followed instructions without knowing the purpose of the mission, and were therefore found not guilty. Despite having made a physical contribution to the commission of the offence, they had no knowledge that they were doing so.

240. In the *Hechingen Deportation* case, the court of first instance considered the *mens rea* required for aiding and abetting and concluded that this mental element encompassed both the knowledge of the crime being committed by the principals and the awareness of supporting, by aiding and abetting, the criminal conduct of the principals.

As mentioned above, the subsequent acquittal of the accused Ho., K., and B. on appeal was based on a different legal standard concerning the *mens rea* of those accused, requiring the aider and abettor to have acted out of the same cast of mind as the principal.

241. Finally, in the *Tadić Judgment* it was found that the test of *mens rea* which emerged from the post-Second World War trials is "awareness of the act of participation coupled with a conscious decision to participate". The requirement adopted by the Trial Chamber was that the mental element for aiding and abetting consists of a knowing participation in the commission of an offence.

(b) International Instruments

242. Article 2(3)(d) of the International Law Commission's Draft Code on Crimes and Offences Against Mankind, provides that the *mens rea* required is that the assistance be given "knowingly". The Commentary adds:

> Thus, an individual who provides some assistance to another individual without knowing that this assistance will facilitate the commission of a crime would not be held accountable under the present sub-paragraph.

243. Therefore, it is not necessary for an aider and abettor to meet all the requirements of *mens rea* for a principal perpetrator. In particular, it is not necessary that he shares and identifies with the principal's criminal will and purpose, provided that his own conduct was with knowledge. That conduct may in itself be perfectly lawful; it becomes criminal only when combined with the principal's unlawful conduct.

244. Reference should also be made to article 30 of the Rome Statute, which provides that, "[u]nless 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*".

(c) Conclusions

245. The above analysis leads the Trial Chamber to the conclusion that it is not necessary for the accomplice to share the *mens rea* of the perpetrator, in the sense of positive intention to commit the crime. Instead, the clear requirement in the vast majority of the cases is for the accomplice to have knowledge that his actions will assist the perpetrator in the commission of the crime. This is particularly apparent from all the cases in which persons were convicted for having driven victims and perpetrators to the site of an execution. In those cases the prosecution did not prove that the driver drove for the purpose of assisting in the killing, that is, with an intention to kill. It was the knowledge of the criminal purpose of the executioners that rendered the driver liable as an aider and abettor. Consequently, if it were not proven that a driver would reasonably have known that the purpose of the trip was an unlawful execution, he would be acquitted.

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Moreover, it is not necessary that the aider and abettor should 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.

Knowledge is also the requirement in the International Law Commission Draft Code, which may well reflect the requirement of *mens rea* in customary international law. This is the standard adopted by this Tribunal in the *Tadić Judgement*, although sometimes somewhat misleadingly expressed as "intent".

249. In sum, the Trial Chamber holds the legal ingredients of aiding and abetting in international criminal law to be the following: the *actus reus* consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The *mens rea* required is the knowledge that these acts assist the commission of the offence. This notion of aiding and abetting is to be distinguished from the notion of common design, where the *actus reus* consists of participation in a joint criminal enterprise and the *mens rea* required is intent to participate.

E. How to Distinguish Perpetration of Torture from Aiding and Abetting Torture

250. The definitions and propositions concerning aiding and abetting enunciated above apply equally to rape and to torture, and indeed to all crimes. Nevertheless, the Trial Chamber deems it useful to address the issue of who may be held responsible for torture as a perpetrator and who as an aider and abettor, since in modern times the infliction of torture typically involves a large number of people, each performing his or her individual function, and it is appropriate to elaborate the principles of individual criminal responsibility applicable thereto.

251. Under current international law, individuals must refrain from perpetrating torture or in any way participating in torture.

252. To determine whether an individual is a perpetrator or co-perpetrator of torture or must instead be regarded as an aider and abettor, or is even not to be regarded as criminally liable, it is crucial to ascertain whether the individual who takes part in the torture process also *partakes of the purpose behind torture* (that is, acts with the intention of obtaining information or a confession, of punishing, intimidating, humiliating or coercing the victim or a third person, or of discriminating, on any ground, against the victim or a third person). If he does not, but gives some sort of assistance and support with the knowledge however that torture is being practised, then the individual may be found guilty of aiding and abetting in the perpetration of torture. Arguably, if the person attending the torture process neither shares in the purpose behind torture nor in any way assists in its perpetration, then he or she should not be regarded as criminally liable (think for example of the soldier whom a superior has ordered to attend a torture session in order to determine whether that soldier can stomach the sight of torture and thus be trained as a torturer).

253. These legal propositions, which are based on a logical interpretation of the customary rules on torture, are supported by a teleological construction of these rules. To demonstrate this point, account must be taken of some modern trends in many States practicing torture: they tend to "compartmentalise" and "dilute" the moral and psychological burden of perpetrating torture by assigning to different individuals a partial (and sometimes relatively minor) role in the torture process. Thus, one person orders that torture be carried out, another organises the whole process at the administrative level, another asks questions while the detainee is being tortured, a fourth one provides or prepares the tools for executing torture, another physically inflicts torture or causes mental suffering, another furnishes medical assistance so as

to prevent the detainee from dying as a consequence of torture or from subsequently showing physical traces of the sufferings he has undergone, another processes the results of interrogation known to be obtained under torture, and another procures the information gained as a result of the torture in exchange for granting the torturer immunity from prosecution.

254. International law, were it to fail to take account of these modern trends, would prove unable to cope with this despicable practice. The rules of construction emphasising the importance of the object and purpose of international norms lead to the conclusion that international law renders all the aforementioned persons equally accountable, although some may be sentenced more severely than others, depending upon the circumstances. In other words, the nature of the crime and the forms that it takes, as well as the intensity of international condemnation of torture, suggest that in the case of torture all those who in some degree participate in the crime and in particular take part in the pursuance of one of its underlying purposes, are equally liable.

255. This, it deserves to be stressed, is to a large extent consistent with the provisions contained in the Torture Convention of 1984 and the Inter-American Convention of 1985, from which it can be inferred that they prohibit not only the physical infliction of torture but also any deliberate participation in this practice.

256. It follows, *inter alia*, that if an official interrogates a detainee while another person is inflicting severe pain or suffering, the interrogator is as guilty of torture as the person causing the severe pain or suffering, even if he does not in any way physically participate in such infliction. Here the criminal law maxim *quis per alium facit per se ipsum facere videtur* (he who acts through others is regarded as acting himself) fully applies.

257. Furthermore, it follows from the above that, at least in those instances where torture is practiced under the pattern described *supra*, that is, with more than one person acting as co-perpetrators of the crime, accomplice liability (that is, the criminal liability of those who, while not partaking of the purpose behind torture, may nevertheless be held responsible for encouraging or assisting in the commission of the crime) may only occur within very narrow confines. Thus, it would seem that aiding and abetting in the commission of torture may only exist in such very limited instances as, for example, driving the torturers to the place of torture in full knowledge of the acts they are going to perform there; or bringing food and drink to the perpetrators at the place of torture, again in full knowledge of the activity they are carrying out there. In these instances, those aiding and abetting in the commission of torture can be regarded as accessories to the crime. By contrast, at least in the case we are now discussing, all other varying forms of direct participation in torture should be regarded as instances of co-perpetration of the crime and those co-perpetrators should all be held to be principals. Nevertheless, the varying degree of direct participation as principals may still be a matter to consider for sentencing purposes.

Thus to summarise the above:

(i) to be guilty of torture as a perpetrator (or co-perpetrator), the accused must participate in an integral part of the torture and partake of the purpose behind the torture, that is the intent to obtain information or a confession, to punish or intimidate, humiliate, coerce or discriminate against the victim or a third person.

(ii) to be guilty of torture as an aider or abettor, the accused must assist in some way which has a substantial effect on the perpetration of the crime and with knowledge that torture is taking place.

In a subsequent case, the Appeals Chamber in *Blaškić* endorsed the notion that aiding and abetting could occur through omission:

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47. The Trial Chamber further stated that the actus reus of aiding and abetting may be perpetrated through an omission, "provided this failure to act had a decisive effect on the commission of the crime and that it was coupled with the requisite mens rea." It considered:

> In this respect, the mere presence at the crime scene of a person with superior authority, such as a military commander, is a probative indication for determining whether that person encouraged or supported the perpetrators of the crime.

The Appeals Chamber leaves open the possibility that in the circumstances of a given case, an omission may constitute the actus reus of aiding and abetting.

In relation to aiding and abetting by omission, the first clear-cut case of conviction by a contemporary international tribunal for failure to carry out a duty incumbent upon the accused on the basis of the laws of war came on 5 May 2009, with the *Mrkšić* Appeal Judgment. In that Judgment, the ICTY Appeals Chamber found (§102) that the accused Veselin Šljivančanin's 'failure to act pursuant to his duty [to protect prisoners of war] substantially contributed to the killing of the prisoners of war'.

USA, Khulumani *v.* Barclay National Bank Ltd. et al., *US Court of Appeals for the Second Circuit, Judgment of 12 October 2007*

Three groups of plaintiffs brought a civil action in United States federal court under the Alien Tort Claims Act (ATCA) against various international corporations that did business in South Africa alleging that the corporations aided and abetted the apartheid regime in South Africa in the commission of torture and extrajudicial killings. In order to prevail on their claim, the plaintiffs were required to demonstrate that the principle of aiding and abetting is established in customary international law. The case is still pending. The following is from the concurring opinion of Judge Katzmann.

[...] I conclude that the recognition of the individual responsibility of a defendant who aids and abets a violation of international law is one of those rules "that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern." Recognized as part of the customary law which authorized and was applied by the war crimes trials following the Second World War, it has been frequently invoked in international law instruments as an accepted mode of liability. During the second half of the twentieth century and into this century, it has been repeatedly recognized in numerous international treaties, most notably the Rome Statute of the International Criminal Court, and in the statutes creating the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"). Indeed, the United States concedes, and the defendants do not dispute, that the concept of criminal aiding and abetting liability is "well established" in international law.

Judge Katzmann engages in a comprehensive review of international criminal law sources to support this conclusion before turning to an examination of the *mens rea* requirement.

Still the Rome Statute's *mens rea* standard is entirely consistent with the application of accomplice liability under the sources of international law discussed above. For example, in the *Ministries Case* conducted under Control Council Law No. 10, the tribunal declined to impose criminal liability on a bank officer who was alleged to have "made a loan, knowing or having

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[redacted]

good reason to believe that the borrower would] use the funds in financing enterprise ducted] in violation of either national or international law," but was not proven to have the loan with the purpose of facilitating the enterprises' illegal activities. Meanwhile, who assist in the commission of a crime with the purpose of facilitating that crime were subject to aiding and abetting liability under the statutes governing the ICTY and ICTR research has revealed no source of international law that recognizes liability for aiding abetting a violation of international law but would not authorize the imposition of such by on a party who acts with the purpose of facilitating that violation (provided, of course the *actus reus* requirement is also satisfied).

With respect to the *actus reus* component of the aiding and abetting liability, the national legislation is less helpful in identifying a specific standard. However, in the course its analysis of customary international law, the ICTY concluded that "the *actus reus* of and abetting in international criminal law requires practical assistance, encouragement moral support which has a *substantial effect* on the perpetration of the crime." *Furund* Trial Chamber Judgment, ¶ 235 (second emphasis added). My research has uncovered no to indicate that a standard other than "substantial assistance" should apply.

Accordingly, I conclude that a defendant may be held liable under international law aiding and abetting the violation of that law by another when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the and (2) does so with the purpose of facilitating the commission of that crime. Further based on this review of international law's treatment of aiding and abetting liability over the past sixty years, I conclude that aiding and abetting liability, so defined, is sufficiently established ["well universally recognized" to be considered customary international law for the purposes of the ATCA.

QUESTIONS

1. Normatively where is the right place to draw the line between innocent and culpable contributions to mass crimes? Should the focus be on the *actus reus* or on the *mens rea*?
2. Aiding and abetting by omission requires, inter alia, the failure to fulfil a duty. What kinds of duties should give rise to the possibility of such liability?
3. Given the potentially broad scope of aiding and abetting liability, does it necessarily depend on the judicious exercise of prosecutorial discretion)?

* [12] These Tribunals would also extend liability to individuals who merely had "knowledge that acts assist the commission of the specific crime of the principal." Any individual who acts with the to facilitate the commission of a crime would necessarily act with such knowledge. Thus, I do not articulation of a broader definition by the ICTY as detracting from my position that liability in accordance with the purposefulness standard is well-established and universally recognized under international critical question is whether there is a discernable core definition that commands the same level of consensus the 18th-century crimes identified by the Supreme Court in *United States v. Sosa*. I believe that the one I adopt is such a definition.

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FURTHER READING

Cassese, *International Criminal Law*, 214–18.

A. Eser, 'Individual Criminal Responsibility', in A. Cassese *et al.* (eds), *International Criminal Court Commentary*, vol. 1 (Oxford: Oxford University Press, 2002), 798–801.

O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (The Netherlands: IOS Press, 2008), 754–7.

Werle, *Principles*, 182–5.

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by the Germans in 1943. Many of the victims had been reported by the Soviets as exiled to Siberia.

Ukraine has its Lidice too, in the town of Zavadka, destroyed by the Polish satellites of the Kremlin in 1946.[13] Three times, troops of the Polish Second Division attacked the town, killing men, women and children, burning houses and stealing farm animals. During the second raid, the Red commander told what was left of the town's populace: 'The same fate will be met by everyone who refuses to go to Ukraine. I therefore order that within three days the village be vacated; otherwise, I shall execute every one of you.'[14]

When the town was finally evacuated by force, there remained only 4 men among the 78 survivors. During March of the same year, nine other Ukrainian towns were attacked by the same Red unit and received more or less similar treatment.

What we have seen here is not confined to Ukraine. The plan that the Soviets used there has been and is being repeated. It is an essential part of the Soviet programme for expansion, for it offers the quick way of bringing unity out of the diversity of cultures and nations that constitute the Soviet Empire. That this method brings with it indescribable suffering for millions of people has not turned them from their path. If for no other reason than this human suffering, we would have to condemn this road to unity as criminal. But there is more to it than that. This is not simply a case of mass murder. It is a case of genocide, of destruction, not of individuals only, but of a culture and a nation. If it were possible to do this even without suffering we would still be driven to condemn it, for the family of minds, the unity of ideas, of language and of customs that form what we call a nation that constitutes one of the most important of all our means of civilization and progress. It is true that nations blend together and form new nations — we have an example of this process in our own country — but this blending consists in the pooling of benefits of superiorities that each culture possesses.[15] And it is in this way that the world advances. What then, apart from the very important question of human suffering and human rights that we find wrong with Soviet plans is the criminal waste of civilization and of culture. For the Soviet national unity is being created, not by any union of ideas and of cultures, but by the complete destruction of all cultures and of all ideas save one — the Soviet.

13 On 10 June 1942, 172 males over the age of 16 years were liquidated, the women and children deported and the village of Lidice razed to the ground in reprisal for the assassination of the Nazi dictator of Moravia, Reinhard Heydrich. Zavadka Morokhivs'ka, Sianits'kyi povit, Lemkivshchyna, now Zawadka-Morochowska, in Poland.

14 From W. Dushnyck, *Death and Devastation on the Curzon Line* (note by R.L.).

15 Lemkin had in mind the United States.

Modes of Participation in Crimes Against Humanity

The *Hechingen and Haigerloch* Case

We present here the English translation of two decisions of German courts in a case involving various defendants (one decision at the level of first instance, the other at that of appeal). Both decisions deal primarily with the issue of participation in crimes against humanity.

These decisions are among the many interesting judgments delivered by German courts between 1945 and 1966 on crimes allegedly committed by Germans during the World War II. The decisions we are presenting discuss many points: (a) the compatibility of Control Council Law No. 10 with the nullum crimen *principle; (b) the value of superior orders; (c) the notion of persecution as a crime against humanity; (d) necessity as a defence. However, the most interesting feature of the judgments resides in their discussion of the possible criminal responsibility of those participants in mass criminality who are neither at the top (in that they plan, order, instigate, etc. or else fail to prevent and punish crimes) nor at the bottom (in that they materially perpetrate the killing, raping, extermination, etc.) but are rather intermediate participants who operate in a grey area. For these participants, it normally proves difficult to establish whether they are culpable and therefore bear criminal liability.*

The Tribunal of Hechingen (a small town in Baden-Württemberg, about 60 kms south of Stuttgart) had to pronounce on the criminal liability of those implicated in the deportation of Jews in 1941–1942 from two towns in Germany (Hechingen and Haigerloch) to Theresienstad and then Auschwitz. The Tribunal found that a medical doctor, who had been charged with ascertaining whether the deportees were fit to travel, was not culpable. It found instead that the four other defendants were guilty of crimes against humanity. The major accused was a senior administrative and police official, who had passed on the deportation orders issued by the Gestapo and seen to it that they were implemented; the Tribunal found that he had aided and abetted the crime of persecution on racial or religious grounds (a crime against humanity under Control Council Law No. 10). The three remaining defendants (German women without any official status who, upon orders from the administrative authority, had searched Jewish women being deported, to find out whether they were holding valuables) were also found guilty as accessories to the same crime against humanity. Strikingly, the Court of appeal held instead that the three women were not guilty, both because they had played a subordinate role and because they were not aware of the illegality of what they were doing. Also, with regard to the main defendant, after

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his conviction by the Tribunal, the Court of appeal remitted the case to a lower court, issuing legal instructions clearly destined to lead to acquittal. In this respect, the appellate decision is part of a post-World War II trend of German superior judicial bodies to insist on circumstances excluding criminal responsibility and thereby acquit defendants convicted by lower courts. The same trend can also be seen in the 1946–1950 case law of the Italian Court of cassation; this court tended to find on many occasions that a number of justifications or excuses made non-punishable the war crimes that according to lower courts — normally assize courts pronouncing between 1946 and 1948 — Italians siding with the Germans had committed against Italian civilians or members of resistance movements.

a.c.

Tribunal (*Landgericht*) Hechingen, Judgment of 28 June 1947, Kls 23/47[1]

[. . .] On the basis of the trial and the hearing of the evidence, the following is established:

(a) The accused S., as then *Landrat* ['county president', senior administrative and police official of a *Kreis*, i.e. County, District] of Hechingen, received the order of 14 August 1942 of the Stuttgart Head Office of the Gestapo [abbreviation of *Geheime Staatspolizei*, Secret State Police — the German text uses the full form throughout]. On 17 August 1942, he gave the mayors of Haigerloch and Hechingen the necessary instructions in writing for carrying out this order, in particular to have the Jews directed to 'deportation' and their luggage searched in the prescribed manner, and to ready these persons for transport on 19 August 1942. He further instructed persons officially subordinate to him to cooperate in the physical search of the persons to be deported; he gave this instruction to, among others, co-defendant Ms Ho., who carried it out on 19 August 1942 together with Mrs M., appointed for the purpose by the mayor of Haigerloch, in relation to the Jewish women concerned. These findings are based, to the extent that they relate to the accused Mr S., on his own statements; otherwise they result from the statements of co-defendant Ms Ho. The detail of how the physical search of the Jewish women by Ms Ho. occurred will be presented below in another context.

(b) A total of 138 people, 136 from Haigerloch and 2 from Hechingen, were affected by this fourth deportation. These 138 people were transported under police escort on 19 August 1942 from Haigerloch to Stuttgart, nine of the particularly infirm in road vehicles, the rest by rail. In Stuttgart they were

1 A. Cassese (ed.), Iain L. Fraser (trans.), *Justiz und NS-Verbrechen – Sammlung deutscher strafurteile wegen Nationalsozialistischer Tötungsverbrechen 1945-1966* (in German), Vol. 1 (Amsterdam: University Press Amsterdam, 1968) 471–493 (Lfd. Nr. 022). The pages of the original German text are indicated in square brackets.
On this case, see B. Burghardt, 'S and Others (the *Hechingen and Haigerloch Deportation* case)', in A. Cassese *et al.* (eds), *Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009), at 896–897, where reference is also made to a third judgment by the district court of Tübingen.

brought to the Gestapo collecting point, and from there transported to Theresienstadt. Of the 138 people departed, only a single victim remained alive and returned to Haigerloch; all the others, it must be regarded as certain, either died or were killed during the deportation. Information on the circumstances in Theresienstadt has been provided by the testimony of Senior State Attorney Mr D. of Stuttgart.

Since during the deportation no consideration was given to age or illness or infirmity of those deported (from *Kreis* Hechingen, as already mentioned, nine severely ill people were deported to Theresienstadt, and among the other deportees, no less than 10 were over 80), some of the deportees were already dead by the time they reached Stuttgart, and others during the transport to Theresienstadt. Theresienstadt was a small town with a normal population of some 7,000 inhabitants; at times up to 60,000 Jews were accommodated there, in a way, as is obvious from these facts alone, that bespeaks contempt for any humanity. From Theresienstadt transports regularly went to the extermination camp at Auschwitz; of those who avoided the death camp, a large proportion died from diseases. Not even National Socialism, by the way, dared to admit the truth to the German people. To deceive the people, those deported to Theresienstadt were allowed to write postcards, the contents of which were admittedly under SS censorship, so as to create the false impression that things were bearable for the Jews in Theresienstadt. It is noteworthy, however, that Jews deported to the so-called *Reichskommissariat Ostland* [the Baltic States, plus part of eastern Poland and the western Soviet Union] or to the so-called *Generalgouvernement* [the bulk of occupied Poland] were allowed no mail, so that it is not the case that written communications from Jews deported there [479] ever reached Germany. It was still more despicable that it was faithfully misrepresented to some of the Jews deported to Theresienstadt that it was intended to set up a Jewish old people's home there, and that they were induced to use their liquid resources to conclude 'residential-care contracts'. In reality no such old people's home was ever created; nor, even, was the objective of concluding the 'residential-care contracts' to deprive those Jews in a seemingly harmless way of the residue of their assets; instead, all that was wanted was a way to deceive the German people about the true aim of the deportation and lie to them that there was humane treatment for the Jews, which neither took place nor was intended.

II. Overall Appraisal in Criminal Law[2]

(1) For the appraisal in criminal law of the Gestapo orders mentioned in the first section of the grounds of judgment and at the same time for the criminal appraisal of all those actions serving to execute those orders, Law No. 10 issued by the Allied Control Council on 20 December 1945 on the punishment of

2 The judgments against S., Ho., K. and B. were not conclusive, being overruled by the judgment of 20 January 1948 by the Tübingen Court of Appeal (see below); the final verdict on S. was given by the Tribunal of Hechingen, see Lfd 080, the other three being freed by Tübingen Court of Appeal. [Note: the names were already abbreviated in the transcripts made available for publication.]

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persons guilty of war crimes, crimes against peace and against humanity is applicable (*Journal Officiel du Commandement en Chef Français en Allemagne* No. 12 p. 84 ff), and in particular Article II of this Law, clause 1(c) which says 'Est considéré comme crime chacun des actes ci-après énumérés: Crimes contre l'Humanité- Atrocités et délits comprenant, sans que cette énumération soit limitative, l'assassinat, l'extermination, l'asservissement, la déportation, l'emprisonnement, la torture, le viol ou tous autres actes inhumains commis contre toute population civile et les persécutions pour des motifs d'ordre politique, racial ou religieux, que lesdits crimes aient constitué ou non une violation de la loi nationale du pays où ils ont été perpétrés.' ['Each of the following acts is recognized as a crime: Crimes against Humanity: Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.']

The Allied Control Council's power to enact such a law follows, according to the generally recognized rules of international law, from the fact that with the unconditional surrender of the German Armed Forces the entire State power, as regards both administration and legislation, on the territory of the German Reich passed unrestrictedly to the Allied Control Council. The provisions of the Third Section of the Hague Convention on the Laws and Customs of War of 18 October 1910 [*sic*] and of all the principles of international law that regulate the authority of the occupying power for the case where lawful authority has only *de facto* fallen into the hands of the occupier ('*l'autorité du pouvoir légal ayant passé de fait entre les mains de l'occupant* . . .'), are not applicable where this transition has, following general and unconditional surrender, come about not only *de facto* but also *de jure*.

Nor can it be objected against application of Law No. 10 passed by the Allied Control Council that this Law rendered punishable actions that at the time they were committed did not face punishment under German law. Since the essential object of punishment is retribution, the threat of punishment before commission of an act is not a requirement for imposing the punishment that necessarily follows from the concept and essence of punishment. The principles *nullum crimen sine lege* and *nulla poena sine lege* are merely maxims of law of the State [*Maximen des Staatsrechts*] and in particular of constitutional law based on considerations of equity and expediency [*Billigkeits- und Zweckmässigkeitserwägungen*]. Where these principles were incorporated in a country's constitution, as in the so-called Weimar Constitution of the German Reich of 11 August 1919 (Article 116), [480] this has no other significance than that an enactment of a criminal law conflicting with them must be regarded as a constitutional amendment and accordingly subjected to the impediments put in the way of constitutional amendments. The fact that even the Constitution of Württemberg-Hohenzollern currently in force provides (Article 17(1)) that 'punishments may be imposed only on the basis of laws that were in force during the time the act was committed' is no bar to the application of Law No. 10 passed by the Allied Control Council, if only because this constitution had neither the power nor the intention to set aside the acts of the Allied Control Council.

(2) Law No. 10 passed by the Allied Control Council is not only the applicable but also the sole and exclusive legal basis for the punishment of those actions which that Law designates as crimes.

(a) The provisions of the German penal code would not, if Law No. 10 passed by the Allied Control Council were not available, suffice to atone for crimes in need of atonement which are, according to the Allied Control Council's will, to be punished. There are numerous cases of mistreatment committed on political or racial grounds and therefore to be considered as acts of persecution for political or racial reasons, which can however be prosecuted under German law only on petition (§232 of the German Penal Code); these cases would remain unpunished were the injured party — perhaps because no longer alive — no longer able to petition for a prosecution. There are numerous cases of property damage committed for political or racial reasons and therefore to be considered as acts of persecution on political or racial grounds that can similarly be prosecuted under German criminal law only on petition (§303(3) of the German Penal Code); these cases too would often go unpunished failing a petition. Gross outrages would be unprosecutable as civil disorder (§125 of the German penal code) because they were committed with the knowledge and desire of the State authorities, whereas civil disorder presupposes acts of violence committed against the will of the State authorities. The taking by violence of property would not always fit the offence of robbery (§249 of the German Penal Code) because the perpetrators did not have the intention of appropriating the things taken for themselves but were acting in favour of the State. To fill these lacunae, Law No. 10 passed by the Allied Control Council was accordingly necessary. It follows, therefore that even in those cases where punishment on the basis of German criminal law would in itself be possible, Law No 10 replaces the relevant provisions of German criminal law.

(b) The axiomatic character of Law No. 10 adopted by the Allied Control Council in relation to German penal laws leads to the further conclusion that the provisions contained in the first (general) part of the German Penal Code are also not directly applicable to crimes falling under Control Council Law No. 10. Control Council Law No. 10 is not merely a law amending or supplementing the second (special) part of the German Penal Code, but even the general provisions of criminal law are, where Control Council Law No. 10 is to be applied, to be taken either from the Control Council Law itself (e.g. as regards aiding and abetting — Article II(2)(c); as regards denial or acceptance of certain grounds of mitigation — Article II(3)) or else, where there are no explicit provisions, to be supplemented from the meaning and purpose of the Law and having regard to generally recognized principles of criminal law (e.g. as regards assessment of the so-called plea of necessity).

(3) It is a fact of course but should, however, all the same be explicitly stated, that the accused S. cannot — as he has attempted — appeal to the fact that popular

opinion at the time did not regard him as guilty or punishable, [481] and that even today popular opinion does not regard him as guilty or punishable.

The then popular opinion [*Volksmeinung*] was, and, since the wording and contents of the Gestapo orders were unknown to it, could only be, formed on the basis of very imperfect knowledge of the facts and circumstances. Additionally, popular opinion mostly assesses not by rational but by irrational criteria; feelings replace the intellect. By contrast, it is the right and duty of the Court to base its decision on objective considerations and not subjective associations. Anyone making much allowance for his feelings usually runs the danger of exonerating himself from observing the general and customary guilt and blurring the boundaries of law and morality; there must be no other access to the heart than through the intellect.

Today's popular opinion is, moreover, a poor and unsuitable judge simply because the German people, when it comes to National Socialism, is largely a judge in its own cause. It has rightly been said that we Germans all too readily withdraw into fate and tragedy (Ernst Robert Curtius), and it is admittedly always easier to present oneself as a victim of circumstances and seek the blame outside us instead of within us, to flee from reality into illusion. But it is a dangerous illusion to believe that the guilt that affects not just the seducer but the seduced can be avoided by the easy recourse of an appeal to sympathy, and anyone who promotes this illusion is doing the German people poor service in the court of humanity.

(4) The accused cannot justify themselves on the ground that they were following orders either. This is explicitly excluded by Article II(4)(b) of Control Council Law No. 10, and it should be noted that the legal idea contained in the Article has always had validity in German law. While officials, like the accused S., K. and Ho., are obliged to obey, they are not obliged to blind obedience. Even the German Civil Service Act of 26/1/1937 provides, in § 7(II), second sentence: 'An official must not follow an order the execution of which would recognizably to him run counter to the criminal laws.' It follows that officials must not follow a criminal order or criminal instruction. They are not only entitled but also obliged to test whether the order or instruction runs counter to the criminal laws. This regulation even applied to the former German Armed Forces, although every unit is very specially built upon discipline and obedience. For § 47 of the Military Penal Code (RGBl. 1926, p. 275) requires: 'If the execution of an order in service matters infringes a criminal law, then the superior giving the order is solely responsible. However, a subordinate obeying it is to be punished as an accessory where: 1) he exceeded the order as issued, or 2) it was known to him that the superior's order concerned an action that was aimed at a civil or military crime or misdemeanour.'

Even a soldier, then, ought not to execute an unlawful order; where he nonetheless followed it, he is answerable as a participant [*Teilnehmer*]. As already set out, the orders on the deportation of the Jews lacked all legal basis. The relevant Gestapo orders were thus unlawful and constituted the ordering of a criminal action, so that these instructions ought not, even according to the law then in force, to have been followed by the accused. Since they nonetheless executed these orders, the accused are punishable as participants [*Teilnehmer*] if it was known to them that the order concerned an action aimed at a crime or misdemeanour. [482]

III. The Accused S.

(1) The 'deportation' of the Jews resident in Kreis Hechingen ordered by the Gestapo and the simultaneous confiscation and seizure of those Jews' assets ordered by the Gestapo was persecution on racial grounds (*persécution pour des motifs d'ordre racial*) and thus a crime against humanity within the meaning of Article II(1)(c) of Control Council Law No. 10. They constituted that crime even if at the time the 'deportation' was ordered the intention did not yet exist to kill the deported Jews or allow them to perish.

The wording of the Gestapo orders allows no doubt as to this. The first order already stresses in its introductory words that the deportation is happening 'as part of purging all Europe of Jews'; a compulsory 'purge of Jews' and a 'persecution on racial grounds' directed against Jews are obviously only different terms for the same thing. The Gestapo's second order calls the 'deportation' ordered 'the start of the Final Solution to the Jewish question' and 'the last opportunity for the moment to purge the individual districts of Jews'. The reference to the 'final solution to the Jewish question' was totally accurate if we recall that National Socialism had from the outset taken the fight against Jewry as its task and carried on this fight with measures which grew harsher by the year.

Control Council Law No. 10 explicitly defines persecution on racial grounds as a crime against humanity irrespective of whether the persecution measures infringe the national law of the country in which the act was committed. It needs no proof as such whether the measures ordered by the Gestapo were covered at least formally by provisions of German law. Nonetheless, it is appropriate to state that those measures were objectively unlawful even under German law. For the 'deportation' of the Jews and the associated deprivation of their freedom there was not even apparent legal basis. While the seizure of assets was allegedly on a legal basis, namely in part the 11th Order under the Reich Citizenship Act, and in part the statutory provisions on the seizure of communist assets and on the seizure of assets of enemies of the people and of the State in the Acts of 26 May 1933 and 14 July 1933, the reference to these provisions was purely arbitrary. While the 11th Order under the Reich Citizenship Act provided that the assets of a Jew who 'took up ordinary residence abroad' were forfeit to the German Reich, this could according to the wording of those orders apply only to Jews who voluntarily shifted their ordinary residence abroad, but not also to Jews who were deported abroad against their will. The application of the Acts on the seizure of communist assets and the assets of the enemies of the people and the State to the deported Jews would have presupposed a trial and finding, for each individual deportee, that they had acted in a communist or 'hostile to people and State' fashion; no such trial or finding was even attempted, far less carried out.

Finally, the measures ordered by the Gestapo would not lose their nature as 'persecution on racial grounds' even if they were aimed at serving military ends, in particular, the defence of the country. There is a difference between what motivates an act and what end the act serves. Even if the 'deportation' of the Jews were supposed to have had military ends (something for which there is no established supporting fact), the fact remains that as an element in the fight against the Jews it constituted persecution on racial grounds. How far the seizure of assets may be supposed to have served military ends cannot moreover be seen at all. [483]

(2) The accused S., by executing himself in part the orders that reached him from the Gestapo and in part having them executed by people under him, participated in persecution on racial grounds and thus in a crime against humanity.

(a) Accused S. objectively, to be sure, acted neither as perpetrator (*Täter*) nor co-perpetrator (*Mittäter*) but as accessory (*Gehilfe*), since his participation was confined to executing the orders of the Gestapo in his capacity as *Landrat* of *Kreis* Hechingen, to the detriment of the Jews concerned, without departing from these orders on the basis of decisions of his own.

The consideration that the Gestapo orders would have been executed even if accused S. had not been involved in their execution, that is, the consideration that his participation was not causal for their success, does not exonerate the accused. The causality concept (*Ursachenbegriff*) in legal science is not — unlike that in natural science — mechanistically oriented, but teleologically, in the sense of the purpose of the legal system. Accordingly, no accessory can escape penal responsibility by showing that the main perpetrator (*Haupttäter*) could have carried out the act even without his assistance. In the great mechanism of the persecution of the Jews, every single cog was interchangeable at all times. Were one, given that fact, to seek to exclude the criminal responsibility of each interchangeable participant because of the absence of causality of his participation, then ultimately only the main perpetrators would be liable; all accessories would get off scot-free, even if they had acted on racial grounds, for even in the latter case their participation would, on a mechanistic view, not have been causal.

The accused S. has further appealed to the fact that it could not be within the intention of Control Council Law No. 10 to punish absolutely all participation in the carrying out of persecution of the Jews; for instance, a typist typing out the Gestapo deportation orders and posting them, or the driver of a locomotive pulling the train the deported Jews were to be transported by, could not be punishable. This consideration is just as wrong as the previous one, though in the opposite direction; while the previous consideration couched the concept of causality too narrowly, it is now too broad. From the impunity of participation by a typist or train driver, the impunity of the *Landrat*'s participation does not follow; to that extent, his argument does not prove what it is supposed to prove. The range of duties (*Pflichtenkreis*) of a typist or train driver is quite different from a *Landrat*'s. A typist's official duty is fulfilled in her accurately and punctually typing what she is asked to; a train driver's in

bringing the rail transport punctually and safely to its destination; neither the one nor the other commits a breach of duty if their activity happened to be part of the persecution of the Jews. Things are quite different with a *Landrat*. As the senior administrative and police official of the *Kreis*, he is entrusted with the administrative and police protection of its population against unlawful interference with their liberty and property; he infringes his set of duties if he participates in interference with the very legal goods he is called on to protect.

The question whether accused S. committed a continuous action or is punishable for four separate actions is one the Court felt it need not go into in its guilty verdict. It here followed the Nuremberg judgment of 30 September/1 October 1946, which for those accused (for instance accused X [*sic*]) found guilty on several counts applied a single punishment, and did not act pursuant to § 74 of the German Penal Code.

(b) In subjective respects, the punishability of accused S. depends on [484] his having acted intentionally as an accessory. Intent as an accessory (*Gehilfenvorsatz*) requires, first, that the accused knew what act he was furthering by his participation: he must have been aware that the actions ordered from him by the Gestapo served persecution on racial grounds. He had this awareness, as the Court hereby finds, as the outcome of the trial and taking of evidence, on the basis of the wording and content of the Gestapo orders he received, even if, as he has credibly assured, he did not reckon on the possibility that the deported Jews might be killed. The accused may also be believed to have assumed that the forced deportation of the Jews was in the interest of the defence of the Reich, and that he formed a too favourable conception of the fate awaiting the Jews after deportation ('resettlement') and was strengthened therein by hopes expressed by some of the Jews concerned themselves. The fact nonetheless remains that the forced deportation of the Jews as such, taken together with the confiscation and seizure of their assets, was seen by the accused as 'persecution on racial grounds'. The accused himself stated at the trial that he regarded the Gestapo measures as 'unjust' to the Jews, and struggled with himself whether to carry out the measures or not; these statements by the accused himself enable and support the finding made above.

Intent as an accessory (*Gehilfenvorsatz*) requires, second, that the accused knew that through his participation he was furthering the principal act. He had this awareness too, as the Court hereby finds, as an outcome of the trial and taking of evidence. This awareness is not excluded by the consideration brought up by the accused that if he himself had refused to execute the Gestapo measures someone else would have carried them out in his place, but on the contrary shown to be present; for this consideration shows that the accused took it upon himself, for reasons the scope of which is still to be discussed, to carry out the Gestapo orders himself instead of leaving it to someone else.

Intent as an accessory does not, by contrast, require the accused himself to have acted from racial considerations or from inhumane attitudes at all. Nor is it required that the accused had an awareness of the illegality of his action, since Control Council Law No. 10 declares persecution on racial grounds

punishable irrespective of whether it infringes the national law of the country in which it was committed; it is thus immaterial what notion the person had as to the legality of his actions. That, finally, the fact that the accused was acting on orders does not exclude penal responsibility as an accessory is explicitly stated in Article II(4)(b) of Control Council Law No. 10.

(3) It remains to be discussed whether accused S. can appeal to grounds excluding guilt or punishment.

(a) Accused S. has asserted that he weighed against each other the facts that he could not prevent the carrying out of the Gestapo measures; that these measures would be carried out all the same even if he refused to do so; that his participation in these measures would accordingly not spare any of the Jews concerned the evils threatening them; and on the other the facts that his participation in these measures enabled him to remain in his post as *Landrat*, that his remaining in office was both in the interest of the Jewish population to the extent that he could mitigate some things, and in the interest of the non-Jewish part of the population with a negative attitude to National Socialism, in so far as he could uphold or procure facilitations for this part of the *Kreis* population too; from this weighing up, he had arrived at the conclusion that preponderant interests justified his carrying out, in order to remain in office, the orders [485] of the Gestapo; he was strengthened in this view by the fact that his remaining in office was desired both on the Jewish side and by respectable figures in the non-Jewish part of the *Kreis* population, and even explicitly asked for; if in this weighing up he had based himself on inaccurate expectations or if the weighing up as such was incorrect, this was at most a political error, not a criminal fault.

That accused S., and with him the circles supporting him in his resolution, were making a severe political mistake in this consideration, even if the premises of the weighing up be supposed to be correct, is plain. During the rule of National Socialism, the temptation was — it may be admitted — indeed great to come to terms with the unbearable, whether out of fear of worse yet to come or in the hope of being able to maintain for oneself and others a 'party-free' reservation — however small. This fear and this hope, both of these elements in the thinking of accused S., were very well recognized by National Socialism, which used them and abused them as a psychological and political factor. Inside the official apparatus, in general only the key positions were occupied by ideologically committed and reliable party comrades. That was quite enough. The rest of the officials could be left with the illusion of freedom in little things, indeed even a certain actual freedom; that was a cheap price to pay for their compliance in all important matters, and they were willing to pay it for they knew very well that all those who — like accused S. — pursued opportunist policies in order to maintain their freedom of action ultimately became prisoners of their own policies.

Thus it could not fail to happen, and, as this case showed actually did happen, that part of the civil service bowed to immoral and illegal impositions; what began as a political error ended as moral and criminal guilt. When

politics comes into conflict with law and morality, this conflict can be solved only in the sense that law and morality must never be adjusted to politics, but politics must always be to law and morality. This principle applies to the State as a whole; it applies to every official as an individual. Each citizen has a right to have an official, from whom an immoral and illegal action is demanded, refrain from that action; each citizen must be protected against officials, irrespective of the considerations they base themselves on, committing such acts. An official who fails to see this is acting not simply unwisely politically because he is undermining trust in the lawfulness of the administration, but at the same time unlawfully. That is why accused S. must be refused the appeal to the balancing of interests he did; an error as to the admissibility of this balancing of interests counts against him.

It should further be added that it is only times of such general spiritual wrong as we have just lived through, and of exaggerated legal positivism and utilitarianism, that could have enabled such a balancing of interests to be considered admissible. According to Christian teaching, it is presumption to risk the certain sacrifice of one moral good against the uncertain gaining or preservation of another moral good and thus replace divine providence with one's own providence. Every moral precept is binding unconditionally and regardless: 'No man, having put his hand to the plough, and looking back, is fit for the Kingdom of God' (Luke 9: 62).

(b) The question still has to be tested whether accused S. in carrying out the Gestapo orders was in a genuine or at least presumptive [*vermeintlicher*] state of necessity [*Notstand*], whether he was determined in his decisions by this necessity and whether if this were to be the case his punishability would be ruled out on that plea. [486]

Control Council Law No. 10, Article II(4)(b), contains the following provision: '*Le fait, qu'une personne ait agi conformément aux ordres de son gouvernement ou d'un supérieur, ne la dégage pas de la responsabilité d'un crime, mais peut être considéré comme une cause de circonstances atténuantes.*' ['The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.']

The Nuremberg Judgment of 30 September/1 October 1946 states the following on Article 8 of the Statute, which corresponds in content to the provision of Control Council Law No. 10 just stated: '*Les dispositions de cet article sont conformes au droit commun des Etats. L'ordre reçu par un soldat de tuer ou de torturer, en violation du Droit international de la guerre, n'a jamais été regardé comme justifiant ces actes de violence. Il ne peut s'en prévaloir, aux termes du Statut, que pour obtenir une réduction de la peine. Le vrai critérium de la responsabilité pénale, celui qu'on trouve, sous une forme ou sous une autre, dans le droit criminel de la plupart des pays, n'est nullement en rapport avec l'ordre reçu. Il réside dans la liberté morale, dans la faculté de choisir, chez l'auteur de l'acte reproché.*' ['The provisions of this Article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognised as a defence to such acts of brutality, though, as the Charter here

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provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.']

This establishes on the one hand that acting on orders cannot be recognized as a ground excluding guilt or punishment, and why this is so, but on the other clarifies that a so-called state of necessity, in which the person acting lacks *liberté morale*, the *faculté de choisir*, is in some circumstances to be taken into account, and that it may be important whether — as the English text of the Nuremberg Judgment puts it — 'moral choice was in fact possible'.

The Court assumes that accused S., had he refused to carry out the order from the Gestapo, would have been removed from office and punished, and that the possibility cannot be rejected out of hand that such a refusal might have brought with it other severe drawbacks (such as consignment to a concentration camp) for him. This is equally true for all four deportations.

But this fact does not rule out guilt and punishability of accused S., for several reasons.

(aa) First, the accused was not determined in his carrying out the Gestapo orders by the situation he found himself in, i.e. by fear or cowardice, but exclusively by the balancing of interests he carried out, which has already been assessed. The accused explicitly and unambiguously stated this at the trial, and this statement is credible. It shows that the accused, on the basis of the balancing of interests he undertook, would have carried out the Gestapo orders even had he not found himself in the position mentioned. Under these circumstances, the accused cannot benefit from a plea of necessity excluding punishment or guilt, irrespective of any influence it may have on the calculation of penalty. Where somebody, despite a state of necessity, resolves on criminal action irrespective of the reasons, it cannot then be said that he could rely on the consideration that justifies the plea of necessity as a ground of exclusion of punishment or guilt, namely that the person did not have *liberté morale*, the *faculté de choisir*. On the contrary, the decision taken by him proves precisely that he did have freedom to decide, that 'moral choice was in fact possible' for him, and that he also made use of this freedom of choice.

(bb) Second, consideration should be given to the fact that not every state of necessity can excuse every crime. It is acknowledged and also justified that the plea of necessity fails in cases where official and professional duties establish the legal obligation to resist the state of necessity. But this was the very situation the accused S. was in: what was being expected of him was a gross infringement of his official duty, not merely an infringement of a general duty of citizens: despite the state of necessity that existed, he had to refuse this expectation. The attempt to take a lax view here can be countered by the apposite statement of a Swabian [487] publicist of the 18th century (Moser, *Von der deutschen Reichsstände Landen*, Frankfurt, 1769, p. 1157):[3] 'What, though, if a

3 J.J. Moser, *Von der Teutschen Reichs-Stände Landen, deren Landständen, Unterthanen, Landes-Freyheiten, Beschwerden, Schulden und Zusammenkünften* (Frankfurt, 1769).

sovereign orders some collective body, councillor, official, officer or whomever something that is known to be against the country's Constitution? Whoever fears God more than man, or merely only is a truly honourable man in other respects, will modestly decline and not do it, preferring to suffer over what he cannot change. But because few think thus, things happen as they do; but things will also so happen on the great Day of Judgment to those who ordered it, and to those who complied.'

What was said then in the age of feudal absolutism must apply *a fortiori* to the age of democracy.

A distinction between judges and administrative officials, say on the basis of the consideration that the judge is 'independent and subject only to the laws' while the administrative official is dependent and bound by instructions from his superior, cannot be drawn here. The citizen has just as much of a claim to lawful administration as to lawful adjudication, and if the judge 'is subject only to the law', the administrative official is also bound only by legal instructions.

Finally, it should be borne in mind that under the rule of National Socialism almost every official ordered to carry out an illegal or immoral order was in a situation of necessity in the event of disobedience. If the Head of the Stuttgart Head Office of the Gestapo, who after all was also acting only on higher instruction in the deportation of the Jews, had refused to act then he would have been exposed to at least the same reprisals as the accused S. had to fear. Were all higher officials who collaborated in the deportation of the Jews to be allowed the plea of necessity then probably no one could be punished for their participation; the provision of Control Council Law No. 10 that acting on orders does not remove criminal responsibility would then be rendered invalid in practice in an indirect way.

(cc) Third, it is acknowledged that the plea of necessity fails where the situation of necessity is caused by one's own fault, in particular, where the perpetrator could foresee he might come into a situation of necessity, and had not exploited a possibility of avoiding this situation. The accused S., however, arrived at this position, where in refusing to execute the Gestapo's orders he could have expected severe detriment, through his own fault. From the whole development of policy against the Jews as presented above, the accused had to draw the conclusion that he as a *Landrat* would also be likely to have to carry out further immoral measures against the Jews if he remained in office. In particular, the deportation of Jews from Baden to France, by then generally known, was to be regarded as a harbinger of further persecutions of the Jews. But a leading political official like the accused, as a *Landrat*, must be expected, given such a development, to draw the consequences early and render his post vacant. He could have had himself moved inconspicuously to a politically neutral post. It is still clearer with the second, third and fourth transport that the position that the Gestapo orders brought him into was entirely his own fault. On the one hand, it was foreseeable that the first deportation would be followed by still others, since the order of 18 November 1941 stated that *Kreis* Hechingen would be involved in the announced 'purge of all Europe from Jews',

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initially only with the number of the Jews communicated therein, and thereby hinting at further deportations; further, one had to expect the possibility, nay likelihood, that in these further deportations the *Landrat* would have to participate in more or less the same way as in the first one. [488] On the other hand, the accused S. would in the period between the first and second deportations, a period of some 4 months, have had the possibility of resigning his post, which would probably have had detrimental effects on his wealth or earnings, but at any rate not have resulted in a situation of necessity.

[. . .] Sentencing of S. [. . .]

IV. The Accused Ho., K. and B.

(1) The accused Ho., K. and B., as already stated in the first section of the grounds of judgment, undertook the body-searching of the Jewish women for deportation ordered by the Gestapo immediately before their departure; all three of them undertook this body-search together with the absconding Mrs M. of Heigerloch on 27 November 1941; additionally the accused Ho. made this body-search together with Mrs M., again on 19 August 1942.

These findings are to be supplemented by the following findings based on the trial and taking of evidence.

(a) The accused Ho. received her instructions from the accused S., to whom she was officially subordinate as a welfare nurse, and was informed initially by him and then further by Mayor R. of Haigerloch as to the content of this task. She carried out the task on 27 November 1941 by having some of the Jewish women — the rest of them being processed partly by the accused K., partly by accused B., partly by Mrs M. — hand over their jewellery; the Jewish women had then to open their clothing so as to expose places where there might be necklaces or brooches. She also body-searched some of the Jewish women. That the accused Ho. used violence has not been shown; the use of force was in the given situation not necessary, since the Jewish women were left with no choice but to succumb to their fate and hand over their jewellery to the accused, whether after special demand for it or without such demand. The jewellery the accused Ho. took in this fashion was then handed over to Mayor R. These findings are based on the statements by the accused herself; they are confirmed by the statement of witness Ms W., who had like her sister Mrs L. been searched by the accused Ho., and of witness Ka., who was among the deportees at the time, along with his wife.

The accused Ho. acted similarly in the search on 19 August 1942, at which, as already mentioned, she was associated with M. in carrying out the tasks. This finding is based on the accused's own statements.

(b) The accused K. similarly received her instructions from the accused S., to whom she too as a welfare nurse was subordinate, though not directly but through mediation of the accused Ho., who initially told her only that she had to be at the station in Haigerloch on 27 November 1941 for the transporting of the Jews. Further instructions were received by the accused K. only at the station in Haigerloch, shortly before the search began. The accused carried out her task in the same way as co-defendant Ho., by having the Jewish women hand over their jewellery; that she also body-searched those Jewish women was credibly denied by her. These findings are based on the accused's own statements.

(c) The accused B. received her instructions from Mayor R. of Haigerloch, who approached her on 27 November 1941 and ordered her to go to the station in Haigerloch. The accused, who was not in public service and accordingly would have been entitled to refuse to act, while initially resisting compliance with Mayor R.'s orders finally did comply, after Mayor R. had searched her out repeatedly and [489] insisted on his order being carried out. The accused reached the station in Haigerloch only after the search of the Jewish women had already begun, and was there instructed on what she had to do. She then participated in the search in the same way as co-defendant Ho., by having the Jewish women hand over their jewellery; she too has convincingly denied having body-searched the Jewish women. These findings are based on the accused's own statements. When before the fourth deportation the accused again received the order from Mayor R. to participate in searching the Jewish women, she successfully refused to comply with the order.

(2) The accused Ho., K. and B., by undertaking the search of the Jewish women for deportation, objectively took part, specifically as accessories (*Gehilfen*), in a persecution on racial grounds and thus in a crime against humanity within the meaning of Article II(1)(c), (2)(b) and (3) of Control Council Law No. 10. Their involvement was admittedly, considered in the context of the whole, only of a subordinate nature, and the three accused did not, by contrast with co-defendant S., infringe any special set of duties. What nonetheless makes their involvement punishable is the fact that the body search taken together with the removal of the valuables found thereby was particularly degrading for the Jewish women affected.

In subjective respects, the punishability of the three accused depends on whether they deliberately (*vorsätzlich*) acted as accessories (*Gehilfen*). This condition is met for all three of these accused.

The accused recognized (accused K. and B. at the latest by the time they were at the station in Haigerloch and accused Ho. earlier, when she received the order given to her) that they were being called on to take part in a persecution on racial grounds; this finding is hereby made on the basis of the oral proceedings. That these three accused did not know the contents of the Gestapo decrees and could not therefore fully perceive what measures of persecution the Jews would individually be exposed to is irrelevant; what they did know, namely that Jews were being forcibly deported and in this connection searched and made to hand over jewellery, suffices to establish intention in their cases. This knowledge (*Wissen*) was also inevitably associated with the insight that through their actions the accused were furthering the principal offence.

Intentionality as accessory (*Gehilfenvorsatz*) did not require that the accused acted from racial motives and further did not require that they had an

awareness of the illegality (*Bewusstsein der Rechtswidrigkeit*) of their actions, as has already been explained in the judgment on accused S. It is similarly irrelevant that if an individual accused or all the accused had refused their participation, the search would still have been carried out by the remaining accused, or by other persons.

Nor can these three accused appeal to lawful excuses from guilt or from punishment. Though they acted on orders, with accused B., moreover, acting on an order with no formal basis, this does not make them exempt from punishment. None of the three accused were in a genuine or even only presumptive state of necessity and none of the three accused has pleaded such necessity. None of the three accused, as is hereby found on the basis of the trial, were governed by fear that their refusal would or could bring danger to life or limb for them.

The accused Ho. has stated as a motive for her decision to take part in the search that co-defendant S. had given the order to her and to accused K. because he desired and expected that she and accused K. would proceed with particular lenience, and because he expected that the search, if not undertaken by a person determined by Mayor R., [**490**] would be carried out intolerantly, if not indeed vexatiously. This is credible and has been confirmed by co-defendant S., and it is further credible that accused Ho. agreed with accused K. before the start of the search that they would carry it out only formally, and not take anything away from the Jewish women. But both accused Ho. and accused K. abandoned this intention again when they noted that co-defendants B. and Mrs M. were also taking part in the search, and they did not feel they could believe they would not take anything away from the Jewish women. The initial motive that decided accused Ho. and possibly also accused K. in taking on the order was replaced before carrying it out by a different and definitive motive which was in turn also decisive for the nature of its execution. [. . .]

(c) [. . .] Determination of penalty in relation to Ho.

The fact that accused Ho., by contrast with the prosecution assumption, took part not in four but only in two searches needed no explicit emphasis in the judgment; it suffices, on the model of the Nuremberg Judgment of 30 September/1 October 1946, for this finding to be contained in the grounds of judgment, as it is.

(bb) [. . .] Determination of penalty in relation to K.

The fact that accused K., by contrast with the prosecution assumption, took part not in four but only in two searches needed no explicit emphasis in the judgment; it suffices, on the model of the Nuremberg Judgment of 30 September/1 October 1946, for this finding to be contained in the grounds of judgment, as it is.

(cc) [. . .] Determination of penalty in relation to B.
[. . .]

V. The Accused H.

(1) Accused H. in his capacity as official doctor of *Kreis* Hechingen and following an order given him by the *Landrat* of *Kreis* Hechingen on the occasion of the first, second and third deportations of the Jews gave expert reports on whether particular Jews to be deported were capable of being transported or of travelling; in the third deportation, he also partly extended his report to whether the Jews concerned required continuous care and attention and whether they were capable of work. The prosecution challenged this testimony in the following seven cases: [**491**] [. . .]

The Gestapo ordered the Jews named to be transported, with the exception of Julius Baer, who was deferred from the third transport and affected only by the fourth deportation.

The facts have been found as the outcome of the trial, on the basis of the accused's own statements together with the testimony read out at the trial; in the cases listed under (a) through (c) above, the attending physicians confirmed as witnesses that they had pronounced as stated.

(2) That accused H. in his capacity as official physician pronounced as to the state of health of the Jews to be deported although he knew that this was a deportation and accordingly persecution on race grounds does not make him punishable, because in giving the expert opinions, as long as these were objectively true, he did not infringe his duties. The Prosecution has accordingly rightly confined itself to those cases in which it felt it could assume infringement of those duties by accused H.

Accused H. would certainly have committed a breach of duty had he given knowingly false reports, in particular had he, with the intention of furthering the deportations, applied excessively strict criteria. This did not occur. According to the report by the expert Dr He., the official medical certificates made out by the accused were an objectively accurate answer to the questions submitted to him. To be sure, the questions to the accused were wrong to the extent that it was not merely the fitness of the Jews in question to be transported but additionally for deportation that was involved, i.e. whether it were not necessary to exclude these Jews from the deportation in the light of their illness or frailty, from considerations of a similar nature as had initially excluded Jews over 65. But that the question put to him was wrong was something the accused did not know, since he did not know the wording of the Gestapo decrees and was at any rate not acting intentionally (*vorsätzlich*) when he omitted to procure knowledge of the wording of those decrees.

The accused H. would have committed a breach of duty also if, in the cases in which he affirmed transportability only conditionally and with certain criteria, he had been aware that the conditions stated by him were not in fact present; in that case by stating these conditions he would have merely been seeking to maintain the outward appearance of an objective assessment. It would have been obvious for the accused to ascertain whether these conditions [**492**] could be met, but it cannot be shown against the accused that he

omitted this enquiry with the intention of thereby furthering the deportation (*der Deportation Vorschub leisten*).

The accused H. has accordingly been acquitted, and the costs incurred from the criminal prosecution against him are to be met from public funds (§467 StG B), whereas the other costs of the proceedings are to borne by the four accused convicted (§465 StPO) [493] [. . .].

Dr. H. was acquitted, whereas Landrat *S. and the three female defendants (Ho., K. and B.) were convicted of crimes against humanity; S. and defendants Ho. and K. appealed.*

Court of Appeal (*Oberlandesgericht*) Tübingen, Judgment of 20 January 1948, ss 54/47[4]

[. . .]

V. The Appeal of Accused S. on the Merits

The verdict challenged deals in its first part, the general findings of fact, with the Gestapo order of 18 November 1941 on the 'deportation of the Jews to the General-Kommissariat Ostland'. The Decree ordering the first deportation lists what the Jews to be deported could take with them. The judgment says the following on this: 'These orders were explained in a letter of 19 November 1941 which the Jewish religious community of Württemberg, had sent, with the authorization and on the orders of the Gestapo, [496] to the individual participants in the transport.' As the trial record shows, on the basis of a court decision this letter had been read out in full verbatim at the hearing by the Criminal Division on 23 June 1947. This reading made it an object of the trial and it has therefore to be taken into account.

This circular letter informed those concerned that they had been assigned to an evacuation transport to the East, and obliged them to be ready at their current accommodation and not to leave this without special permission from the Authorities, even temporarily. Employment, even in important enterprises, did not exempt them from the evacuation. It explicitly warned the Jews not to oppose or avoid the evacuation. Any attempt in this direction was pointless and could lead to severe consequences for those concerned. A list was also given of what could be taken with them. Mention was made here of the particular importance of construction tools. The attached declaration of assets was to be filled in precisely. With delivery of the letter, as was stated therein, a general prohibition to dispose of their assets was placed on the recipients by explicit instruction of the authorities. The letter explained the instructions in this restraining order in more detail.

The finding of the judgment in the sentence cited earlier accordingly conveyed the content of the circular by no means exhaustively, but only inexactly and imperfectly. No further mention is made of it in the rest of the grounds of judgment. In their letter, the heads of the Jewish religious community termed

4 Cassese, *supra* note 1, 494–502.

the carrying out of the measures indispensable and called all resistance against it meaningless, and stated that it was an evacuation to the East. The content of this letter could have been of significance for the position of accused S. on the Gestapo order and his own decision. The Court had accordingly to test whether the accused was influenced in his decision by knowledge of this letter, and what importance he attributed to it. No finding or assessment to this effect is contained in the judgment.

This bench holds to the consistent case law of the *Reichsgericht* that an unclear or incomprehensible and therefore insufficient statement of the facts constitutes a contravention of material law. Such a contravention may also be present 'where a criminal court's judgment, while finding facts that may be capable of influencing the assessment of the facts in the accused's favour or otherwise, has not discussed them in the concluding assessment' (Löwe-Rosenberg, StPO 2. Nachtrag 1940 zu § 337 A. 159, with references to the judgments given).

There is such a contravention here. On the basis of the general objection of infringement of material law, accordingly, the judgment against the accused S. is by § 353(1) StPO to be set aside. Also to be set aside, by § 353(2) are the findings underlying the judgment where affected by this flaw. On the basis of § 353(4) StPO the matter is to be referred back for further hearing and decision.

VI. The Appeal by the Accused Ho. and K.

The quashing of the judgment against accused S. does not affect the verdicts on accused Ho. and K. For them, the error noted above is irrelevant, since as is evident from the judgment of the Criminal Division they had no knowledge of the letter from the religious community.

The Criminal Division tested the actions of all the accused from the viewpoint of a crime against humanity within the meaning of Article II(1)(c) of Control Council Law No. 10 and found that this Law is valid law for Germany [497] and is binding on German courts. There is no contravention of law here. The Württemberg-Hohenzollern military government has pronounced the German courts competent to judge in the instant case (Article III(1)(2) of the Law).

The Criminal Division goes on to correctly state that the ban on retroactivity does not stand in the way of applying the Law. For the actions made punishable by the act offended against the generally recognized legal and moral principles of all civilized peoples even at the time they were committed and thus constitute a wrong (*Unrecht*), a crime (*Verbrechen*). It is therefore consonant with justice that such severe misdeeds be punished. Thus, legal certainty is also satisfied, and that is what the ban on retroactivity is intended to serve. Were such deeds to remain unpunished, then legal certainty and justice would be undermined.

Crimes against humanity are inhuman and cruel actions directed against elementary human rights, against human beings in their dignity and value. They arise from a political ideology that despises these human rights; they are committed out of an inhumane mindset (cf. also LG Konstanz DRZ 1947 at 267,

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OLG Cologne NJW 1947, at 70, KG DRZ 1947 at 308; cf. also the judgment of the Supreme Court of Justice in *Rastatt* of 1.2.1947, JO 1947 at 662).

Persecution on political, racial and religious grounds is listed in Article II(1)(c) of the Law as the last explanatory example of a crime against humanity. This crime too must accordingly be carried out inhumanely. The perpetrator must have acted out of an inhumane mindset, derived from a politically, racially or religiously determined ideology (cf. also LG Konstanz MDR 1947 at 305, OLG Kiel MDR 1947 at 307; cf. also KG DRZ 1947 at 309).

[Control Council] Law No. 10, in Article II(2)(a)-(e), equates all conceivable forms of commission or participation. It does not distinguish between perpetration (*Täterschaft*) and participation (*Teilnahme*). The accessory (*Gehilfe*) to a crime against humanity is 'regarded as guilty of a crime against humanity, without regard to the capacity in which he acted' (Clause 2 of the Introductory Act). From this complete equation with the perpetrator it follows that the accessory must have acted from the same mindset as the perpetrator himself, that is, from an inhumane mindset and in persecutions under politically, racially or religiously determined ideologies. The Criminal Division rightly took it that as regards the punishability of participation, Law No. 10 is of plain interpretation.

For intention (*Vorsatz*), awareness of illegality (*Bewusstsein der Rechtswidrigkeit*) is a requisite (cf. also KG DRX 1947 at 310, OLG Frankfurt/M. SJZ 1947 at 626). The accused had to have the awareness of having infringed a law or otherwise doing wrong. If they did not have this awareness, they cannot plead that ignorance if it is based on an attitude that is in contradiction to the generally recognized moral law (cf. also OLG Frankfurt/M. SJZ 1947, at 626, KG DRZ 1947, at 198). Nor can the accused appeal to the National Socialist legislation against Jews as an excuse. For it is in contradiction with the general legal consciousness and moral law, and was a wrong only camouflaged, not justified, by legalization.

The deportation of Jews in 1941 and 1942 had as its object the systematic extermination of the deportees, was conceived from hatred of the Jews and cruelly executed, and marked by the anti-Semitism, the extent and the nature of the extirpation qualified unmistakably as a crime against humanity. The men who suggested, ordered or otherwise performed as their work these deportations are guilty as principal offenders (*hauptsächliche Verbrecher*) of the persecution of the Jews. They had the decisive power, particularly in the offices of the Gestapo. They would also be punishable for grave deprivation of liberty while in office, extortion and murder to the extent [**498**] that German law were to be applied. In order to carry out these crimes, legalized in form, a comprehensive, highly structured organization was partly built up and partly brought in, the organization of the State authorities also being abused for the purpose. An uncountable number of assistants (*Hilfskräften*) acted in it. Their conduct is to be assessed according to their position, their insight into the criminal objectives and the extent of their collaboration.

The holders of higher official posts and offices, among them those of *Landrat*, were able in view of their office, their general and specialized education, their

knowledge of law and political life and their other experience of life to recognize and evaluate the factual and legal position. That they did not have an awareness of the illegality can be recognized only in individual cases on proof of special circumstances. Ordinary people (*Einfache Menschen*) by contrast, who were involved only on the margins of the events and carried out only subordinate activities, who very frequently had a limited field of view so that they could not perceive the connections, will, according to general experience of life, have acted culpably only in special cases.

The accused Ho. and K. were, according to the Criminal Division's findings, involved only in a subordinate manner in the deportations. In doing so they behaved particularly leniently and sympathetically, i.e. humanely. Their attitudes were not anti-Jewish. Moreover, as the judgment also explicitly finds, they did not have an awareness of the illegality (*Bewusstsein der Rechtswidrigkeit*) of what they were doing. They are accordingly not guilty, whether under Law No. 10 or in German criminal law. By § 353(1) StPO the [Tribunal's] judgment is to be set aside. Both these accused are to be acquitted.

VII. The Verdict on Accused B.

Co-defendant B. lodged no appeal. The judgment found that accused B. was involved in the same manner as accused Ho. in searching the Jewish women to be transported, that her involvement was, like that of the accused Ho. and K., of a subordinate nature and that it had not been shown that she acted out of National Socialist ideology or from racial motives. She too lacked awareness of the illegality. The conviction of accused B. is accordingly based on the same contravention of law as the conviction of the accused Ho. and K. For this reason, accused B. is according to § 357 StPO to be treated in the same way as if she had lodged an appeal. Her conviction is accordingly to be set aside and accused B. is to be acquitted.

VIII. Viewpoints for the new trial and decision in the case of accused S.

(1) The accused cannot appeal to the Gestapo decrees as binding orders from his superior authorities, to justify or excuse his actions. This is explicitly provided by Article II(4)(b) of Law No. 10 and has not been misjudged by the judgment challenged.

(2) Even in so far as these decrees had the outward appearance of legal orders they were illegal, since their content constituted a gross wrong (IV above).

(3) On the state of necessity over and above the law (*übergesetzlicher Notstand*) The judgment challenged finds that the accused was an inward opponent of National Socialism (*innerlich ein Gegner des Nationalsozialismus*), had also confirmed this attitude in his conduct in office and was not an anti-Semite. That meant, however, that there existed a possibility that he was brought by the Gestapo orders into great internal anxiety that compelled him to weigh up the conflicting duties and choose between them. In dealing with the balance of duties and interests asserted by the accused the judgment challenged

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states: 'It should further be added that [499] it is only times of such general spiritual wrong as we have just lived through, and of exaggerated legal positivism and utilitarianism, that could have enabled such a balancing of interests to be considered admissible.' It cannot clearly be seen whether an inadmissible balance between moral duties and allegedly political considerations is being criticized, or the appeal to the state of necessity over and above the law is being termed inadmissible as such. If the former was the intention, there was a failure to see that even in political considerations moral principles must find application. Were the accused to be charged with taking an immoral stance in a political decision, this would have to be unambiguously established. If however the state of necessity over and above the law itself was meant, then the Court fell into an error. For the viewpoint favourable to the balancing of legal goods and duties has asserted itself precisely against an exaggerated legal positivism. It is taken from the unwritten law above the law that forms the basis of any legal system. Nor does a mere utility viewpoint find expression in it. Where duties conflict and different legal goods are in conflict with each other, then the conflict has to be resolved, the balancing carried out, according to the basic idea of the legal system and the value relationships expressed in it. Especially in extraordinary circumstances of life under abnormal circumstances of government and law, when traditional standards fail, the question whether an action was criminal or was aimed at protecting particular legal goods must be tested in detail and the contradiction between duties and legal goods carefully weighed up.

The legal idea of the state of necessity over and above the law was already brought forth in case law of the *Reichsgericht* in a judgment of 11 March 1927 — RGSt. 62 p. 242 ff. — and has since then been applied continually. There is no reason here to depart from this generally recognized case law. The Criminal Division will accordingly have to test whether the accused acted in such a state of necessity over and above the law.

The question of the moral admissibility of the action is not affected by this principle. This was already stated by the *Reichsgericht* in the above-mentioned judgment. To this extent too the Criminal Division has made a legally inadmissible evaluation. It states, following on from the above-cited sentence, that according to Christian teaching it is presumption to risk the certain sacrifice of one moral good against the uncertain gaining or preservation of another moral good. Every moral precept is binding unconditionally and regardless. It need not be gone into whether the content of Christian moral doctrine is correctly given here. For the accused's act was to be evaluated not from the viewpoint of morality, still less a rigorist moral doctrine, but by the criterion of law. Law and morality intersect, but do not overlap.

The Criminal Division will, in testing the question whether the accused was in a state of necessity as regards his duties, out of which there was in fact or in his opinion no other way than to carry out the Gestapo decrees, in particular also have to take account of the circular (*Rundschreiben*) emanating from the Jewish religious community.

(4) On the state of necessity (*Notstand*) as a ground for exclusion of guilt

If the accused acted without a justifying ground, the Criminal Division will have to go on to test whether the accused's guilt was excluded by a state of necessity.

The judgment challenged, following the judgment of the Nuremberg International Military Tribunal of 30/9-1/10/1946 (JO 1946 p. 378), did not fail to see that such a state of necessity is in some circumstances to be taken into account. It also sees that the accused, had he refused obedience, would have been removed from office and punished, and the possibility cannot be ignored that such refusal would have had still other severe detriment as a consequence (such as the concentration camp). [500] This applies in the same way to all the four deportations the accused took part in.

The Criminal Division's further analyses are however not without legal error. The judgment finds that accused S. did not plead necessity and accordingly refrains from a test from this point of view. The Court ought however, if there is occasion, to do the test *ex officio*, and decide whether a state of necessity was present for the accused or whether he erroneously saw a state of necessity as present. If the accused did not plead necessity, the Criminal Division was entitled to take it that the accused himself did not believe that there was a state of necessity for him, even were it otherwise. That did not however mean finding that in fact no state of necessity existed for the accused.

It is further stated in the judgment that the accused allowed himself to be guided exclusively by a balancing of interests; it would then be impossible that for him to have been determined by a state of necessity in his decision. This view conflicts with one's experience of life. A balancing of duties and compulsion are not mutually exclusive, but can act on the person deciding as motives alongside each other or successively and compel him to a particular action.

The Criminal Division stresses that the state of necessity was the fault of the accused. It is first to be tested whether there was a state of compulsion (*Nötigungsstand*) within the meaning of § 52 StGB, that is, whether the accused was constrained to the act under accusation by a third party through irresistible force or through a threat associated with a present and not otherwise resistible danger to his own life and limb or that of a relative. Such action exerted by a third party through coercion can remove the freedom of the will and compel one under someone else's will. The person deciding cannot, irrespective of how he came to be in this position, be accused of culpable action, because of the constraint exercised upon his will. For the area of application of § 52 StGB, accordingly, the question whether the accused culpably arrived in a position of compulsion of this nature is excluded. Whether the threat postulated by § 52 StGB was contained in the Gestapo orders for the event of refusal to obey or whether in general such a position of terror existed for the accused is to be tested. The Criminal Division's considerations as to whether the accused had culpably come into a position of necessity could have been formulated only within the framework of § 54 StGB.

The Criminal Division says that the accused was by his office and occupation legally obliged to resist the state of necessity. If however his free will was

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excluded within the meaning of § 52 StGB through constraint by someone else then there is no room for such a consideration.

The question would however also have to be answered negatively for the case of § 54 StGB in relation to the accused. The law recognizes for the state of necessity in general the mental pressure that may bear down on someone taking a decision and takes account here of the human urge for self-preservation and thus also of general human weakness. These principles cease to apply only where there is a special legal duty to sacrifice life and limb. Such a duty is set for, say, police officials and firemen by the nature of their professional tasks. But the judgment challenged assumes such a professional duty for the accused too, but wrongly. Setting his own life and limb and that of his relatives at risk in performing his administrative duties was not necessarily legally required of the accused in his exercise of the office of *Landrat*. Special circumstances that might allow some other legal evaluation to be admissible were not found by the Criminal Division.

Where the judgment challenged refuses the accused the plea of necessity then here too it has confused law and morality and placed too high requirements on the accused's conduct. It is certainly morally necessary for resistance to be offered to wrong and criminality without regard to harm to life and soul. [501] Yet in law one has to do not with what one may expect from a hero or a saint, but with what can and must be demanded of the average morally inclined legal subject. [. . .] [502]

Thus the Court of appeal acquitted Ho. and K., cancelled the conviction of B., and remitted the case concerning Landrat *S. to a lower court, instructing it to rely upon the notion of necessity, as defined by the Court of appeal.*

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105. Kann ein Rechtsanwalt, indem er in Ausübung seines Berufes Rat in einer Rechtssache erteilt, sich der Beihülfe zu einer strafbaren Handlung schuldig machen?

St.G.B. § 49.

I. Strafsenat. Urt. v. 17. November 1904 g. B. u. Gen. Rep. 1178/04.

I. Landgericht Köln.

Der Kaufmann A. B. war rechtskräftig wegen Betruges zu einer Gefängnisstrafe verurteilt worden und verbüßte diese ihm auferlegte Strafe. Es wurde ihm gestattet, in Begleitung eines Schutzmannes seine Angehörigen in deren Wohnung zu besuchen. Seine Ehefrau und seine Söhne haben ihm nun bei dem Besuche vorsätzlich, indem sie die Aufmerksamkeit des bewachenden Schutzmannes ablenkten, dazu verholfen, aus der Gewalt des letzteren zu entfliehen. Sie sind wegen vorsätzlicher Beihülfe zur Selbstbefreiung eines Gefangenen verurteilt worden.

Der mitangeklagte Rechtsanwalt M., ihr Rechtsbeistand, um dessen Revision es sich hier allein handelt, ist wegen Beihülfe zu dieser Tat und zugleich — in idealer Konkurrenz — wegen Begünstigung des A. B., um ihn der Bestrafung zu entziehen, verurteilt worden.

Auf seine Revision wurde das Urteil der Strafkammer, soweit es seine Verurteilung ausspricht, aufgehoben und die Sache zur anderweiten Verhandlung und Entscheidung an die Vorinstanz zurückverwiesen aus folgenden

Gründen:

... Was den Angeklagten Rechtsanwalt M. betrifft, so hat die Strafkammer folgendes festgestellt: Bevor der Gefangene A. B. floh und seine Angehörigen, die Mitangeklagten, ihm zur Selbstbefreiung behülflich waren, haben letztere seinen, des M., Rat in seiner Eigenschaft als ihres Rechtsbeistandes verlangt. Der Beschwerdeführer hat zuerst abgeraten, dann aber, als er sah, daß die Flucht doch ins Werk gesetzt werden würde, „hat er als Rechtsbeistand geglaubt, der Ehefrau B. seinen Rat nicht vorenthalten zu sollen". Indem er den § 120 St.G.B.'s übersah, hat er seinen „Rat" dahin erteilt, daß die Mitangeklagten für ihre Hülfeleistung bei der Flucht ihres Ehemannes und Vaters nicht bestraft werden könnten. Dadurch hat

er sie in ihrem Vorhaben gestärkt. Es wird als erwiesen bezeichnet, daß M. sich auch bewußt war, wie er durch Rat die zur Hülfeleistung bei der Flucht ihres Ehemannes und Vaters bereits entschlossenen Mitangeklagten in ihrem Entschlusse befestigt und bestärkt hat, und daß „sein Wille darauf gerichtet war, nachdem an der Flucht B.'s nichts mehr geändert werden konnte, seinerseits den Mitangeklagten bei der geplanten Hülfeleistung zur Flucht Beihülfe zu leisten, indem er sie über die dabei von ihnen zu vermeidenden Delikte belehrte und ihnen durch Hinweis auf ihre Strafloſigkeit Sicherheit einflößte." Indem die Strafkammer darlegt, daß auch der rechtskundige M. durch seinen Irrtum über das Strafgesetz (§ 120 St.G.B.'s) nicht geschützt werde, hat sie ihn für schuldig erachtet, den Mitangeklagten, der Ehefrau und den Söhnen B., zur Begehung der vorsätzlichen Hülfeleistung zur Selbstbefreiung eines Gefangenen durch Rat wissentlich Hülfe gewährt und durch dieselbe Handlung dem A. B. nach Begehung des Vergehens der Unterschlagung wissentlich Beistand geleistet zu haben, um ihn der Bestrafung zu entziehen. Der Angeklagte M. ist aus §§ 120. 49. 257 und 73 St.G.B.'s zu Strafe verurteilt worden.

Der hiergegen von dem Angeklagten eingelegten Revision konnte der Erfolg nicht versagt werden.

Zwar ist dem ersten Richter zuzugeben, daß es nicht zu den Pflichten — oder auch nur Rechten — eines Rechtsanwaltes gehört, durch seinen Rat zur Begehung einer strafbaren Handlung wissentlich Hülfe zu leisten, und daß auch ihn ein Irrtum über das Strafrecht nicht straffrei macht. Andererseits aber ist es selbstverständlich, daß das — nach bestem Wissen abgegebene, richtige oder unrichtige — Rechtsgutachten eines Rechtsanwaltes darüber, ob eine gewisse, von dem das Gutachten Erheischenden geplante Handlung nach den Gesetzen mit Strafe belegt sei oder nicht, an und für sich nicht als Beihülfe im Sinne des § 49 St.G.B.'s angesehen werden darf, auch wenn das Gutachten die Ausführung der Tat zur Folge hat, der Gutachter diesen bevorstehenden Erfolg bereits bei seiner Ratserteilung wußte und die Tat in Wahrheit ein strafbares Delikt ist. Die Beihülfe durch Rat besteht in einer psychischen Einwirkung auf den Täter, allerdings auch, um den bereits zur Tat Entschlossenen in seinem Entschlusse zu befestigen oder zu bestärken.

Vgl. Entsch. des R.G.'s in Strafs. Bd. 27 S. 157.

Zur „Wissentlichkeit" — gleichbedeutend mit Vorsätzlichkeit — aber ist es nicht ausreichend, daß dem Gehülfen bekannt ist, der Täter wolle die betreffende strafbare Handlung begehen; es ist vielmehr für das subjektive Tatbestandsmerkmal erforderlich, daß der Täter seine Hülfe und insbesondere seinen Rat gewähre, in dem Bewußtsein, es werde durch diese seine Tätigkeit die Ausführung der von dem anderen beabsichtigten Tat gefördert werden, und daß somit auch der Wille des Ratgebenden auf diesen Erfolg gerichtet sei.

Vgl. Entsch. des R.G.'s in Strafs. Bd. 16 S. 25, Bd. 17 S. 377, Bd. 32 S. 353.

Gehört es nun, wie unzweifelhaft ist, zu den Berufshandlungen und Berufspflichten eines Rechtsanwaltes, denjenigen, die seinen Rat erfordern, nach bestem Wissen diesen Rat zu erteilen, so wird man von vornherein und präsumtiv davon ausgehen müssen, daß das Bewußtsein und der Wille des Anwaltes in solchen Fällen lediglich darauf gerichtet ist, pflichtmäßig Rat zu erteilen, insbesondere nicht darauf, auf das, was der Klient infolge der rechtsgutachtlichen Äußerung seines Rechtsbeistandes tut, einzuwirken. Das wird man im allgemeinen auch in dem Falle annehmen müssen, wenn der Anwalt sich sagt oder weiß, daß sein Rat den Klienten zur Vornahme irgendeiner bestimmten Handlung veranlassen wird, insbesondere, daß der gutachtliche Rat den anderen zur Begehung eines Delikts bestimmen, also objektiv zur Ausführung einer strafbaren Handlung Beihülfe leisten wird. Sollte der erste Richter bei Feststellung des Vorsatzes des Angeklagten auch schon in einem derartigen „Bewußtsein" das Tatbestandsmerkmal der Wissentlichkeit im Sinne des § 49 St.G.B.'s erblickt haben, so würde seine Feststellung des subjektiven Tatbestandes auf Rechtsirrtum beruhen. In Fällen der vorliegenden Art wird man besonders streng zu unterscheiden und bei Prüfung der Frage nach der Vorsätzlichkeit den Begriff des „Bewußtseins" und des „Willens" in Anpassung an die konkrete Sachlage mit besonderer Schärfe aufzufassen haben. Will der Anwalt — auf berufsmäßige Gutachten anderer Zweige wird dieselbe Erwägung zutreffen — nichts weiter tun, als seinen berufs- und pflichtmäßigen Rat (d. i. Belehrung) erteilen, ist ihm dabei bekannt, daß sein Gutachten zur Begehung eines Delikts führt, ... hat jedoch sein Wille mit dieser Folge seiner rechtlichen Begutachtung oder Ratserteilung nichts zu schaffen, so kann

von einer wissentlichen Beihülfe nicht die Rede sein. Geht aber seine Geistes- und Willenstätigkeit nicht nur darauf hin, in der Ratserteilung seinen Beruf zu erfüllen, sondern auch durch die berufsmäßige Ratserteilung die Ausführung einer Straftat zu fördern, dann — und nur dann — liegt Beihülfe im Sinne des Strafgesetzes vor. Nun sagen zwar die Urteilsgründe hier, daß der Wille des Angeklagten darauf gerichtet war, seinerseits zur Flucht Beihülfe zu leisten, diese Feststellung aber wird — wie mangels jeder in einem so subtilen Falle doch unbedingt erforderlichen Angabe von Gründen angenommen werden muß — lediglich auf die unmittelbar vorhergehende Darlegung des Beweises des „Bewußtseins" des Angeklagten von den fraglichen Folgen seiner Ratserteilung gegründet, und somit ist es nicht ausgeschlossen, nach Lage des erwiesenen Sachverhaltes sogar höchstwahrscheinlich, daß die Strafkammer den Begriff des „Bewußtseins" in dem vorstehend gemißbilligten Sinne aufgefaßt hat. Hierfür spricht namentlich auch die Stelle in den Urteilsgründen, wo es wörtlich heißt, der Angeklagte habe als Rechtsbeistand geglaubt, der Ehefrau B. seinen Rat nicht vorenthalten zu sollen. Damit wäre das Tatbestandsmerkmal der „Wissentlichkeit" im Sinne des § 49 St.G.B.s verkannt. Zur anderweiten Feststellung dieses Merkmals mußte hiernach das angefochtene Urteil in dem entsprechenden Umfange aufgehoben werden, wobei noch zu bemerken ist, daß augenscheinlich der Mangel des Urteils auch die Feststellung des subjektiven Tatbestandes des § 257 St.G.B.'s trifft.

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Gaston Stefani

Georges Levasseur
Professeur honoraire à l'Université de droit,
d'économie et de sciences sociales de Paris

Bernard Bouloc
Professeur à l'Université Panthéon-Sorbonne (Paris I)

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CHAPITRE 1

LES PERSONNES RESPONSABLES

289 Dans la conception classique qui est celle du Code pénal français, la notion de délinquant est étroitement liée à celle d'infraction. Pour être délinquant, il faut avoir commis une infraction, c'est-à-dire, non pas un acte quelconque préjudiciable à la société, mais un acte prévu et puni par la loi pénale. Or, comme l'infraction suppose un élément moral, ni les choses, ni les animaux qui n'ont ni intelligence, ni volonté, ne peuvent être sujets actifs d'une infraction et poursuivis comme délinquants [1]. Seuls les êtres humains peuvent être délinquants ; or les êtres humains, ce sont les *personnes physiques*.

Est-ce à dire que les groupements de personnes physiques — auxquels la loi reconnaît une existence juridique distincte de celles des individus qui les composent, qui ont un patrimoine, des droits et des obligations propres, et qu'on appelle les *personnes morales* (sociétés, associations, syndicats) — ne puissent jamais commettre d'infraction et engager leur responsabilité pénale ? Depuis le nouveau Code pénal, la responsabilité pénale des personnes morales est admise en principe par la loi, en plus de celle des personnes physiques qui ont matériellement commis l'infraction . C'est qu'en effet, sont délinquants, non seulement ceux qui ont commis eux même l'acte, mais encore ceux qui ont aidé à réaliser l'acte matériel constitutif de l'infraction (complicité). Il restera à se demander, si du fait de la proclamation du principe de la responsabilité pénale de son propre fait, il est possible d'admettre qu'une personne (un chef d'entreprise par exemple) puisse être responsable pénalement de l'acte matériel commis par autrui. Aussi examinera-t-on successivement :

Section 1. — La détermination des personnes responsables.

Section 2. — Le complice.

Section 3. — Le pénalement responsable du fait d'autrui.

1. V. pour quelques exemples de procès faits, dans l'ancien droit français à des animaux, Mme DELMAS-MARTY, « Les chemins de la répression », p. 35.

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C. L'intention criminelle

333 ***L'intention criminelle*** ◇ Troisième et dernière condition de la répression de la complicité, elle constitue en quelque sorte l'élément moral de l'incrimination de la complicité.

Pour que le complice soit punissable, il faut qu'il ait participé en connaissance de cause à l'infraction principale, qu'il ait su qu'il s'associait à un crime ou à un délit déterminé, comme un meurtre ou un vol. Il faut « l'intention de contribuer à l'acte délictueux consommé ou tenté par autrui [1] ». On ne pourrait par exemple considérer comme complice d'un meurtre exécuté avec un fusil de chasse, celui qui aurait prêté le fusil au meurtrier pour lui permettre de chasser [2]. Mais la jurisprudence n'exige pas que le complice ait connu les circonstances aggravantes de l'infraction à laquelle il a voulu s'associer. L'exigence d'une intention criminelle personnelle au complice résulte de l'article 121-7 du C. Pén. qui vise la provocation à l'infraction et les instructions données « pour commettre » l'infraction (al. 2), et l'aide et l'assistance prêtées « sciemment » (al. 1er).

334 ***Notion d'intention du complice*** ◇ L'intention requise chez le complice est tout à fait distincte de l'intention criminelle ou de la faute pénale de l'auteur principal. Elle consiste toujours dans une *faute intentionnelle,* dans une volonté de s'associer intentionnellement à l'acte délictueux de l'auteur principal [3]. Le plus souvent, elle résulte d'une entente préalable avec celui-ci ; mais parfois, l'entente n'a lieu qu'au moment même de la commission de l'infraction. En tout cas, il faut, selon la formule des arrêts, que le complice et l'auteur principal aient agi « ensemble et de concert », en vue d'obtenir le résultat délictueux.

Il s'en suit que l'auteur d'une faute d'imprudence ne peut pas être poursuivi comme complice, même si cette imprudence ou cette négligence constitue une faute au point de vue civil et engage sa responsabilité civile. Mais dans le cas où l'infraction commise par l'auteur principal est une infraction involontaire, la faute pénale d'imprudence commise par un tiers

1. Crim. 6 août 1924, B. n° 323 ; Ch. Acc. Bourges, 17 mai 1963, *D.* 1963, 355 ; Trib. Nevers, 8 mai 1964, *J.C.P.* 1964-II-13.752 *bis* ; Crim. 16 mars 1970, *J.C.P.* 1971-II-16.813, note BOULOC : « En l'état des faits constatés par eux et desquels ne ressort pas une participation volontaire à une escroquerie, les juges du fond peuvent relaxer celui qui est poursuivi comme complice » ; Crim. 25 juin 1979, *Bull.* n° 233.

2. Crim. 13 janv. 1955, *D.* 1955, 291, note CHAVANNE.

3. Elle suppose une conscience de s'associer à une infraction pénale et de favoriser la réalisation de cette infraction par une intervention volontaire. Voir notamment : Crim. 21 oct. 1948, *Bull. crim.* n° 242 ; Crim. 8 févr. 1950, *J.C.P.* 1950-IV-53 ; Crim. 26 nov. 1974, *Bull.* n° 349, *D.* 1975, I. R. p. 12. Il faut un fait de participation consciente du prévenu aux faits qui constituent l'infraction retenue contre l'auteur principal ; Crim. 15 févr. 1982, *Bull. crim.* n° 50, *D.* 1983, p. 275, note D. MAYER et J.-P. PIZZIO (complicité en matière de publicité trompeuse : le complice doit avoir fourni les moyens en connaissance de cause) ; Crim. 1er avril 1984, *Gaz. Pal.*, 4 avril 1985. V. aussi R. KOERING-JOULIN, « L'élément moral de la complicité par fourniture de moyens ruineux », *D.* 1980, chr. 231.

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ne peut-elle pas être retenue à son encontre et le rendre punissable au titre de la complicité ? C'est la question de savoir si la complicité existe dans les délits d'imprudence.

Contrairement à une partie de la doctrine — pour qui dans ces infractions il ne peut y avoir de complices mais seulement des coauteurs, car la complicité suppose toujours chez le complice une intention délictueuse, — la jurisprudence admet parfois que la complicité s'applique à tous les délits, même aux délits non intentionnels [1].

335 ***Moment de l'intention*** ◇ La conscience chez le complice de participer à une infraction doit être concomitante de la fourniture des instructions ou de la prestation de l'aide ou de l'assistance. La Cour de cassation exige en effet que la connaissance ait existé chez le complice au moment même où il a, soit fourni les instructions et les moyens pour commettre l'infraction, soit prêté aide et assistance [2] mais il importe peu que l'acte principal ait été encore à l'état de projet lors de la fourniture des moyens [3]. En revanche, le fait d'avoir su par la suite que l'aide ou l'assistance avait permis ou facilité la commission d'une infraction n'est pas, d'après la jurisprudence, un acte de complicité punissable, faute d'intention chez le complice.

336 ***Preuve de l'intention*** ◇ Puisque la complicité ne peut être réprimée que s'il existe une intention personnelle au complice, c'est au Ministère public qu'il appartient de rapporter la preuve que le complice savait effectivement et au moment même où il a agi, que l'aide et l'assistance qu'il prêtait, allait servir à l'infraction. Cette action consciente peut résulter de la qualité de directeur d'un journal [4]. Elle peut aussi se déduire de comportement ultérieurs, même si la complicité ne peut pas résulter d'actes postérieurs au fait principal [5]. De toute façon, lorsqu'il retient la culpabilité d'un complice, le juge doit toujours préciser qu'il a constaté l'intention criminelle, et indiquer dans les motifs de sa décision sur quoi repose sa conviction [6].

1. Crim. 17 nov. 1887, B. n° 392 ; Crim. 14 déc. 1934, D. P. 1935-1-96 — à propos d'un homicide par imprudence, Chambéry, 8 mars 1956, *J.C.P.* 1956-II-9.224, note VOUIN. V. toutefois Crim. 24 oct. 1956, *Bull.* n° 375. Il y a complicité en matière de publicité trompeuse : Crim. 15 févr. 1982, *Bull.* n° 50 ; Crim. 23 avril 1997, *Bull.* n° 143.

2. Crim. 5 nov. 1943, D. A. 1944, 29 ; Paris 30 juin 1977, *Rev. Jurisp. Com.*, 1978, p. 419, note B. BOULOC ; Crim. 28 juin 1995, *Bull.* n° 241 ; Crim 23 avril 1997, *Bull.* n° 143 ; Crim. 7 oct. 1998, *Bull.* n° 249. V. toutefois Crim. 15 novembre 1990, *Bull.* n° 388, *Gaz. Pal.*, 28 mars 1991, note J.-P. DOUCET affirmant que l'élément intentionnel doit être apprécié au moment où les faits ont été commis.

3. Crim. 8 janvier 1991, *Bull.* n° 15.

4. Crim. 27 oct. 1992, *Bull.* n° 343.

5. Crim. 4 nov. 1991, *Bull.* n° 391.

6. Crim. 11 nov. 1921, *D.* 1922-1-64.

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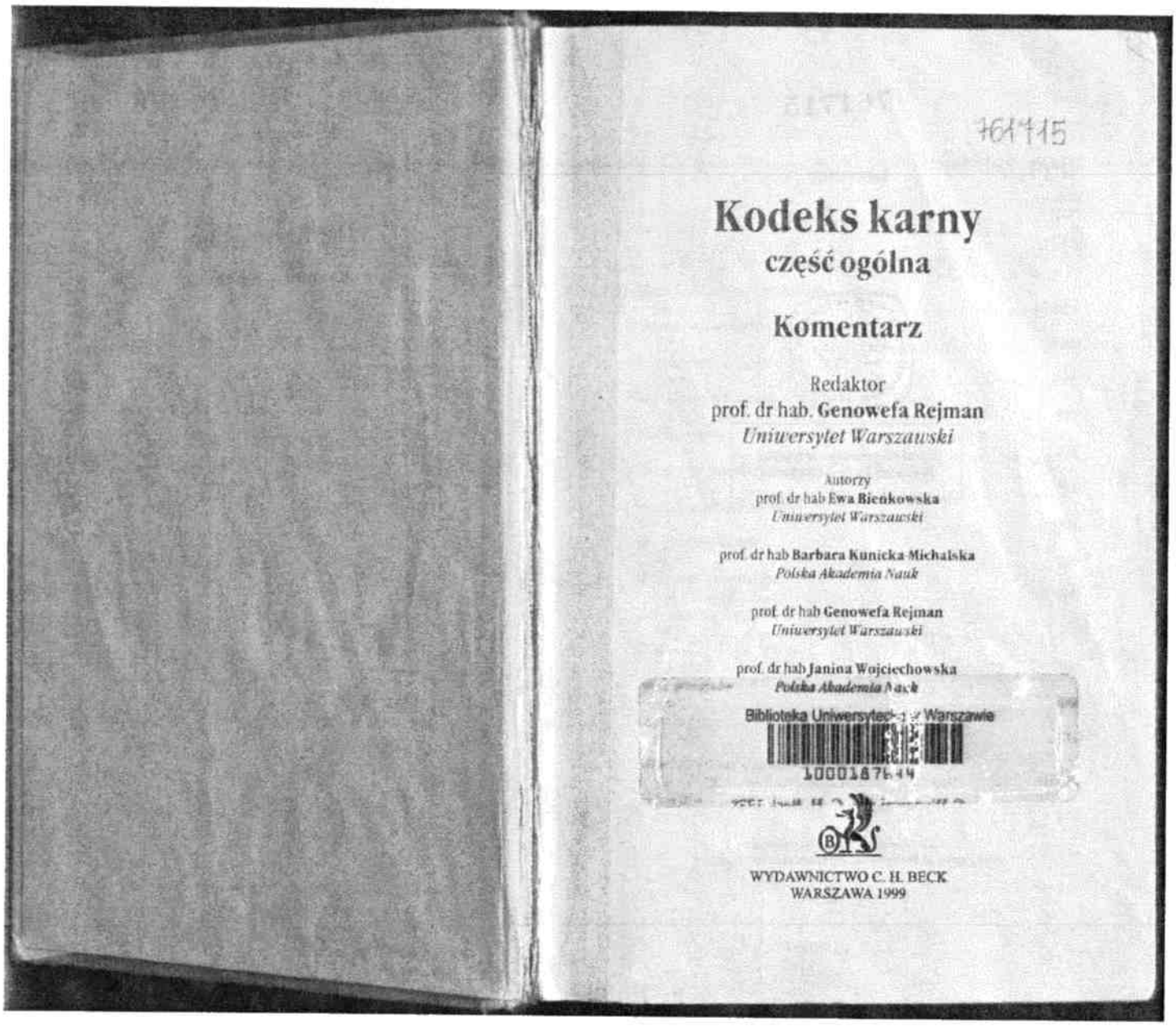

Kodeks karny
część ogólna

Komentarz

Redaktor
prof. dr hab. **Genowefa Rejman**
Uniwersytet Warszawski

Autorzy
prof. dr hab **Ewa Bieńkowska**
Uniwersytet Warszawski

prof. dr hab **Barbara Kunicka-Michalska**
Polska Akademia Nauk

prof. dr hab **Genowefa Rejman**
Uniwersytet Warszawski

prof. dr hab **Janina Wojciechowska**
Polska Akademia Nauk

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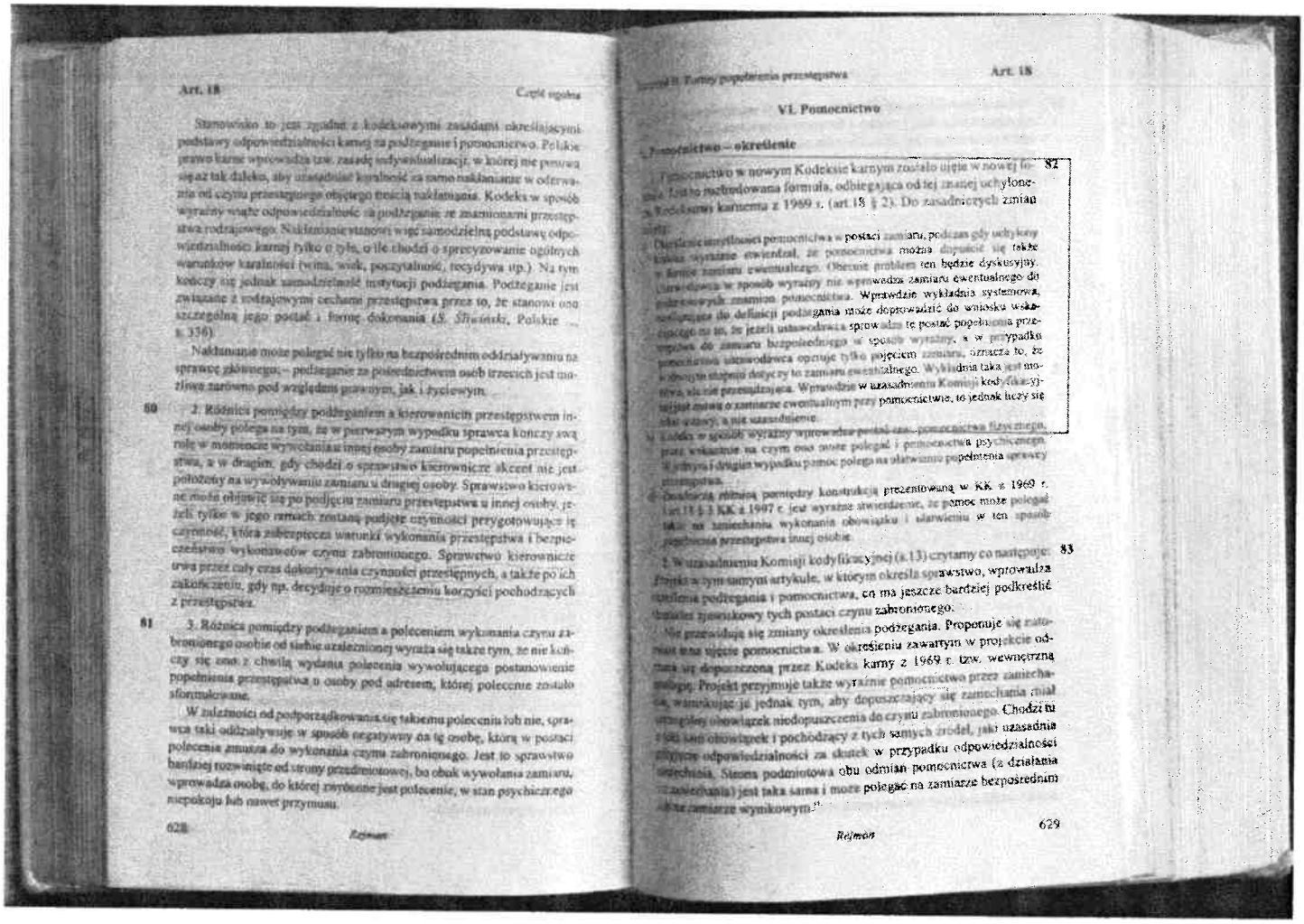

Stanowisko to jest zgodne z kodeksowymi zasadami określającymi podstawy odpowiedzialności karnej za podżeganie i pomocnictwo. Polskie prawo karne wprowadza tzw. zasadę indywidualizacji, w której nie posuwa się aż tak daleko, aby uzależniać karalność za samo nakłanianie w odierwaniu od czynu przestępczego objętego treścią nakłaniania. Kodeks w sposób wyraźny wiąże odpowiedzialność za podżeganie ze znamionami przestępstwa rodzajowego. Nakłanianie stanowi więc samodzielną podstawę odpowiedzialności karnej tylko o tyle, o ile chodzi o sprecyzowanie ogólnych warunków karalności (wina, wiek, poczytalność, recydywa itp.). Na tym kończy się jednak samodzielność instytucji podżegania. Podżeganie jest związane z rodzajowymi cechami przestępstwa przez to, że stanowi ono szczególną jego postać i formę dokonania (*S. Śliwiński*, Polskie ... s. 336).

Nakłanianie może polegać nie tylko na bezpośrednim oddziaływaniu na sprawcę głównego, – podżeganie za pośrednictwem osób trzecich jest możliwe zarówno pod względem prawnym, jak i życiowym.

80 2. Różnica pomiędzy podżeganiem a kierowaniem przestępstwem innej osoby polega na tym, że w pierwszym wypadku sprawca kończy swą rolę w momencie wywołania u innej osoby zamiaru popełnienia przestępstwa, a w drugim, gdy chodzi o sprawstwo kierownicze akcent nie jest położony na wywoływaniu zamiaru u drugiej osoby. Sprawstwo kierownicze może objawić się po podjęciu zamiaru przestępstwa u innej osoby, jeżeli tylko w jego ramach zostaną podjęte czynności przygotowujące tę czynność, która zabezpieczy warunki wykonania przestępstwa i bezpieczeństwo wykonawców czynu zabronionego. Sprawstwo kierownicze trwa przez cały czas dokonywania czynności przestępnych, a także po ich zakończeniu, gdy np. decyduje o rozmieszczeniu korzyści pochodzących z przestępstwa.

81 3. Różnica pomiędzy podżeganiem a poleceniem wykonania czynu zabronionego osobie od siebie uzależnionej wyraża się także tym, że nie kończy się ono z chwilą wydania polecenia wywołującego postanowienie popełnienia przestępstwa u osoby pod adresem, której polecenie zostało sformułowane.

W zależności od podporządkowania się takiemu poleceniu lub nie, sprawca taki oddziaływuje w sposób negatywny na tę osobę, którą w postaci polecenia zmusza do wykonania czynu zabronionego. Jest to sprawstwo bardziej rozwinięte od strony przedmiotowej, bo obok wywołania zamiaru, wprowadza osobę, do której zwrócone jest polecenie, w stan psychicznego niepokoju lub nawet przymusu.

VI. Pomocnictwo

1. Pomocnictwo – określenie

82 Pomocnictwo w nowym Kodeksie karnym zostało ujęte w nowej formule. Jest to rozbudowana formuła, odbiegająca od tej znanej uchylonego Kodeksu karnego z 1969 r. (art. 18 § 2). Do zasadniczych zmian należą:

– Określenie umyślności pomocnictwa w postaci zamiaru, podczas gdy uchylony Kodeks wyraźnie stwierdzał, że pomocnictwo można dopuścić się także w formie zamiaru ewentualnego. Obecnie problem ten będzie dyskusyjny. Ustawodawca w sposób wyraźny nie wprowadza zamiaru ewentualnego do podstawowych znamion pomocnictwa. Wprawdzie wykładnia systemowa, odwołująca do definicji podżegania może doprowadzić do wniosku wskazującego na to, że jeżeli ustawodawca sprowadza tę postać popełnienia przestępstwa do zamiaru bezpośredniego w sposób wyraźny, a w przypadku pomocnictwa ustawodawca operuje tylko pojęciem zamiaru, oznacza to, że w drugim stopniu dotyczy to zamiaru ewentualnego. Wykładnia taka jest możliwa, ale nie przesądzająca. Wprawdzie w uzasadnieniu Komisji kodyfikacyjnej jest mowa o zamiarze ewentualnym przy pomocnictwie, to jednak brzy się ona ostrożnie, a nie uzasadnienie.

– Kodeks w sposób wyraźny wprowadza podział na ... pomocnictwo fizyczne, przez wskazanie na czym ono może polegać i pomocnictwo psychiczne. W pierwszym i drugim wypadku pomoc polega na ułatwieniu popełnienia sprawcy przestępstwa.

– Dostrzegają różnicą pomiędzy konstrukcją prezentowaną w KK z 1969 r. i art. 18 § 3 KK z 1997 r. jest wyraźne stwierdzenie, że pomoc może polegać także na zaniechaniu wykonania obowiązku i ułatwieniu w ten sposób popełnienia przestępstwa innej osobie.

83 2. W uzasadnieniu Komisji kodyfikacyjnej (s.13) czytamy co następuje: Projekt w tym samym artykule, w którym określa sprawstwo, wprowadza definicje podżegania i pomocnictwa, co ma jeszcze bardziej podkreślić ustawowy tych postaci czynu zabronionego.

Nie przewiduje się zmiany określenia podżegania. Proponuje się natomiast ująć pomocnictwo. W określeniu zawartym w projekcie odmawia się dopuszczoną przez Kodeks karny z 1969 r. tzw. wewnętrzną sprzeczność. Projekt przyjmuje także wyraźnie pomocnictwo przez zaniechanie, warunkując je jednak tym, aby dopuszczający się zaniechania miał prawnego obowiązek niedopuszczenia do czynu zabronionego. Chodzi tu o ten sam obowiązek i pochodzący z tych samych źródeł, jaki uzasadnia przyjęcie odpowiedzialności za skutek w przypadku odpowiedzialności przez zaniechanie. Strona podmiotowa obu odmian pomocnictwa (z działania i zaniechania) jest taka sama i może polegać na zamiarze bezpośrednim albo zamiarze wynikowym.[1]

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*325 THE MENTAL ELEMENT REQUIRED FOR ACCOMPLICE LIABILITY: A TOPIC NOTE

Candace **Courteau**

I. Introduction

To be guilty of a crime the offender must meet the act requirement (actus reus) and have the specific state of mind (mens rea) necessary to commit the offense. [FN1] In the realm of accomplice liability, one is liable as an accomplice to the crime of another if he gave assistance with the required mental state. [FN2] Yet, for an accomplice the act requirement is much less stringent, as the primary actor's act is imputed to the accomplice as long as the accomplice gave some assistance. [FN3] Moreover, there has been considerable debate about the level of intent required for accomplice liability. [FN4]

This article will focus on the second element of accomplice liability-the mental element. [FN5] Its purpose is to give a general analytical survey of the law of accomplice liability regarding the requisite mental element. Usually the courts' substantive analysis as to these decisions is confusing. Nevertheless, since the actions of the primary actor are imputed to the accomplice and the degree of assistance of the accomplice minimal, a clear rule about the sufficiency of the mental element of the accomplice is needed to limit the theory within justifiable bounds. [FN6]

First, this article will explore the origins and competing policies behind accomplice liability. Second, it will review what theories other jurisdictions and *326 the Model Penal Code have imposed on accomplice liability. Third, it will address the theories that Louisiana has employed in fashioning accomplice liability. Fourth, the theory of accomplice liability with regard to recklessness/negligence crimes will be discussed. In conclusion, the author will review suggestions for clarifying the law.

II. Origins and Policies of Accomplice Liability

Under the common-law, parties to crime were divided into different degrees. [FN7] An aider and abettor who was actually or constructively present at the crime was classified as a principal in the second degree. [FN8] This party either had to act with the intent required for the underlying crime or with guilty knowledge. [FN9] Thus, at common law, an accomplice that assisted the perpetrator with knowledge of the perpetrator's criminal purpose could be held liable for the substantive offense.

The two major policies which underlie accomplice liability are deterrence and personal culpability. [FN10] Reasons given for holding an accomplice liable are 1) to punish him for his actions and 2) to prevent/deter him from committing this type of crime again. [FN11] Since the aider and abettor lends his assistance to the perpetrator, his actions help to bring about the prohibited result. Society recognizes that this dangerous aider and abettor's conduct should be deterred and that he or she should be punished. [FN12] Some suggest the deterrence policy applies better to accomplices than to perpetrators because "[w]hen the crime is . . . committed by a third person, the usual strain and immediacy involved in the decision-making is not present." [FN13] Therefore, the "accomplice . . . [can] calculate deliberately the consequences of his actions." [FN14]

However, critics of the deterrence policy argue that "[n]ot all accomplices should be treated alike." [FN15] Not all accomplices present as much danger as the *327 perpetrator. [FN16] Since "accomplices [vary] in their type of involvement in group crime, a model based on specific deterrence or rehabilitation is unlikely to be generally effective." [FN17]

The interest of society in deterring criminals must be balanced against the "interest of the individual in being free unless found legally blameworthy." [FN18] In criminal law, a "deeply rooted" principle exists that one should be liable only for one's personal guilt. [FN19] Accomplice liability "skirts the boundaries" of this principle. [FN20] Thus, theorists have endeavored to reconcile accomplice liability and personal liability. [FN21] Two rationales for holding the accomplice liable even though he did not commit the act are: (1) the rules of agency, and (2) the forfeited personal identity doctrine. [FN22]

Under civil agency theory, the principal "agrees" to be bound by the acts of the agent and to be personally liable for those acts. [FN23] Similarly, "the accomplice authorizes the primary actor's conduct . . . [and] accepts it as her own." [FN24] However, civil agency "requires a party to consent to being subjected to the control of another, whereas criminal liability does not." [FN25] In criminal law there is no requirement of consent between the principal and the accomplice. The lack of consent in criminal agency theory ignores the fundamental premise upon which civil agency is based, and for this reason, the analogy has its limits.

The second theory underlying accomplice liability, the forfeited personal identity doctrine, provides that a person who chooses to aid in a crime forfeits his or her personal identity and that his or her identity becomes bound up in that of the principal. [FN26] Under this theory, "[w]e pretend the accomplice is no more than an incorporeal shadow" of the main perpetrator. [FN27] However, critics have argued that by molding one person's identity into another's as justification for accomplice liability, this doctrine "permits society to ignore the potentially numerous levels of personal culpability and personal involvement of wrongdoers," [FN28] thus punishing one for harm that he may not have intended or caused. *328 Moreover, accomplice liability may not be linked to causation. [FN29] Even though the accomplice may not have caused the harm, he can be treated as severely as the perpetrator who did. [FN30]

These theories may help explain the rationale behind accomplice liability to some extent; however, there are moral problems with treating the accomplice as a "mere incorporeal shadow." [FN31] It would be better to recognize that "moral intuition" tells society that those who "[willfully participate] in crime should be punished." [FN32] Then, instead of molding the accomplice's identity into that of the perpetrator, the accomplice's own personal culpability could be examined to determine the degree of punishment he deserves.

III. Knowledge v. Intent-The Search for the Proper Standard

There has been a long, ongoing debate about the requisite mental standard for an accomplice. An accomplice must really have two mental states: 1) to assist the principal, and 2) to commit the substantive offense. [FN33] The difficulty lies in determining the standard for the mental element that the accomplice must have with respect to the core offense. Historically at common law, knowledge of the perpetrator's criminal intent was sufficient to hold the accomplice liable for the underlying crime. [FN34] Today, many argue that the accomplice must himself have the intent required for the substantive crime so as not to subvert the principle of criminal law that one should be punished only to the extent of one's personal culpability. [FN35] Thus, standards range from 1) mere knowledge that the accomplice's assistance will help in the commission of the offense, to 2) the accomplice's own intent to commit the offense. These standards are not merely theoretical. The Model Penal Code provides examples of difficult situations in which the standard will make a difference in determining the liability of the accomplice. For example: "[a] lessor rents with knowledge that the premises will be used to establish a bordello. A vendor sells with knowledge that the subject of the sale will be used in the commission of the crime. A doctor *329 counsels against an abortion during the third trimester but, at the patient's insistence, refers her to a competent abortionist." [FN36] In all of these situations, if the knowledge standard were used the accomplices would be liable for the substantive crime as they knew of the principal's intent to commit the core offense and assisted the principal in committing the offense. However, as none of the accomplices intended to commit the substantive offense, they would not be liable if the intent standard is used.

These different standards also affect the policies behind accomplice liability. As previously mentioned, one of the major policies behind accomplice liability is deterrence. [FN37] The proponents of the knowledge standard argue that this standard better serves this policy concern. [FN38] They argue that crime prevention should be the main consideration in determining the mens rea requirement under accomplice liability. [FN39] One big problem with this argument is the determination of what degree of knowledge and assistance will be sufficient to deter criminal conduct. [FN40] The drafters of the Model Penal Code rejected the theory of knowing facilitation by requiring "that the actor have a purpose to promote or facilitate the offense in question." [FN41] Only when the accomplice has as his true purpose the advancement of the criminal end will he face punishment for the substantive offense. [FN42] Therefore, courts face the dilemma of either holding the accomplice liable on a mere knowledge standard, or letting the accomplice go free because he did not intend to commit the underlying crime. This either/or situation does not always provide a just outcome and has led to confusing decisions among the courts, including the federal courts.

IV. Federal Cases

Federal statute 18 U.S.C. § 2 provides: "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal." [FN43] There is no clear federal standard for the mental element of an accomplice, and the circuits are split on this issue. However, the prevailing view is that the accomplice must have the intent to commit the underlying offense. [FN44]

*330 A. The Knowledge Standard

One early case suggested that a seller with knowledge of the buyer's criminal purpose would be liable as an aider and abettor. [FN45] In Backun v. United States, the seller sold stolen goods (that he had hidden in his closet) to a buyer for an extremely low price knowing that the buyer would transport the goods across the state line to find a better market. The seller was convicted of the "crime of transporting stolen merchandise of a value in excess of $5,000 in interstate commerce, knowing it to have been stolen, in violation of the National Stolen Property Act, 18 U.S.C.A. § 415." [FN46] The court distinguished the facts of this case from "an ordinary sale made with knowledge that the purchaser intends to use the goods purchased in the commission of a felony" because there was "evidence of direct participation of [the seller] in the criminal purpose." [FN47] However, strong language in dicta suggested that an ordinary sale made with knowledge of the buyer's intent would be sufficient to hold the accomplice liable because of one's "moral obligation to prevent the commission of a felony." [FN48] "The seller may not ignore the purpose for which the purchase is made if he is advised of that purpose, or wash his hands of the aid that he has given the perpetrator of a felony by the plea that he has merely made a sale of merchandise." [FN49]

The Fourth Circuit in United States v. Eberhardt, [FN50] also suggested that knowledge of the primary actor's crime would be a sufficient standard under which to hold the accomplice liable. In protest of the Vietnamese war, a group of four men mixed part of their blood with animal blood. Then, while one man remained in the lobby, the three other men poured the blood over selective service files. The nonparticipating accomplice was charged as an aider and abettor and convicted of willfully mutilating records in a public office of the United States. Although this accomplice's acts of giving blood and accompanying the others to the building were sufficient to indicate that he had the requisite intent for the crime, the court went even further in dicta suggesting that: "[the accomplice's] mere giving of blood with the knowledge that it would *331 be used for an unlawful purpose would be enough to convict him as an aider and abettor." [FN51]

These cases found that the societal goals of crime prevention and deterrence outweighed the negative aspects of the knowledge standard. Although the court found that the aiders and abettors possessed the requisite intent, underlying these cases is the idea that people were "under [a] moral obligation to prevent the commission of felony"; [FN52] and thus guilty knowledge may be enough to satisfy the mens rea requirement. These courts found societal safety more important than: (1) the possibility of subverting personal culpability, or (2) interference with business practices of a merchant.

B. Intent Required for Underlying Crime

Another line of cases has held that the accomplice must possess the required mental element for the substantive offense. The Second Circuit's decision in United States v. Peoni [FN53] is one case decided before Backun which many opinions cite as supporting the idea that the accomplice must intend to promote or facilitate the offense. In Peoni, Judge Learned Hand, after interpreting common law definitions of accomplice liability, stated:

> It will be observed that all these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; and that they all demand that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used-even the most colorless, "abet"-carry an implication of purposive attitude towards it. [FN54]

This "purposive attitude" standard is the prevailing view of the federal courts today. [FN55] However, modern federal courts continue to recognize the ambiguity that still exists with respect to the requisite mental element; they have commented that new complex statutory crimes are "causing disparate results based on conflicting ideas of accomplice liability." [FN56] In fact, many courts have encountered difficulty in interpreting the federal "aiding and abetting" statute, [FN57] and while purporting to follow Peoni, use terminology that suggest that their analysis is based on a knowledge standard.

***332** One case where it seems clear that the accomplice had the intent for the substantive offense is United States v. Raper. [FN58] Here, Raper was convicted for aiding and abetting in the possession of heroin with the intent to distribute. In this case, Raper and a friend had a scheme by which Raper would collect money for drugs from the buyer. The buyer would then collect the drugs from Raper's friend, who had the drugs concealed in his underwear. It was clear that the two men had a plan, and that both acted with the required intent. However, before citing the "purposive attitude" language from Peoni, the court listed as one of the elements for aiding and abetting the offense "guilty knowledge on the part of the accused." [FN59] This dicta, like that of Backun, [FN60] is very confusing and could potentially mislead others in their search for the correct mental element required for an accomplice.

In United States v. Andrews, [FN61] Ivan Andrews' conviction under the aiding and abetting statute for a murder committed by his sister was reversed by the court. Ivan himself shot a man named Lowery. Then, Ivan's sister killed a passenger who was in Lowery's car. Ivan was convicted as an aider/abettor to the murder committed by his sister. This court listed as a necessary element under the aiding and abetting statute "that Ivan 'had the requisite intent' for [the crime]." [FN62] The court found that the jury could not infer the necessary intent from these circumstances as Ivan's mere presence and agreement to "get" Lowery was insufficient. The court then concluded that the jury could not have inferred Ivan's intent "under the natural and probable consequences doctrine," [FN63] which holds the accomplice liable for all natural and probable consequences that flow from the commission of the crime, as his sister's actions were impulsive and "went beyond that scope." [FN64] By recognizing the natural and probable consequences doctrine, it appears that the court was willing to apply a lesser standard for the mental element, although it listed as one of the elements for aiding and abetting the intent to commit the underlying crime. Even so, the court was unwilling to find that Ivan's intent could be inferred under the circumstances.

Courts have struggled with the requisite mental element for an accomplice. Federal courts moving from requiring knowledge to a greater degree of intent may signify that a higher degree of personal responsibility should be required to convict an accomplice. [FN65] However, the accomplice's lesser degree of culpability ***333** should be balanced with the fact that an accomplice who assists with guilty knowledge should be deterred (even if to a lesser extent than one who intends the crime be committed). [FN66]

V. Other Jurisdictions

Much like the federal courts, states have struggled with accomplice liability and split along the same lines. Few states have kept the knowledge standard. [FN67] A majority of states, in line with the Model Penal Code, require that the accomplice have the "intent to promote or facilitate the offense." [FN68]

In the 1980's, California courts were split on what the mental element for an accomplice should be. During

this period, the courts divided over jury instructions which defined principals as those who aided the crime with knowledge of the perpetrator's criminal purpose. [FN69] One line of cases made it clear that the test for aider/abettor liability was the accomplice's knowledge of the perpetrator's intent. [FN70] These courts found that the accomplice's "intent is implicit in the act of aiding with knowledge of the perpetrator's guilty state of mind." [FN71]

An opposite line of authority developed requiring "that [the accomplice] share the intent of the perpetrator," [FN72] and disagreeing with the "implicit intent" standard. They argued that instead of setting up a presumption where knowledge equals intent, the jury should be given the facts to decide if the prosecution had proven the accomplice's criminal intent. [FN73] One justice gave an example of a situation illustrating how inequity could result under the knowledge standard:

> A abducts a young woman with the intent to rape her, forces her into a car and starts to drive off. B, the woman's brother, rushes to his car intending to rescue his sister. C, the woman's boyfriend, jumps into *334 the passenger seat of B's automobile, pulls out a gun and says to B, "Hurry up, I'm going to kill A." B's car pursues A's vehicle with C shooting through the window at A. Clearly, B has knowledge of C's intent to murder A and is aiding in the commission of the offense by driving C. Can he be convicted of aiding and abetting in the attempted murder when his only intent is to rescue his sister? I think not. [FN74]

Rejection of the implicit intent approach was necessary to assure just results under all circumstances.

A few states still find knowledge to be sufficient. [FN75] In Washington, the mens rea required for an accomplice is "general knowledge that the principal intends to commit a crime." [FN76] In Michigan, the courts explicitly recognize "two types of aiding and abetting: (1) where the aider and abettor himself possesses the requisite specific intent for the underlying crime and (2) where the aider and abettor knows that the principal has the requisite intent." [FN77] In these states, the legislature made a determination that one who assists with guilty knowledge should be punished as a principal. [FN78] The courts express this element as "merely a general intent requirement imposed to prevent an innocent participant from becoming an aider and abettor." [FN79]

Most states however, follow the scheme of the Model Penal Code. The Model Penal Code specifies that one becomes an accomplice if he aids "with the purpose of promoting or facilitating the offense." The commentary states that this language "requires that the actor . . . have as his conscious objective the bringing about of conduct . . . [which is] criminal." [FN80] Although this definition does not explicitly state that an accomplice must have the intent for the underlying crime, a majority of states adopting this language interpret this to be the meaning. [FN81]

In finding the proper standard to apply, the state courts face the same dilemma as the federal courts. [FN82] Most states are concerned about protecting those less culpable from facing the same penalty as the actual perpetrator. [FN83] *335 This rule is more in line with general principles of criminal law. [FN84] This intent requirement aids in the fact finder's determination, as once intent is found, courts do not have to quibble over the level of assistance rendered. Today, most jurisdictions prefer this rule, and Louisiana falls in line with these jurisdictions.

VI. Louisiana

A. Generally

In Louisiana, the legal standard is that the accomplice have the intent for the underlying crime. An early Supreme Court decision which addressed the problem of setting the standard for the mental element of the accomplice was State v. Holmes. [FN85] In Holmes, the defendant, Holmes, assisted in the planning and execution of a robbery by providing the car for his threesome of criminals and helping to obtain a shotgun and shells. Holmes and a friend (with the shotgun under his coat) entered a store wearing ski masks. As Holmes tried to remove the security guard's pistol, the guard reached for his gun. Holmes' friend shouted, "[d]on't try it," and then shot the guard in the face. Holmes unholstered the pistol, retrieved the money from the store safe, and pistol whipped a customer. They then escaped and split the money.

At trial, the court first had to define the legal requirement for an accomplice's mental state. The court found that the prosecution misstated the law when it intimated that "all that was necessary to establish the defendant's guilt of first degree murder was proof that the defendant was knowingly involved in the armed robbery." [FN86] The court found that "an individual may only be convicted as a principal for those crimes for which he personally has the requisite mental state." [FN87] Since the mental element for first degree murder is "specific intent to kill or to inflict great bodily harm [[[,]" [FN88] Holmes himself must have had the specific intent to kill the guard, and his friend's intent could not be transferred to him. The court then concluded that the factual circumstances were sufficient to find that Holmes had the specific intent required. [FN89] Later cases state that ***336** they are following the same standard. Since the mental requirement of a given crime affects the analysis, these cases will be divided by looking at those crimes which, under Louisiana law, require "specific intent," and those which require "general intent."

B. Specific Intent Crimes

"Specific intent" is defined in Louisiana Revised Statutes 14:10(1) as "that state of mind which exists when . . . the offender actively desired the prescribed criminal consequences to follow his act or failure to act." [FN90] Therefore, "specific intent is present when from the circumstances the offender must have subjectively desired the prohibited result. . . ." [FN91] In order to determine the defendant's mental state his actions will have to be scrutinized, thereby making this a fact-intensive inquiry.

In State v. Pierre, [FN92] the Supreme Court reversed the defendant's conviction for manslaughter after finding that he did not have the specific intent to kill the victim. Here, defendant was tried for the second degree murder of a thirteen year old boy. [FN93] The facts surrounding the victim's rape and murder were sketchy, and contradictory testimony was given about the defendant's involvement. All that could be proven was that defendant was at the scene (there was contradictory testimony about whether defendant was in the house where the victim was raped or remained in a van), and there was no evidence that he aided in the murder (he did not participate in the victim's beating death). The court found there were no acts from which intent could be inferred, ***337** and that the "jurors could only speculate about the defendant's role" in the murder. [FN94]

Compare Pierre to State v. Meyers. [FN95] This case involved the drive-by shooting of a street corner drug dealer. The driver and the backseat passenger appealed their convictions of second degree murder, claiming that they lacked the specific intent to kill. The court once again defined the legal standard as the intent required for the underlying crime. Next, the court looked at the circumstances surrounding the crime and determined that the defendants did have the specific intent to kill. However, given the facts of the case the court's holding might be questioned.

In analyzing the case, the court found the following facts sufficient to infer the defendants' intent:

> neither [the driver] nor [the passenger] tried to assist the victim . . . after the shooting. They did not call the police to report the shooting or give any statement regarding the murder to anyone. [The driver] drove the Cutlass to the scene and [the passenger] watched the incident [through] the car window. [FN96]

The court acknowledged that there was "no direct evidence presented that either [man] knew that [the perpetrator] was armed"; however, it found that in the life of drug dealers this was a common event and that "the participants here all knew that [the perpetrator] intended to shoot [the victim]." [FN97]

In affirming the jury's decision, the court emphasized the fact that the defendants did not offer the victim assistance after the shooting as evidence of the defendants' intent. Such an inference of intent from nonaction could lead to troubling results, given that other inferences can also be drawn from the facts. For example, the defendants could have neglected to make a report for fear of prosecution. The state presented no evidence that either Meyers or Davis knew that the shooter was armed. Meyers and Davis could have merely intended to participate in a drug deal. Even if they knew of the perpetrator's intent to kill this is different from having the intent themselves. As the court itself stated, "it is not enough to find merely that [the perpetrator] had the necessary mental state, since this intent cannot be imputed to the accused." [FN98] However, the court found the circumstantial evidence sufficient to support the jury's finding of guilt.

The mere presence of a passenger in Meyers is especially similar to Pierre in which the defendant's mental state was not sufficient to hold him liable as an aider and abettor. There, the crime committed was just as heinous, but the court did not consider the defendant's failure to assist the victim or file a report. In *338 Meyers, the court offers little justification for its failure to reverse the jury's determination. This is another example of a court confusing the legal standard by suggesting that knowledge of the perpetrator's intent is sufficient, while giving contradictory statements about requiring intent for the underlying crime. The court was willing to allow the jury to infer the defendant's "implicit intent" from his knowledge of the perpetrator's conduct. In Meyers, the court used the defendant's knowledge as a factor in determining intent, an analysis which would be more appropriate in finding accomplice liability for a general intent crime.

C. General Intent Crimes

Different proof of the mental state of the accomplice is required for general intent crimes. General intent is defined as the state of mind which exists "when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act." [FN99] Therefore, "general intent exists when from the circumstances the prohibited result may reasonably be expected to follow from the offender's voluntary act, irrespective of any subjective desire to have accomplished such result." [FN100] Since the consequences only have to be "reasonably certain" to occur in general intent crimes, it will be less difficult to find that an accomplice has the requisite mental state for these types of crimes.

Two cases which illustrate how accomplice liability works with general intent crimes are State v. Smith [FN101] and State v. Hebert. [FN102] In Smith, the court reversed the defendant's conviction for armed robbery. [FN103] Two brothers were robbing a shoe store when one found a hammer behind a counter and used it to threaten the clerks. The brother who did not wield the hammer was convicted by the lower court as a principal to armed robbery. The appellate court focused on the fact that this brother did not aid or abet the other's use of the hammer.

However, in Hebert, the court upheld the defendant's conviction for armed robbery, finding the defendant did have the requisite mental element. There, the second circuit found the perpetrator's use of a gun was planned or reasonably expected to follow from the plan to rob the store. As Smith and Hebert illustrate, as long as some act points towards assistance given by the accomplice *339 to the perpetrator, courts will generally hold that the accomplice has the requisite mental element.

VII. Suggestions/Solutions

A. Type of Knowing Aid Given by the Accomplice

Many solutions have been given for providing a balance between deterrence and personal culpability. One solution would involve taking into account the degree to which the accomplice knowingly aided in the criminal scheme. [FN104] The initial drafters of the Model Penal Code made this suggestion, but it was rejected. [FN105] The benefit of taking into account the amount of aid given by the accomplice would be to limit the liability of the minor actor. [FN106] However, critics of this standard have argued that it is too vague. [FN107] Dressler argues that it will be hard for a jury to determine what "substantial" help is and thus, the intent requirement for the accomplice will remain a hazy one. [FN108]

B. Sentencing Guidelines

One way to avoid penalizing the less culpable accomplice to the same degree as the principal is through sentencing guidelines. [FN109] The jury must find the elements of the core offense present. Yet, the judge in his discretion applies the sentencing guidelines to determine the defendant's punishment.

Federal courts follow the Federal Sentencing Guidelines Manual promulgated by the United States Sentenc-

ing Commission. [FN110] Under these guidelines, "each offense has a corresponding base offense level and may have one or more specific offense characteristics that adjust the offense level upward or downward." [FN111] A judge begins with the offense level, and then adds or subtracts points from it according to the aggravating or mitigating circumstances in order to determine the punishment. Under the guidelines, an aider and abetter's ***340** "offense level is the same level as that for the underlying offense." [FN112] However, the judge may consider as a mitigating factor whether the defendant was a minimal or minor participant in determining whether to decrease the offense level. [FN113]

In Louisiana, the trial judge must consider Louisiana Code of Criminal Procedure article 894.1, which contains general sentencing guidelines, before imposing a sentence. [FN114] Where there is no mandatory minimum sentence, "[t] he trial judge is to be afforded wide discretion in the imposition of the sentences within statutory limits, and the sentence imposed should not be set aside in the absence of a manifest abuse of his discretion." [FN115] "The purpose of this article is to provide the trial court with standards so that it may individualize the sentence to fit the particular defendant . . . ." [FN116] Therefore, the judge may consider the mitigating fact that the defendant was only an accomplice.

A major criticism of accomplice liability is that the accomplice is being punished to the same extent as the actual perpetrator. [FN117] Under the sentencing guidelines, the judge in his discretion may determine that the accomplice was less blameworthy and therefore should receive a lesser punishment. One problem with sentencing guidelines may be that they allow the judge too much discretion if no mandatory minimum sentence exists. However, such guidelines give standards for sentencing "through a system that imposes appropriately different sentences for criminal conduct of differing severity." [FN118]

C. Criminal Facilitation Statutes

Some states make "assistance" a distinct criminal offense by promulgating facilitation statutes. [FN119] "These extend accessorial liability to persons who engage in conduct with the awareness that it will aid others to commit serious crimes, but treat such facilitation as a less grave offense than the crimes that are aided." [FN120] A statute such as this would "have the advantage of providing means whereby such persons, clearly less culpable than those directly participating in the crime, could be subjected to lesser and different penalties, just as has long been the case for the accessory after the fact." [FN121] Also, the Final Report of the National Commission on Reform of Federal Criminal Laws recognized the ***341** difficulty that the courts were facing by drafting a criminal facilitation statute and commenting that: "This section . . . would provide a legislative solution to the dilemma faced by a court which has to choose between holding a facilitator as a full accomplice or absolving him completely of criminal liability." [FN122] The standard adopted under this statute is that of the "knowing substantial assistance" of the accomplice. Thus, there is still the problem of determining when assistance has reached a "substantial" level. [FN123] However, this statute provides a standard that will produce just results by recognizing that the accomplice in this situation should be punished for his guilty knowledge and assistance, but to a lesser degree than the actual perpetrator.

VIII. Assisting Reckless/Negligent Conduct

A. In General

Whether to punish someone who assists the perpetrator in committing a criminally negligent crime is another problem that the courts have faced in the context of accomplice liability. [FN124] This situation often arises in the context of drunken driving offenses where the owner of a car gives the keys to someone obviously intoxicated. [FN125] Most courts hold that one can be charged as an accomplice to a recklessness/negligence crime; [FN126] however, a few courts find that this is a legal impossibility and refuse to allow accomplice liability. [FN127] In a negligence crime, such as negligent homicide, the drunk driver (the principal) ***342** does not necessarily intend to commit the crime, therefore the requirement that the accomplice have the intent to commit the underlying crime seems inconsistent in this type of scenario.

B. Other Jurisdictions

1. Legal Impossibility

In State v. Etzweiler, [FN128] the New Hampshire court found that Etzweiler could not be charged as an accomplice to negligent homicide. [FN129] Etzweiler loaned his car to a co-employee whom he knew to be drunk. Ten minutes later, the co-employee who was driving recklessly struck a car, killing its two passengers. In rejecting the indictment charging Etzweiler as an accomplice to negligent homicide, the court recognized that the New Hampshire statute is based upon the Model Penal Code. [FN130] This court read Section III and Section IV of the New Hampshire statute together to find that under the code, "an accomplice's liability ought not to extend beyond the criminal purposes that he or she shares." [FN131] The court found that it would be a legal impossibility for Etzweiler to be an accomplice to negligent homicide:

> To satisfy the requirements of RSA 626:8 III, the State must establish that Etzweiler's acts were designed to aid [the co-employee] in committing negligent homicide. Yet under the negligent homicide statute, [the principal] must be unaware of the risk of death that his conduct created. . . . We cannot see how Etzweiler could intentionally aid [the ***343** principal] in a crime that [the principal] was unaware that he was committing. [FN132]

So, although Etzweiler loaned his car to an intoxicated person, he faced no consequences for those actions. [FN133]

2. Permissible Result

Other states take a differing view and hold that one can be convicted as an accomplice to negligence crimes. The Colorado Supreme Court in People v. Wheeler [FN134] reversed the trial court's finding that criminally negligent homicide by an accomplice is not a cognizable crime. [FN135] The trial court found that since the accomplice must know that the principal intended to commit the crime, it would be impossible for the complicitor to know that the "principal intended to perpetrate an unintentional killing." [FN136] However, the supreme court recognized that the complicity statute does not prescribe a separate crime, but is a definitional statute, and that the "intent to promote or facilitate the commission of the offense" of which the statute speaks is the intent to promote or facilitate the act or conduct of the principal. [FN137]

> Therefore, for a person to be guilty of criminally negligent homicide through a theory of complicity, he need not know that death will result from the principal's conduct because the principal need not know that. However, the complicitor must be aware that the principal is engaging in conduct that grossly deviates from the standard of reasonable care and poses a substantial and unjustifiable risk of death to another. In addition, he must aid or abet the principal in that conduct and, finally, death must result from that conduct. [FN138]

***344** New York was faced with a similar case in People v. Abbott. [FN139] Here, two men were drag racing down a public road when one of their cars struck a nonparticipating vehicle, killing all of its occupants. The driver of the car that avoided the collision was convicted of criminally negligent homicide. As in Wheeler, the state argued that this driver was liable because he "intentionally aided . . . in the criminally negligent conduct which resulted in the deaths . . . ." [FN140] The court found that to hold one liable as an accomplice for the crime of criminally negligent homicide, the State must prove: (1) that the accomplice "shares the requisite culpable mental state for the crime" (here criminal negligence), and (2) that he "intentionally [aided] in its commission." [FN141] Here, the speed of the driver's vehicle and the fact that his conduct allowed the events to take place were sufficient to show that the legal standard was met.

C. Louisiana

In State v. Martin, [FN142] a case factually similar to Abbott, the Louisiana Supreme Court upheld a drag-racing defendant's conviction for negligent homicide. The court found that the state must prove that the accomplice was: "1) criminally negligent and thereby had the requisite mental state; and 2) 'concerned' in the commission of a negligent homicide." [FN143] The court further found no error with the jury's conclusion that the requirement of both prongs had been met. [FN144] Louisiana courts have analyzed this situation by holding the "accomplice" liable for his own conduct. Therefore, the accomplice's liability lies in his own reckless mental

state and action.

Thus, in a case of loaning a car to a drunk driver, the issue would apparently be whether one was grossly negligent in engaging in that conduct. Another factor in the independent liability analysis is causation. The Martin opinion, in an apparently favorable reference to State v. Petersen, [FN145] suggests that the defendant might not be liable for negligent homicide if a co-racer were killed, rather than a third person. [FN146] Similarly, one could determine whether the supplier of the car or the weapon was a substantial cause in producing the result.

*345 D. Solutions

Many of the same policies for and against finding accomplice liability previously discussed apply to negligence crimes. [FN147] Crime deterrence policies suggest that the accomplice should be held liable. The owner of the car will think twice before recklessly handing over his or her car keys to a drunk. However, there has been criticism that "[b]ecause aiding and abetting so clearly requires knowing and willful participation in an offense with an intent that the offense succeed, expanding the doctrine to reach an offense based on negligence marks a radical departure from precedent." [FN148]

Some states look to the actual statute on accomplice liability to find that the accomplice must intend the commission of the offense. [FN149] However, that statute alone does not impose liability. This analysis leads to the anomalous conclusion that the accomplice must intend an unintentional crime-a legal impossibility. The better rule will require courts to examine the underlying crime to define the mental element for the accomplice. The prosecution will have to prove that the accomplice was negligent in aiding the conduct of the perpetrator. In a negligence crime, the state of mind of the accomplice must be a gross deviation from the standard of care of a reasonable man under similar circumstances. [FN150] Another approach would be to bypass the complicity theory and to hold the "accomplice" liable for his own conduct. [FN151]

IX. Conclusion

A person may be convicted of a crime he or she did not physically commit or intend to commit. The standard of knowledge versus intent of the accomplice towards the core offense is determinative of accomplice liability in some scenarios. The example in which a merchant sells goods to a buyer knowing that the buyer intends to use the goods to commit a crime can be analyzed under different theoretical bases for imposing accomplice liability. The seller cannot be seen as a consenting party under an agency theory. Neither has the seller "forfeited" his or her personal identity. Nevertheless, the seller has, however remotely, caused harm to society. This harm and the deterrence needed to prevent it has to be balanced with the seller's own personal culpability.

Punishing the less culpable accomplice to a lesser degree could be achieved by legislative enactment of a facilitation statute. With such a statute, the jury *346 would get to determine if the accomplice met the elements of this lesser offense. The same result would be achieved through the use of sentencing guidelines where the accomplice's minor role could be considered a mitigating factor. However, with this solution, it is within the discretion of the judge to determine the defendant's punishment. Either method would achieve the goals of deterrence without compromising the principle of personal culpability.

With respect to negligence crimes, the best result would be to hold the accomplice liable if he or she aided the perpetrator's conduct with a reckless state of mind. This solution would have the consequence of holding liable those whose actions show disregard for life but who do not actually commit the crime. As some commentators have argued, this is like holding the person liable for the substantive crime. [FN152] When these changes are implemented, both policies of deterrence and holding one liable only for one's own personal culpability will be met.

[FN1]. See William Lawrence Clark and William L. Marshall, A Treatise on the Law of Crimes § 5.00, at 260-67 (7th ed. 1967). Note that there is no mens rea requirement for a strict liability offense or felony murder. Id. § 5.10, at 303-13. See also Rollin M. Perkins, Criminal Law § 1, at 67-72 (3d ed. 1982).

[FN2]. See 2 Wayne R. Lafave & Austin W. Scott, Jr., Criminal Law § 6.7, at 576 (2d ed. 1986).

[FN3]. See Grace E. Mueller, Note, The Mens Rea of Accomplice Liability, 61 S. Cal. L. Rev. 2169, 2169-70 (1988).

[FN4]. Id. at 2172.

[FN5]. The Louisiana Criminal Code does not use the term "accomplice." The Code provides: "All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals." La. R.S. 14:24 (1997). Similarly the federal statute provides: "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal." 18 U.S.C. § 2 (1994). In other states and in the Model Penal Code, the term "accomplice" is defined by statute, and for the purposes of this paper the term "accomplice" will be used to identify an aider or abettor to a crime (a person who in Louisiana would be a "principal").

[FN6]. See Mueller, supra note 3, at 2172.

[FN7]. Parties were divided into four categories: "(1) principal in the first degree, (2) principal in the second degree, (3) accessory before the fact, and (4) accessory after the fact." Perkins, supra note 1, at 727.

[FN8]. Id. at 738.

[FN9]. Id. at 743. (Perkins states: "If the charge is first degree murder based upon an alleged deliberate and premeditated killing, the abettor is not guilty of this degree of the crime unless he either acted upon a premeditated design to cause the death of the deceased or knew that the perpetrator was acting with such an intent, and the same may be said of an assault with an intent to kill." (emphasis added) (footnotes omitted)).

[FN10]. See Louis Westerfield, The Mens Rea Requirement of Accomplice Liability in American Criminal Law-Knowledge or Intent, 51 Miss. L.J. 177, 177-79 (1980).

[FN11]. Id.

[FN12]. See Joshua Dressler, Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions To An Old Problem, 37 Hastings L.J. 91, 111 (1985).

[FN13]. Westerfield, supra note 10, at 178.

[FN14]. Id.

[FN15]. Dressler, supra note 12, at 113.

[FN16]. Id. at 112-13. For example, in a juvenile gang, the leader may be the most dangerous, and therefore "less easily deterrable than other accomplices." This type of accomplice may need "greater punishment" than his or her followers in order to be deterred.

[FN17]. Id. at 113.

[FN18]. Westerfield, supra note 10, at 177.

[FN19]. Dressler, supra note 12, at 108.

[FN20]. Westerfield, supra note 10, at 176.

[FN21]. Id. See also Dressler, supra note 12; Mueller, supra note 3.

[FN22]. See Dressler, supra note 12, at 111. See also Glanville Williams, Criminal Law: The General Part § 126, at 381-83 (2d ed. 1961).

[FN23]. Warren A. Seavey, Handbook of the Law of Agency § 8, at 11 (1964).

[FN24]. Dressler, supra note 12, at 110.

[FN25]. Id. (footnotes omitted).

[FN26]. Id. at 111.

[FN27]. Id.

[FN28]. Id. at 116 ("Yet, it is precisely because the criminal justice system stigmatizes the guilty and metes out punishment for wrongdoing that the common law usually rejects forfeiture, and instead evaluates legal guilt and apportions punishment based on the degree of personal responsibility . . . . Rejection of the forfeiture doctrine makes it less likely that criminals will be treated inhumanely, or that rights perceived as fundamental will be denied.").

[FN29]. Id. at 102.

[FN30]. Id. at 108. See also Sanford H. Kadish, Complicity, Cause, and Blame: A Study in the Interpretation of Doctrine, 73 Calif. L. Rev. 323, 329-36 (noting that causation cannot be used to blame the accomplice as the perpetrator's free will is the cause of the harm).

[FN31]. Dressler, supra note 12, at 111.

[FN32]. Dressler, supra note 12, at 108.

[FN33]. Mueller, supra note 3, at 2174-76.

[FN34]. See supra text accompanying notes 7-9.

[FN35]. Mueller, supra note 3, at 2173-74; Westerfield, supra note 10, at 172-73; see also Model Penal Code § 2.06 commentary at 312 n.42 (1985) ("if anything, the culpability level for the accomplice should be higher than that of the principal actor, because there is generally more ambiguity in the overt conduct engaged in by the accomplice, and thus a higher risk of convicting the innocent.").

[FN36]. Model Penal Code § 2.06 commentary at 316 (1985).

[FN37]. See supra text accompanying notes 10-18.

[FN38]. Westerfield, supra note 10, at 177.

[FN39]. Id.

[FN40]. Model Penal Code § 2.06 commentary at 315-16 (1985).

[FN41]. Model Penal Code § 2.06(3)(a) commentary at 314 (1985).

[FN42]. Model Penal Code § 2.06 commentary at 318 (1985) (The Institute favored this narrow formulation over a broad standard of knowledge "in order not to include situations where liability [would be] inappropriate.").

[FN43]. 18 U.S.C. § 2 (1994).

[FN44]. See, e.g., infra text accompanying notes 53-66.

[FN45]. Backun v. United States, 112 F.2d 635 (4th Cir. 1940). See also Bacon v. United States, 127 F.2d 985 (10th Cir. 1942) (affirming Bacon's conviction for transporting intoxicating liquor). Bacon was the owner of a liquor store which sold whiskey to Fox, a bootlegger. The court specified the degree of knowledge required of the seller by stating that: "Mere possibility or suspicion that goods lawful in themselves might be used unlawfully is not enough to make one an aider and abettor. More is required than that. He must know or have reason to know that the goods which he sells are and will be used in an unlawful venture." Id. at 987.

[FN46]. Id. at 636.

[FN47]. Id. at 638.

[FN48]. Id. at 637.

[FN49]. Id. at 637. See also Borgia v. United States, 78 F.2d 550, 555 (9th Cir. 1935); Vukich v. United States, 28 F.2d 666, 669 (9th Cir. 1928); Anstess v. United States, 22 F.2d 594, 595 (7th Cir. 1927); Pattis v. United States, 17 F.2d 562, 566 (9th Cir. 1927).

[FN50]. United States v. Eberhardt, 417 F.2d 1009, 1013 (4th Cir. 1969).

[FN51]. Id. at 1013.

[FN52]. Backun, 112 F.2d at 637.

[FN53]. 100 F.2d 401 (2d Cir. 1938).

[FN54]. Id. at 402 (emphasis added).

[FN55]. See Lafave, supra note 2, at 583 (stating that other courts "have tended to accept the Peoni limitation on accomplice liability").

[FN56]. United States v. Hill, 55 F.3d 1197, 1200 (6th Cir. 1995).

[FN57]. 18 U.S.C. § 2 (1994).

[FN58]. 676 F.2d 841 (D.C. Cir. 1982).

[FN59]. Id. at 849 (citing United States v. Staten, 581 F.2d 878, 886-87 (D.C. Cir. 1978)) (emphasis added).

[FN60]. See supra text accompanying notes 45-49.

[FN61]. 75 F.3d 552 (9th Cir. 1996).

[FN62]. Id. at 555.

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[FN63]. Id. at 556. Under the natural and probable consequences doctrine the accomplice is liable for all natural and probable consequences of the criminal scheme which he encouraged or aided. Lafave, supra note 2, at 590.

[FN64]. Id.

[FN65]. See supra text accompanying notes 45-63. This move takes place chronologically from earlier cases such as Backun and Eberhardt (which suggested that knowledge of the accomplice would be sufficient) to later cases like Raper (where accomplice had to intend the crime).

[FN66]. See Westerfield, supra note 10, at 182.

[FN67]. Wash. Rev. Code Ann. § 9A.08.020(3)(a)(ii) (West 1988) provides that "a person is an accomplice of another person in the commission of a crime if: With knowledge that it will promote or facilitate the commission of the crime, he . . . aids or agrees to aid such other person in planning or committing it." See also 17 Cal. Jur. 3d (Rev.) Part 1, Criminal Law § 105.

[FN68]. See Ala. Code § 13A-2-23 (1994); Ark. Code Ann. § 5-2-403 (Michie 1997); Colo. Rev. Stat. Ann. § 18-1-603 (West Supp. 1997); Del. Code Ann., tit.11, § 271 (1995); Haw. Rev. Stat. Ann. § 702-222 (Michie 1994); N.D. Cent. Code § 12.1-03-01 (1997); Ore. Rev. Stat. § 161.155(2) (1990); Pa. Stat. Ann. tit. 18, § 306(c)(1) (West 1998).

[FN69]. People v. Green, 181 Cal. Rptr. 507, 509-10 (Cal. Ct. App. 1982).

[FN70]. Id. at 510; People v. Standifer, 113 Cal. Rptr. 653 (Cal. Ct. App. 1974); People v. Germany, 116 Cal. Rptr. 841 (Cal. Ct. App. 1974).

[FN71]. Green, 181 Cal. Rptr. at 510-11 (emphasis added).

[FN72]. People v. Yarber, 153 Cal. Rptr. 875 (Cal. Ct. App. 1979); People v. Petty, 179 Cal. Rptr. 413 (Cal. Ct. App. 1981); People v. Brown, 172 Cal. Rptr. 221 (Cal. Ct. App. 1981).

[FN73]. Green, 181 Cal. Rptr. at 515 (Miller, J., concurring).

[FN74]. Id. at 515 (Miller concurring).

[FN75]. State v. Mas, No.33802-1-I, 1997 WL 258450 (Wash. Ct. App. May 19, 1997); State v. Bockman, 682 P.2d 925 (Wash. Ct. App. 1984); People v. King, 534 N.W.2d 534 (Mich. Ct. App. 1995); People v. Partridge, 535 N.W.2d 251 (Mich. Ct. App. 1995).

[FN76]. Mas, 1997 WL 258450 at 7.

[FN77]. King, 534 N.W.2d at 536-37.

[FN78]. Mas, 1997 WL 258450 at 8.

[FN79]. King, 534 N.W.2d at 538 (citing People v. Karst, 360 N.W.2d 206 (Mich. 1984)).

[FN80]. Model Penal Code § 2.06, Comments, at 310 (1985).

[FN81]. See State v. Easton, 577 S.W.2d 953 (Mo. Ct. App. 1979); State v. Soares, 815 P.2d 428, (Haw. 1991); Robinson v. State, 665 S.W.2d 890 (Ark. Ct. App. 1984). See also Mueller, supra note 3, at 2177-82 (giving

examples of problems with interpreting the Model Penal Code).

[FN82]. See supra text accompanying notes 43-66.

[FN83]. See supra text accompanying notes 72-74.

[FN84]. See supra text accompanying note 19.

[FN85]. State v. Holmes, 388 So. 2d 722 (La. 1980). See also State v. McAllister, 366 So. 2d 1340 (La. 1978). In State v. McAllister the court affirmed the defendant's conviction of manslaughter and disagreed with the defendant's challenge that Louisiana Revised Statutes 14:24 was vague, over broad, and denied equal protection and due process. The court reiterated the fact that the person is not charged with violating Louisiana Revised Statutes 14:24 as this statute merely defines principals; however, the person is charged with the substantive offense. The statute defining the substantive offense determines the mental element.

[FN86]. Holmes, 388 So. 2d at 725.

[FN87]. Id. at 726.

[FN88]. La. R.S. 14:30 (1997).

[FN89]. Holmes, 388 So. 2d at 728 ("[S]pecific intent is a state of mind and, as such, it need not be proven as a fact, but may be inferred from the circumstances of the transaction and the actions of the defendant." (citing State v. Williams, 383 So. 2d 369 (La. 1980)). La. R.S. 15:438 (1992) provides: "The rule as to circumstantial evidence is: assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence."

Holmes, 388 So. 2d at 728 (Marcus, J., concurring in the result) (Marcus, without reasoning, questioned the legal standard imposed by the majority of requiring the principal to have the intent of the substantive statute.) (Dennis, J., dissenting) (Dennis agreed with the legal standard imposed by the majority but found that under the facts Holmes did not have the requisite specific intent. He found that Holmes' act of "attempting to unholster the guard's pistol" was more consistent with sparing his life. Also, Holmes had no time to object to his friend's actions. Lastly, Holmes would not have wanted the shot fired since Holmes was standing right beside the guard.). The disagreement between the majority and the dissent show just how difficult it can be to infer a person's mental element from the surrounding circumstances even if one agrees with the legal standard.

[FN90]. La. R.S. 14:10(1) (1997) (emphasis added).

[FN91]. Holmes, 388 So. 2d at 726 (quoting State v. Daniels, 109 So. 2d 896, 899 (La.1959)).

[FN92]. State v. Pierre, 631 So. 2d 427 (La. 1994). Compare to State v. Jasper, 677 So. 2d 553 (La. App. 2d Cir. 1996), writ denied, 688 So. 2d 521 (1997), reh'g denied, 693 So. 2d 790 (1997), where court found that the defendant did have the specific intent to kill required for second degree murder. The court distinguished Pierre by finding that there, the defendant grabbed a weapon and went looking for the victim. More importantly, witnesses saw defendant shooting into the car in which the victim was a passenger.

[FN93]. La. R.S. 14:30.1(1) (1997).

[FN94]. Pierre, 631 So. 2d at 429.

[FN95]. State v. Meyers, 683 So. 2d 1378 (La. App. 5th Cir. 1996).

[FN96]. Id. at 1384.

[FN97]. Id. at 1384 (emphasis added).

[FN98]. Id. at 1382 (citing State v. Holmes, 388 So. 2d 722 (La. 1980)).

[FN99]. La. R.S. 14:10(2) (1997) (emphasis added).

[FN100]. Holmes, 388 So. 2d at 726 (quoting State v. Daniel, 109 So. 2d 896, 899 (La. 1959) (overruled on other grounds)).

[FN101]. 450 So. 2d 714 (La. App. 4th Cir. 1984),

[FN102]. 688 So. 2d 612 (La. App. 2d Cir. 1997).

[FN103]. Smith, 450 So. 2d at 716. State v. Battieste, 597 So. 2d 508 (La. App. 1st Cir. 1992), vacated in part on other grounds, 604 So. 2d 960 (La. 1992) (stating that armed robbery is a general intent crime, citing State v. Payne, 540 So. 2d 520 (La. App. 1st Cir., writ denied, 546 So. 2d 169 (La. 1989)).

[FN104]. See Dressler, supra note 12, at 121-24.

[FN105]. Model Penal Code § 2.04(3)(b), Tentative Draft No. 1 (1953).

[FN106]. Id. at cmt. 3. See also Lafave, supra note 2, at 583.

[FN107]. See Lafave, supra note 2, at 584 (citing Model Penal Code § 2.06, cmt. 6(c) n.58 (1985)).

[FN108]. Dressler, supra note 12, at 122. However, difficult determinations are left to the common sense of the jury all of the time. Dressler instead has suggested that the test should be whether the accomplice caused the crime. Id. at 140. "A causal accomplice is one but for whose acts of assistance the social harm would not have occurred when it did." Id. at 124-25. If the accomplice did not cause the crime, then he would receive a lesser punishment. Dressler proposes that the element of causation be added to the test in order to "make persons guilty of the harm they cause." Id. at 125-26. However, this formulation does not clarify the requisite mental element of the accomplice as the degree of culpability must still be determined.

[FN109]. See U.S. Sentencing Guidelines Manual (1997).

[FN110]. Id.

[FN111]. Id. at Ch. 2, intro. comment (1995).

[FN112]. Id. at § 2X2.1.

[FN113]. Id. at § 3B1.2.

[FN114]. La. Code Crim. P. art. 894.1.

[FN115]. State v. Stoner, 438 So. 2d 1275, 1276 (La. App. 2d Cir. 1983), writ denied, 444 So. 2d 118 (1984) (citing State v. Abercrumbia, 412 So. 2d 1027 (La. 1982).

[FN116]. Id. at 1277.

[FN117]. See Mueller, supra note 3, at 2172.

[FN118]. U.S. Sentencing Guidelines Manual Ch. 1, Pt. A, intro. comment (1995).

[FN119]. Ky. Rev. Stat. Ann. § 506.080 (Banks-Baldwin 1995); N.Y. Penal Law §§ 115.00-115.15 (McKinney 1998).

[FN120]. Model Penal Code § 2.06, cmt. 6(c) (1985).

[FN121]. Lafave, supra note 2, at 584.

[FN122]. National Commission on Reform of Federal Criminal Laws, Final Report-Proposed New Federal Criminal Code § 1002 commentary at 68 (1971). Section 1002 defines criminal facilitation as requiring: (1) knowing substantial assistance to a person intending to commit a felony; (2) that the other person commit the contemplated crime or a like or related felony; and (3) that the assistance provided be in fact employed in committing the crime.

[FN123]. See supra text accompanying notes 104-108.

[FN124]. La. R.S. 14:12 (1997) reads in full: "Criminal negligence exists when, although neither specific nor general criminal intent is present, there is such disregard of the interest of others that the offender's conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances."

[FN125]. See Mueller, supra note 3, at 2189.

[FN126]. State v. Garza, 916 P.2d 9 (Kan. 1996); People v. Wheeler, 772 P.2d 101 (Colo. 1989); People v. Abbott, 445 N.Y.S.2d 344 (N.Y. App. Div. 1981).

[FN127]. Echols v. State, 818 P.2d 691 (Alaska Ct. App. 1991); State v. Etzweiler, 480 A.2d 870 (N.H. 1984). The Model Penal Code section 2.06(4) purports to provide for this situation by "[making] it clear that complicity in conduct causing a particular criminal result entails accountability for that result so long as the accomplice is personally culpable with respect to the result to the extent demanded by the definition of the crime." Model Penal Code § 2.06, cmt. 7 (1985) (emphasis added). Model Penal Code section 2.06(4) states: "When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense."

[FN128]. 480 A.2d 870, 875 (N.H. 1984).

[FN129]. See also Echols v. State, 818 P.2d 691 (Alaska Ct. App. 1991) where the court reversed the defendant's conviction of assault in the first degree. The defendant was charged under Alaska's complicity statute for soliciting the assault. Alaska Stat. § 11.16.110(2) (Michie 1996) requires the accomplice have the intent to promote the commission of the offense. The mental element for the substantive offense of the assault required "that [the] person recklessly causes serious physical injury . . . ." Alaska Stat. § 11.41.200 (a)(1) (Michie 1996). The court started with the premise that "the accomplice must intend the commission of the particular crime charged." Echols, 812 P.2d at 692. The court then pointed out that although the Model Penal Code is one of the sources of the Alaska criminal code that their code had no provision similar to the Model Penal Code section 2.06(4). The court admitted that if such a provision was enacted it would support the State's position that the defendant need only act with recklessness towards the conduct causing the result. Echols, 818 P.2d at 695.

[FN130]. N.H. Rev. Stat. Ann. § 626:8 III (Michie 1996) provides: "A person is an accomplice of another person in the commission of an offense if: (a) With the purpose of promoting or facilitating the commission of the offense, he . . . aids . . . such other person in planning or committing it." Etzweiler, 480 A.2d at 873. N.H. Rev. Stat. Ann. § 626:8 IV (Michie 1996) states: "When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense, if he acts with

the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense." Etzweiler, 480 A.2d at 874.

[FN131]. Etzweiler, 480 A.2d at 874.

[FN132]. Id. at 874-75.

[FN133]. Other Justices found that the accomplice liability statute could be interpreted differently. Justice Souter, concurring, found that Section IV of the statute should be read separately from Section III, therefore providing for liability in a situation where the "accomplice in 'conduct' causing a particular result is also an accomplice in the commission of the offense defined by reference to that result." However, he found that Section IV was too unclear as to "give . . . notice of its intended effect and is thus unenforceable." 480 A.2d at 876. Chief Justice King, dissenting, found that Section IV was sufficiently clear and that it would permit the State to charge Etzweiler as an accomplice to negligent homicide. He stated that the provision required the accomplice to act "purposefully with respect to the principal's criminal conduct," and that the accomplice must have the same state of mind as the principal towards the result (here, criminal negligence). 480 A.2d at 881 (emphasis in original). This Justice felt that this interpretation was the only way to give meaning to both Section III and Section IV.

[FN134]. 772 P.2d 101 (Colo. 1989).

[FN135]. Id. at 104-05.

[FN136]. Id. at 105.

[FN137]. Id. at 104 (emphasis added).

[FN138]. Id. at 105.

[FN139]. People v. Abbot, 445 N.Y.S.2d 344 (N.Y. App. Div. 1981). See also State v. Garza, 916 P.2d 9 (Kan. 1996). Garza and another man were shooting at each other when a bullet from the other man's gun hit the victim. Garza was charged with aggravated battery. The court found that "[g]iving assistance or encouragement to one who it is known will thereby engage in conduct dangerous to life is sufficient for accomplice liability as an aider or abettor as to crimes defined in terms of recklessness or negligence." Id. at 15.

[FN140]. Abbott, 445 N.Y.S.2d at 346.

[FN141]. Id. at 346-47.

[FN142]. 539 So. 2d 1235 (La. 1989).

[FN143]. Id. at 1238.

[FN144]. Id.

[FN145]. 526 P.2d 1008 (Or. 1974) (manslaughter conviction reversed where victim was a knowing and voluntary participant in drag race).

[FN146]. Martin, 539 So. 2d at 1239.

[FN147]. See supra text accompanying notes 7-32.

[FN148]. Major Frank W. Fountain, Aiding and Abetting Involuntary Manslaughter and Negligent Homicide:

An Unprincipled Extension of Principald Liability, Army Law. 3, 5 (Nov. 1991).

[FN149]. Especially those with complicity statutes that have language requiring that the accomplice have the intent to promote/facilitate the commission of the crime. See Echols v. State, 818 P.2d 691, 692 (Alaska Ct. App. 1991).

[FN150]. La. R.S. 14:12 (1997).

[FN151]. Fountain, supra note 148, at 9.

[FN152]. See supra note 151.

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THE AMERICAN MODEL PENAL CODE: A BRIEF OVERVIEW

Paul H. Robinson and Markus D. Dubber***

If there can be said to be an "American criminal code," the Model Penal Code is it. Nonetheless, there remains an enormous diversity among the fifty-two American penal codes, including some that have never adopted a modern code format or structure. Yet, even within the minority of states without a modern code, the Model Penal Code has great influence, as courts regularly rely upon it to fashion the law that the state's criminal code fails to provide. In this essay we provide a brief introduction to this historic document, its origins, and its content.

INTRODUCTION

Within the United States, there are fifty-two American criminal codes, with the federal criminal code overlaying the codes of each of the fifty states and the District of Columbia. Under the U.S. Constitution, the power to impose criminal liability is reserved primarily to the states, with federal authority limited to the prohibition and punishment of offenses specially related to federal interests (including crimes committed on property of exclusive federal jurisdiction such as military bases, crimes against certain federal officers, and crimes that involve conduct in more than one state that is difficult for a single state to effectively prosecute, such as drug

*Colin S. Diver Professor of Law, University of Pennsylvania.

**Professor of Law & Director, Buffalo Criminal Law Center, State University of New York at Buffalo.

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and organized crime offenses).[1] The vast bulk of crimes and essentially all "street" crimes—homicide, rape, robbery, assault, and theft—fall under jurisdiction of one of the fifty state criminal codes or the code of the District of Columbia.

There is much diversity among the fifty-two American criminal codes and, therefore, it is often difficult to state "the" American rule on any point of criminal law. But there also are many similarities among the codes, in large part due to the influence of the American Law Institute's Model Penal Code. Promulgated in 1962, the code prompted a wave of state code reforms in the 1960s and 1970s, each influenced by the Model Penal Code.

Some of the Model Penal Code provisions have not been widely accepted. For example, while the Model Penal Code generally rejects the common law's "felony murder" rule, which in its broadest form holds all killings in the course of a felony to be murder, most states have retained the rule. Similarly, a majority of states have rejected the Model Penal Code's innovation in prescribing the same punishment for inchoate offenses, such as attempt, and consummated offenses.

Nonetheless, the Model Penal Code is the closest thing to being an American criminal code. The federal criminal code is too unsystematic and incomplete in theory and too irrelevant in practice to function as a national code. Where states have not followed the Model Penal Code, the divergences locate points of controversy that often continue today. And the code and its commentaries have been the intellectual focus of much American criminal law scholarship since the code's promulgation.[2]

I. THE HISTORY OF THE MODEL PENAL CODE

The Model Penal Code was not the first or the most ambitious, but far and away the most successful attempt to codify American criminal law. To appreciate the Model Penal Code's significance, it must be placed within the

1. More specifically, the states' criminal law power derives from their "police power." The federal government has no police power and therefore must rest its criminal-law making on other grounds, most notably the power to regulation interstate commerce. See Markus D. Dubber & Mark G. Kelman, American Criminal Law: Cases, Statutes, and Comments 2–3 (2005); see generally Markus D. Dubber, The Police Power: Patriarchy and the Foundations of American Government (2005).

2. See generally Markus D. Dubber, Criminal Law: Model Penal Code §§ 1–2 (2002); Paul H. Robinson, Criminal Law § 2.1 (1997).

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spotty history of American criminal codification.[3] Unlike the development in continental Europe, modern criminal law in the United States did not arrive in the form of criminal codes. Rather than concern themselves with the threat of punishment, American reformers pragmatically proceeded directly to reform the punishment itself. In the new field of corrections, Americans led the way. As a French resident of Philadelphia noted admiringly in 1796, "the attempt at an almost entire abolition of the punishment of death, and the substitution of a system of reason and justice, to that of bonds, ill-treatment, and arbitrary punishment, was never made but in America."[4] As early as 1776, Thomas Jefferson had drafted a bill for the Virginia legislature that called for punishment based on the theory of prevention outlined by Cesare Beccaria and developed by Jeremy Bentham.[5] The final two decades of the eighteenth century brought the establishment of solitary confinement prisons in Philadelphia and then in New York and other states, including Virginia. 1823 saw the opening of the prison in Auburn, New York, to which visitors flocked from around the world, including Alexis de Tocqueville.[6]

American criminal codes were first compiled by Edward Livingston and later David Dudley Field. Livingston's elaborate drafts for a federal criminal code and a Louisiana criminal code, completed in 1826, were both the most ambitious and the least successful efforts at criminal law codification in the United States. Livingston's penal code was Benthamite both in scope and in substance. The penal code was divided into four separate codes comprising all aspects of penal law, from the definition of penal norms in a "Code of Crimes and Punishments," to the imposition of those norms in a "Code of Procedure" and a "Code of Evidence," and eventually

3. For a more detailed treatment of the history of Anglo-American criminal codification, see Sanford H. Kadish, Codifiers of the Criminal Law, in Blame and Punishment: Essays in the Criminal Law 205 (1987).

4. François-Alexandre-Frédéric La Rochefoucauld-Liancourt, On the Prisons in Philadelphia 33 (1796) (quoted in Louis P. Masur, Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776–1865, at 71 (1989)).

5. For a critical appraisal of Jefferson's draft, see Markus D. Dubber, "An Extraordinarily Beautiful Document": Jefferson's Bill for Proportioning Crimes and Punishments and the Challenge of Republican Punishment, in Modern Histories of Crime and Punishment (Markus D. Dubber & Lindsay Farmer eds., 2007).

6. See Gustave de Beaumont & Alexis de Tocqueville, On the Penitentiary System in the United States and Its Application in France (1833).

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to the actual infliction of sanctions in a "Code of Reform and Prison Discipline."[7] Each aspect of the penal law, and each corresponding code, was individually, and as a system, designed to rationalize penal law on the utilitarian principle that Bentham had derived from Cesare Beccaria's famous treatise *On Crimes and Punishments: la massima felicità divisa nel maggior numero.*[8]

David Dudley Field was both far less ambitious, and far more successful, as a criminal codifier. A successful New York lawyer, Field's codification efforts extended beyond the penal law and reflected pragmatic concerns about the accessibility of law, most importantly to lawyers.[9] Field's codes were designed to simplify legal practice by sparing attorneys the tedium of having to sift through an ever rising mountain of common law opinions. As a result, Field was more concerned with streamlining than he was with systematizing or even reforming New York penal law. Field's New York Penal Code was submitted to the legislature in 1865, and passed into law in 1881.[10] It remained in force until it was replaced by the New York Penal Law of 1967.

That New York Penal Law, like the revised criminal codes of many other states, was based in large part on the American Law Institute's Model Penal Code, which had been published in 1962. In fact, Herbert Wechsler, the Chief Reporter of the Model Penal Code, served on the legislative commission that drafted the New York code.[11]

The Model Penal Code combined Livingston's systematic ambition and integrated utilitarian approach with Field's pragmatism and legislative success. When the Model Penal Code project was launched in 1951, the vast majority of American criminal codes were in a sorry state. Only Louisiana had undertaken a serious effort to reform its criminal code since

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7. See Edward Livingston, The Complete Works of Edward Livingston on Criminal Jurisprudence (1873).

8. Cesare Beccaria, Dei delitti e delle pene (1764). On the relation between Bentham and Beccaria, see H.L.A. Hart, Bentham and Beccaria, in Essays on Bentham: Studies in Jurisprudence and Political Theory 40 (1982).

9. New York Field Codes (1850–1865).

10. 4 New York Field Codes (1850–1865).

11. See generally Richard Bartlett, Criminal Law Revision Through a Legislative Commission, 18 Buff. L. Rev. 213 (1968–1969); Richard Denzer, Drafting a New Penal Law for New York, 18 Buff. L. Rev. 251 (1968–1969).

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the nineteenth century.[12] A typical American criminal code at the time was less a code and more a collection of ad hoc statutory enactments, each enactment triggered by a crime or a crime problem that gained public interest for a time. What passed for a major "reform" in that period was the federal criminal code in 1948 putting the offenses in alphabetical order. Faced with this state of affairs, the American Law Institute's decision to draft a Model Penal Code was an ambitious undertaking.

The American Law Institute (ALI) is a nongovernmental organization of highly regarded judges, lawyers, and law professors in the United States. The institute typically drafts a "restatement" of an area of law, which articulates and rationalizes the governing rules in American jurisdictions. When published, the ALI "Restatement of the Law" for a particular area often becomes persuasive authority for courts and legislatures and commonly is relied upon by courts in interpreting and applying the law.

When the institute undertook its work on criminal law, however, it judged the existing law too chaotic and irrational to merit "restatement." What was needed, the institute concluded, was a model code, which states might use to draft new criminal codes.

The institute's criminal law work was started in 1931, a year after the institute completed a model code of criminal procedure. But the work was stalled during the depression years by lack of adequate funding and later by the events surrounding World War II. It was renewed in 1951 with a grant from a private foundation and proceeded at full speed for more than a decade.

From the beginning, the project bore the imprint of the Chief Reporter, Herbert Wechsler, a law professor at Columbia University who also had participated in the Nuremberg trials of Nazi war criminals.[13] Wechsler assembled a distinguished and remarkably diverse advisory committee of law professors, judges, lawyers, and prison officials, as well as experts from the fields of psychiatry, criminology, and even English literature.[14] In addition, a number of drafting groups tackled various

12. See La. Crim. Code (1942).

13. On Wechsler's approach to criminal law codification, see Herbert Wechsler, The Challenge of a Model Penal Code, 65 Harv. L. Rev. 1097 (1952).

14. Jerome Hall, the leading American criminal law theorist of the time, did not meaningfully participate in the drafting of the code. Cf. Jerome Hall, The Proposal to Prepare a Model Penal Code, 4 J. Legal Stud. 91 (1951); see also Markus D. Dubber, Penal Panopticon: The Idea of a Modern Model Penal Code, 4 Buff. Crim. L. Rev. 53, 63–64 (2000) (discussing Wechsler's rejection of Hall's retributivism).

specific topics, such as the treatment of insane offenders or the death penalty. After much debate within the drafting group and the advisory committee, tentative drafts of parts of the code with detailed commentary were presented to and debated by the entire membership of the institute at its annual meetings. This process of annually considering tentative drafts continued until 1962, when the institute finally approved a complete *Proposed Official Draft*. The original drafters' commentaries contained in the various tentative drafts were consolidated, revised, and finally republished along with the 1962 text as a six-volume set in 1985.[15]

The diversity of its advisory committee indicates the almost Livingstonian scope of the Model Penal Code's ambition. The Model Penal Code is not merely a criminal code, but rather extends to the law governing the infliction of punishment. In fact, the code refers to itself as a "Penal and Correctional Code" or P.C.C., with its first two parts dedicated to substantive criminal law and the other two parts addressing "treatment and correction" and "organization of correction," respectively.[16] No part of the Model Penal Code is explicitly devoted to the remaining aspect of penal law, the law of criminal procedure and evidence. Nonetheless, the code is littered with procedural provisions, including sections that determine the method and propriety of prosecution in particular cases;[17] address the defendant's competency to stand trial;[18] define, assign, and shift the burden of proof;[19] establish evidentiary presumptions;[20] and deal with the appointment of expert witnesses.[21] These provisions complement the ALI's 1930 Model Code of Criminal Procedure. Ten years after the completion of the Model Penal Code, the ALI also published a Model Code of Pre-Arraignment Procedure.

While the Model Penal Code acknowledged the importance of retributional concerns, it commonly gave prominence to more utilitarian

15. Model Penal Code (Official Draft and Revised Comments 1985).

16. Id. § 1.01(1).

17. Id. §§ 1.07-.11, 2.12.

18. Id. § 4.04.

19. Id. §§ 1.12, 2.04(4), 2.08(4), 2.09(1), 2.10, 3.01-.11, 212.4(1), 212.5, 213.6, 221.2(3), 223.1(1), 223.4, 223.9, 230.3, 242.5.

20. Id. §§ 1.03(4), 1.12(5), 5.03(7), 5.06(2) & (3), 5.07, 210.2(b), 211.2, 212.4, 223.6(2), 223.7(1), 223.8, 224.5, 251.2(4), 251.4.

21. Id. § 4.05.

functions: to deter criminal conduct and, in the event this failed, to diagnose the correctional and incapacitative needs of each offender.[22] The Model Penal Code in this way laid the foundation for the Correctional Code.[23] For example, the Model Penal Code prescribes the same peno-correctional treatment for a person who attempts to commit an offense as for a person who manages to consummate the offense, because both undeterred offenders have displayed the same symptom of dangerousness.[24]

Still, it cannot be said that the Model Penal Code systematically worked out the implications of any particular theory of punishment (or treatment). Adopting an approach that has been characterized as "principled pragmatism,"[25] the code drafters never lost sight of the code's ultimate goal, the reform of American criminal law. Instead of rewriting criminal law in strict consequentialist terms, the code drafters took care to ground the code firmly in existing law and frequently sacrificed theoretical consistency for pragmatic expediency. To continue with the example of attempt, the Model Penal Code carved out an exception for serious offenses, to blunt the otherwise radical impact of its new principle of equal treatment for attempted and consummated offenses.[26] Similarly, the code did not condemn capital punishment, the one sanction that could not fit into its law of "treatment and correction." Instead, it addressed the question in a bracketed section that imposes many serious restrictions on the imposition of capital punishment.[27] Ironically, this conflicted provision later became the foundation for several death penalty statutes and, eventually, the United States Supreme Court's effort to place capital punishment on a constitutional foundation.[28]

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22. The purposes of the code's various parts are defined in id. § 1.02(1) & (2). See generally Dubber, supra note 14; Robinson, supra note 2, § 1.2.

23. Model Penal Code pts. III & IV (Proposed Official Draft 1962).

24. Model Penal Code § 2.05 cmt. at 293–95 (Official Draft and Revised Comments 1985).

25. Herbert L. Packer, The Model Penal Code and Beyond, 63 Colum. L. Rev. 594 (1963).

26. Model Penal Code § 5.01(1) (Proposed Official Draft 1962).

27. Id. § 210.6.

28. See, e.g., McGautha v. California, 402 U.S. 183, 202 (1971); Gregg v. Georgia, 428 U.S. 153, 158, 190–91, 194 (1976); Proffitt v. Florida, 428 U.S. 242, 247 (1976); California v. Ramos, 463 U.S. 992, 1009 (1983).

II. THE INFLUENCE OF THE MODEL PENAL CODE

As a pragmatic document, the Model Penal Code enjoyed great success in American legislatures. The code's impact on American criminal law far exceeded that of even the most successful earlier codification project, the Field code. But it was the criminal law portion of the code—the statement of general principles of liability in part I and the definition of specific offenses in part II—that gained historic significance. The sentencing, treatment, and corrections portions, in parts III and IV, saw little acceptance and were soon left behind as American punishment theory and practice moved on to other approaches.

Even before the Model Penal Code was finished, its tentative drafts were used as models for criminal code reform. The two decades following the 1962 promulgation saw a host of state recodifications. New codes were enacted in Illinois, effective in 1962; Minnesota and New Mexico in 1963; New York in 1967; Georgia in 1969; Kansas in 1970; Connecticut in 1971; Colorado and Oregon in 1972; Delaware, Hawaii, New Hampshire, Pennsylvania, and Utah in 1973; Montana, Ohio, and Texas in 1974; Florida, Kentucky, North Dakota, and Virginia in 1975; Arkansas, Maine, and Washington in 1976; South Dakota and Indiana in 1977; Arizona and Iowa in 1978; Missouri, Nebraska, and New Jersey in 1979; Alabama and Alaska in 1980; and Wyoming in 1983. All of these thirty-four enactments were influenced in some part by the Model Penal Code. Draft criminal codes produced in other states, such as California, Massachusetts, Michigan, Oklahoma, Rhode Island, Tennessee, Vermont, and West Virginia, did not pass legislative review and may yet be revived.

Of the states that have not yet adopted a modern criminal code, the federal system is the most unfortunate example. The U.S. Congress has tried on and off to reform the federal criminal code since 1966, when Congress established a code revision commission at the urging of President Johnson.[29] In 1971, the Brown Commission produced a comprehensive and systematic Proposed New Federal Criminal Code.[30] Later code proposals, built upon the Brown Commission model, were introduced as legislative bills. One of these bills even passed the Senate but died

29. See generally Ronald L. Gainer, Federal Criminal Code Reform: Past and Future, 2 Buff. Crim. L. Rev. 45 (1998).

30. National Commission on Reform of Federal Criminal Laws, Final Report: A Proposed New Federal Criminal Code (1971).

in the House of Representatives. Criminal code reform is always difficult because it touches highly political issues, but the lack of a modern federal criminal code is considered a matter of some embarrassment among criminal law scholars in the United States. The present federal criminal code is not significantly different in form from the alphabetical listing of offenses that was typical of American codes in the 1800s.

The Model Penal Code's influence has not been confined to the reform of state codes. Thousands of court opinions have cited the Model Penal Code as persuasive authority for the interpretation of an existing statute or in the exercise of a court's occasional power to formulate a criminal law doctrine. (As is well known, while American courts have authority to interpret a code's ambiguous provisions, they generally are bound to follow what they know to be the legislative intention, and bound by interpretation decisions of a higher court.)

Even the Model Penal Code's official commentaries have been influential. Many states have little legislative history available for their courts to use in interpreting a state code provision. Where the state code provision was derived from or influenced by a Model Penal Code provision, the Model Penal Code's commentary often is the best available authority on the reasoning behind the provision and its intended effect.

The code's official commentaries also have become an important research source for criminal law scholars. The commentaries generally give a thoughtful and detailed explanation of the reasoning underlying a code provision as well as the scholarly debates concerning it. Also, because the official commentaries were not published until 1980 (Special Part) and 1985 (General Part), the commentary drafters had available to them information on how each of the Model Penal Code provisions fared during the previous two decades of state criminal code reform. The extent of a code provision's reception or rejection by the states often is detailed in the official commentaries.

The code's provisions for sentencing[31] and treatment[32] have not been influential.[33] They reflect a rehabilitative approach that has since passed out

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31. Model Penal Code arts. 6 & 7 (Proposed Official Draft 1962).

32. Id. pts. III & IV.

33. The American Law Institute is currently considering a revision of the code's sentencing provisions. See Symposium, Model Penal Code: Sentencing, 7 Buff. Crim. L. Rev. 1–306 (2003); see also Kevin R. Reitz, American Law Institute, Model Penal Code: Sentencing, Plan for Revision, 6 Buff. Crim. L. Rev. 525 (2003).

of favor. The code has many fewer grading categories than most modern American codes, thereby allowing greater sentencing discretion within each offense grade.[34] Its sentencing system generally relies upon the exercise of broad discretion by judges to individualize an offender's sentence.

In contrast, current American practice is to limit sentencing discretion.[35] That change in approach comes in part from a belief that discretion undercuts the virtues of the legality principle: Discretion increases the likelihood of disparate sentences for similar offenders committing similar offenses.[36] Discretion increases the potential for abuse by a biased decision maker. Discretion undercuts predictability, which is important for both effective deterrence and fair notice. Finally, discretion shifts the criminalization and punishment decisions away from the legislative branch and to the less democratic judicial and executive branches of government.

The code's discretionary sentencing system also is of little current influence in the U.S. because of a change in the underlying theory of liability and punishment.[37] The code's use of discretion was consistent with its interest in using the criminal justice system to promote rehabilitation and to incapacitate dangerous offenders who could not be rehabilitated. With that purpose, the length of an offender's incarceration logically depended upon how the person changed during his criminal commitment. An actual release date could only be determined when an offender appeared to be ready for release.

The limited ability of the social sciences to rehabilitate and to reliably predict future dangerousness has dampened the interest in broad sentencing discretion. This, along with a growing interest in imposing just punishment, has led to less sentencing discretion and more determinate sentences (that is, sentences not subject to early release on parole).

This change in the underlying penal philosophy affected the legislative success not only of the code's sentencing and treatment provisions but also

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34. See Gerard E. Lynch, Towards a Model Penal Code, Second (Federal?): The Challenge of the Special Part, 2 Buff. Crim. L. Rev. 297 (1998).

35. See, for example, the (once) mandatory sentencing guidelines for federal courts, United States Sentencing Guidelines Manual (2005). The future of determinate guideline sentencing in the United States, however, recently has been thrown into doubt. See United States v. Booker, 543 U.S. 220 (2005) (federal sentencing guidelines merely advisory).

36. See, e.g., Marvin E. Frankel, Criminal Sentences: Law Without Order (1973).

37. See, e.g., Andrew von Hirsch, Doing Justice: The Choice of Punishments (1976); Francis A. Allen, The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose (1981); Herbert Morris, Persons and Punishment, 52 Monist 475 (1968).

of some of its liability and grading provisions. For example, few states have followed the code's abandonment of the common law distinction between the punishment for attempted and consummated offenses. The code's policy makes good sense if one's focus is on rehabilitation and incapacitation of the dangerous—an offender may be equally dangerous whether or not his conduct in fact causes the harm intended or risked. On the other hand, if the criminal law is to capture the community's sense of justice, then the community's shared intuition that resulting harm does matter cannot be ignored.[38]

The code's Special Part also has become dated in some areas, such as in its treatment of sexual offenses and drug offenses. American society's views on many sexual and gender issues have changed since the code was drafted in the 1950s. Modern American codes typically adopt a gender-neutral approach to defining sexual offenses, give greater expression to the concern for victims of sexual offenses, and reflect a greater sensitivity to the history of sexual victimization of women by men. For instance, beginning in the 1980s, states began to reject the marital immunity for rape, which the Model Penal Code had retained from the common law. At the same time, drug offenses now figure among the most serious offenses defined in American criminal codes. In 1962 the Model Penal Code included no drug offenses. In an appendix to the code's Special Part, the drafters merely remarked that "a State enacting a new Penal Code may insert additional Articles dealing with special topics such as narcotics, alcoholic beverages, gambling and offenses against tax and trade laws."[39]

III. THE INNOVATIONS OF THE MODEL PENAL CODE

To appreciate the Model Penal Code's contribution to criminal law codification in the United States, it is important to recall the embryonic state of the subject at the outset of the Model Penal Code project in the early 1950s. The then most recent codification effort was that of the 1948 reform

38. Paul H. Robinson & John M. Darley, Justice, Liability, and Blame: Community Views and the Criminal Law (1995); Paul H. Robinson, Competing Conceptions of Modern Desert: Vengeful, Deontological & Empirical (forthcoming 2007); Paul H. Robinson & John M. Darley, Intuitions of Justice: Implications for Criminal Law and Justice Policy (forthcoming 2007).

39. Model Penal Code app. (Proposed Official Draft 1962).

of the federal criminal code, an alphabetical ordering of federal crimes for which, according to a contemporary observer, "the spadework was done by the hired hands of three commercial law-book publishers, on delegation from a congressional committee desirous of escaping the responsibility of hiring and supervising its own staff."[40]

As a result, the Model Penal Code drafters had virtually no existing American criminal codes to which to turn, with the possible exception of the recently reformed criminal code of Louisiana. That code, however, could have only limited significance for a Model Penal Code of American criminal law because of the unique history and nature of Louisiana law, which alone among the states was rooted not in uncodified English common law, but in codified European civil law. Much of what the Model Penal Code introduced into the United States has long been common practice in European codes. But while the code's structure generally resembles that of many European codes, the extent to which these foreign codes more directly influenced the Model Penal Code is unclear. The strongest foreign influence on the code came in the person of Glanville Williams, a British criminal law expert on the uncodified English common law.

A. A Comprehensive General Part

The Model Penal Code drafters created a "General Part" that contains a set of general principles applicable to each of the specific offenses contained in the "Special Part" of the code. The general principles include such matters as general principles for imposing liability, general principles of defense, general inchoate offenses, etc. Such a structure, hardly revolutianry by European standards, provides greater clarity and sophistication while simultaneously simplifying the code. Instead of having to repeat the rules governing complicity, omission liability, culpability requirements, or available defenses, for example, in each offense (or leaving them to the courts to define), the rules can be stated once in detailed form in the General Part, to be referred to in the prosecution of any offense in the Special Part.

The current federal criminal "code" is typical of what existed in the states before the Model Penal Code. It has essentially no General Part. (The term "code" may suggest a document of greater coherence and planning than is present in the current federal "code," so it may be better

40. Henry M. Hart, Jr. The Aims of the Criminal Law, 23 Law & Contemp. Probs. 401, 432 n.70 (1958).

to refer simply to "Title 18 of the United States Code"). Title 18's chapter 1, grandly titled "General Provisions," includes a less-than-helpful definition of complicity, an insanity defense, and a few definitions. Thus, 99 percent of the General Part remains uncodified in federal law, thereby delegating criminal-law making authority to the federal judiciary.

B. An Analytic Structure

The Model Penal Code, like most successful criminal codes, implicitly provides an analytic structure that gives judges, lawyers, and jurors a decisional process for assessing criminal liability.[41] Its three-part structure might be summarized with these questions:

First, does the actor's conduct constitute a crime? The code defines the contours of the law's prohibitions (and, where duties to act are created, the law's commands). This is the issue most familiar to laypersons and most prominent in older criminal codes. It is the sole subject of the code's entire Special Part.

Second, even if the actor's conduct does constitute a crime, are there special reasons why that conduct ought not to be considered wrongful in this instance, under these facts? Article 3 of the Model Penal Code answers this question through the use of justification defenses. These defenses concede the violation of a prohibitory norm, but offer a countervailing justificatory norm that undercuts the propriety of liability on the special facts of the current situation.

Finally, even if the actor's conduct is a crime and is wrongful (unjustified), should the actor be held blameworthy for it? Is he or she deserving of criminal liability and punishment? This question is answered primarily by the excuse defenses and culpability requirements in articles 2 and 4 of the code. For example, wrongful conduct by an actor who is at the time insane or under duress or involuntarily intoxicated may not be sufficiently blameworthy to merit the condemnation of criminal conviction.

C. Defining Offenses Fully, Using Defined Terms

The Model Penal Code drafters understood that an undefined term invites judicial lawmaking in the same way as an absent or partial provision, and

41. See Dubber, supra note 2, §§ 3, 18; Paul H. Robinson, Structure & Function in Criminal Law pt. II (1997). For a functional analysis of the code's structure, see id. pt. III.

can as effectively undercut the goals of the legality principle. Every code will inevitably contain ambiguous language that must be interpreted by judges. A drafter's obligation, they believed, is to reserve that delegation of judicial authority to the instances in which it is not reasonably avoidable. Code terms that might reasonably be given different definitions by different readers ought to be defined.

With this view, the Model Penal Code drafters did much to fully define offenses and to define the terms they used in defining offenses; the code explicitly rejects common law offenses and bars judicial creation of offenses.[42] In addition, the code's General Part includes definitions of commonly used terms that will then have the same meaning in every provision of the code. Defined terms also are contained at the beginning of many articles in the Special Part.

Compared to many European criminal codes, the Model Penal Code covers more topics in greater detail. As a result, the code occasionally reads more like a criminal law textbook than a code. Its comprehensiveness and detail reflect the scope and nature of the code's reform ambition. Topics can be left for judicial or scholarly interpretation only in the presence of a highly sophisticated judiciary and academic community. At the time of the code project, the criminal law in the United States met neither of these conditions. The code, after all, was specifically designed to wrest the criminal law out of the hands of the judiciary which, after centuries of common-law making, had left the criminal law an unprincipled mess.

D. A System for the Interpretation of Code Provisions

The Model Penal Code drafters' concern for advancing legality interests also showed in their creation of a system for the interpretation of the code's provisions. Such guidance in the exercise of judicial discretion increases the law's predictability and reduces both disparity in application and the potential for abuse of discretion.

The statutory principles of interpretation also are designed to advance the goals for which criminal liability and punishment are imposed. Model Penal Code section 1.02 directs judges to interpret ambiguous provisions

42. Model Penal Code § 1.05 (Proposed Official Draft 1962).

to further the code's purposes.[43] While such a provision has its shortcomings (it gives no guidance on what to do when different purposes conflict, as frequently occurs), it is an important first step toward rationality in code drafting, for it offers a formal statement of what the code is meant to achieve.

E. A System of Offenses

Rather than a *collection* of offenses, where each offense is an independent creature, often the result of a political campaign prompted by a particular crime or event, the Model Penal Code adopts a *system* of offenses, in which offenses are designed to work together as a complementary group. Offenses typically avoid both gaps and overlaps in coverage. By considering all offenses together, the legislature can better insure that the penalties associated with each offense properly reflect the relative seriousness of that offense in relation to other offenses.

Part of this systematic approach to creating and defining offenses is to organize offenses conceptually—offenses against the person, offenses against property, etc.—and within each general group to organize offenses into related subcategories.[44] Offenses against the person, for example, are organized into four articles: homicide (§ 210); assault, endangerment, and threats (§ 211); kidnapping and related offenses (§ 212); and sexual offenses (§ 213). Such conceptual grouping makes it easier to see, and to avoid, overlaps among offenses and unwarranted grading disparities. It also makes it easier for a code user to find the relevant offense. And, when the relevant offense is found, such grouping insures the user that related offenses are nearby, not hidden in a dark corner elsewhere in the code.

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43. The code's purposes are:

> (a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests: (b) to subject to public control persons whose conduct indicates that they are disposed to commit crimes: (c) to safeguard conduct that is without fault from condemnation as criminal: (d) to give fair warning of the nature of the conduct declared to constitute an offense: (e) to differentiate on reasonable grounds between serious and minor offenses.

Model Penal Code § 1.02(1)(a)-(e) (Proposed Official Draft 1962).

44. For a comparative discussion of the code's notion of "individual or public interests" and the concept of *Rechtsgut* in German criminal law, see Markus D. Dubber, Theories of Crime and Punishment in German Criminal Law, 53 Am. J. Comp. L. 679 (2006).

F. Innovations in Specific Criminal Law Doctrines

In substance, the Model Penal Code is based on the American criminal law at the time it was drafted. For the vast majority of issues in the general and special part of criminal law, this law was judge-made common law. If the code drafters ventured beyond the confines of American criminal law, they consulted English common law jurisprudence, particularly as interpreted by Glanville Williams, whose extended project to rationalize English criminal law coincided with Herbert Wechsler's attempt to rationalize American criminal law through the Model Penal Code.[45]

Many of the Model Penal Code's substantive innovations already were laid out in Wechsler's monumental 1937 article, "A Rationale of the Law of Homicide."[46] There Wechsler, and his Columbia colleague Jerome Michael, subjected American criminal law to a detailed critique, using the law of homicide as an illustration. The Model Penal Code thus arose from a painstaking critique of positive law, rather than from a systematic theory of criminal liability. Wechsler was no theoretician. As a major figure in the American legal process school, Wechsler saw the problems of substantive criminal law as problems of policy. The criminal law, and therefore the Model Penal Code, was a means to achieve a policy end.[47]

1. Offense Elements

The Model Penal Code set out to simplify and rationalize the hodgepodge of common law offense definitions in two ways.[48] First, it adopted an approach that has been called "element analysis," which carefully distinguished between the various elements of an offense, including conduct, attendant circumstances, and its result. Second, it recognized and defined only four mental states: purpose, knowledge, recklessness, and negligence. Each objective element of a given offense in the code can have attached to it a different mental state.

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45. See Glanville Williams, Criminal Law: The General Part (1st ed. 1953; 2d ed. 1962).

46. Jerome Michael & Herbert Wechsler, A Rationale of the Law of Homicide I & II, 37 Colum. L. Rev. 701, 1261 (1937).

47. That end, however, in Wechsler's opinion, recently had been scientifically settled once and for all in favor of a deterrent-rehabilitative approach. See id. at 732 n.126.

48. Paul H. Robinson & Jane A. Grall, Element Analysis in Defining Criminal Liability, 35 Stan. L. Rev. 681 (1983); Robinson, supra note 41, ch. 3.

The first innovation was designed to eliminate the common law's confusion about the so-called mens rea of a given offense. This confusion, the code drafters believed, often resulted from the inability of the common law to distinguish between different elements of an offense, each of which may require a different mental state for conviction.

Standing alone, the differentiation of various offense elements, coupled with the novel requirement that each element, rather than merely each offense, carry a mental state, might have complicated rather than simplified the law. The second innovation addressed this problem by replacing the dozens of mental states that had emerged over the course of the common law with merely four.

This radical change in the law of mens rea, one of the core principles of the common law, drew little criticism from commentators and proved remarkably popular among state legislatures.[49] In fact, the Model Penal Code's definitions of these four mental states may be the code's most important contribution to American criminal law reform. These definitions strove to simplify not only by radically reducing the number of mental states, but also by reducing (but not eliminating) reliance upon normative judgments. Talk of "malice aforethought" and even "premeditation" were replaced by presumably testable phenomena such as "conscious object" or "knowledge." In its zeal to clarify the law, the Model Penal Code even excised the words "intent" and "intention" from its terminology, concepts that in spite (or perhaps partly because) of their ambiguity had assumed a central place in the criminal law of the United States, as well as of many other countries.[50]

On the subject of so-called strict or absolute liability offenses, i.e., offenses whose elements do not all require a culpability state, the Model Penal Code struck a characteristically pragmatic compromise. Instead of eliminating such offenses altogether, it limited their common use to two offense categories, "civil offenses" defined in the criminal code as "violations," punishable only by fine, forfeiture, or other civil penalty, and "offenses defined by statutes other than the code, insofar as a legislative purpose to impose absolute liability for such offenses or with respect to

49. But see Jerome Hall, Negligent Behavior Should Be Excluded from Penal Liability, 63 Colum. L. Rev. 632 (1963).

50. But cf. N.Y. Penal Law § 15.05(1) (2006) (retaining mental state of "intentional," but redefining it in terms of "conscious objective").

any material element thereof plainly appears."[51] The Model Penal Code does not prohibit strict liability in the code's offenses, but does create a presumption against interpreting the absence of a culpability element as strict liability. Instead, a requirement of recklessness is read into an offense that contains no specific culpable state of mind requirement.[52]

In the particular case of felony murder, a serious strict liability offense under the common law whose definition required no mental state with respect to the act of homicide, the Model Penal Code transformed the definitional question into an evidentiary one. Instead of eliminating the requirement of a mental state with respect to the homicidal act, as the common law had done, the code instead established a rebuttable presumption that the perpetrator of an underlying felony in fact had the mental state with respect to the killing that would constitute murder (recklessness manifesting an extreme indifference to the value of human life).[53]

2. Inchoate and Accomplice Liability

The Model Penal Code's abandonment of the common law distinction between inchoate and consummated offenses already has been mentioned.[54] This decision was both the most doctrinaire and the least successful by the code drafters. Punishing inchoate offenses as harshly as consummated ones appears particularly harsh against the background of the wide sweep of inchoate offenses under the code. By defining all inchoate offenses in its General Part, the code cemented the common law's broad approach to preparatory offenses. Every crime, including the pettiest misdemeanor, was criminalized in its inchoate form, whether as an attempt, a solicitation, or as a conspiracy. Still, the Model Penal Code did bar the conviction of, though not the prosecution for, both the inchoate and the consummated form of an offense.[55] The code thereby rejected the most expansive theory of inchoate offenses under the common law, still espoused at the time by federal criminal law, which had permitted separate punishments for the preparation and consummation

51. Model Penal Code § 2.05 (Proposed Official Draft 1962).

52. Id. § 2.02(3).

53. Id. § 210.2(1)(b).

54. See generally Herbert Wechsler et al., The Treatment of Inchoate Crimes in the Model Penal Code I & II, 61 Colum. L. Rev. 571, 957 (1961).

55. Model Penal Code § 1.07(1)(b) (Proposed Official Draft 1962).

of the same offense.[56] The code also prohibits multiple convictions "of more than one [inchoate] offense . . . for conduct designed to commit or to culminate in the commission of the same crime."[57]

The Model Penal Code draws a sharp theoretical distinction between inchoate offenses and complicity, which was defined as the attribution of the principal's criminal conduct to another.[58] The distinction was of less practical significance, however, as the code abandoned not only the distinction between the punishment for preparatory and consummated offenses, but also that between the punishment of principals and accessories. In fact, the code discarded the common law distinctions between first- and second-degree principals, on the one hand, and accessories before and after the fact, on the other, in favor of a single distinction between principal and accomplice, both of whom were then subjected to the same punishment.[59]

Only after an intervention by Judge Learned Hand, one of America's most prominent judges, did the American Law Institute reject the drafters' proposal to extend accomplice liability, and therefore full punishment as a principal, to a person who was merely aware of his contribution to the principal's criminal act.[60] The code instead requires that the accomplice act "with the purpose of promoting or facilitating the commission of the offense."[61] As a compromise, some states have adopted general facilitation provisions that criminalize aiding another's criminal conduct knowingly or merely "believing it probable" that one is rendering aid.[62]

3. Justification Defenses

The code for the first time recognized a general defense of necessity, or lesser evils. This defense is available where particular justification defenses, such as self-defense, defense of property, or law enforcement authority,

56. See, e.g., Callanan v. United States, 364 U.S. 587 (1961).

57. Model Penal Code § 5.05(3) (Proposed Official Draft 1962).

58. See id. § 2.06.

59. On the common law of complicity, see Francis Bowes Sayre, Criminal Responsibility for the Acts of Another, 43 Harv. L. Rev. 689 (1930).

60. Model Penal Code § 2.06 cmt. at 313-19 (Official Draft and Revised Comments 1985).

61. Model Penal Code § 2.06(3)(a) (Proposed Official Draft 1962).

62. N.Y. Penal Law § 115.00 (2006).

are not. The defense applies to conduct the actor believes to be "necessary to avoid a harm or evil to himself or another," provided that "the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged."[63] The broad scope of this provision is best illustrated by the cases enumerated in the official code commentary:

> Under this section, property may be destroyed to prevent the spread of a fire. A speed limit may be violated in pursuing a suspected criminal. An ambulance may pass a traffic light. Mountain climbers lost in a storm may take refuge in a house or may appropriate provisions. Cargo may be jettisoned or an embargo violated to preserve the vessel. An alien may violate a curfew in order to reach an air raid shelter. A druggist may dispense a drug without the requisite prescription to alleviate grave distress in an emergency.[64]

The lesser evils defense does not affect the actor's civil liability and is a so-called affirmative defense. To successfully invoke an affirmative defense, the defendant must produce supporting evidence before the burden of proof shifts to the prosecution, which must then disprove the defense beyond a reasonable doubt.[65] The code frequently relies on this procedural mechanism to resolve difficult issues of substantive criminal law.[66]

4. Excuse Defenses

The Model Penal Code drafters devoted almost an entire article to the problem of legal insanity. Except for its final section, which sets the age of maturity for purposes of criminal liability at sixteen,[67] article 4 deals in great detail with the full panoply of substantive and procedural issues surrounding the defense of insanity, including such procedural questions as the defendant's competency to stand trial, the assignment of the burden of proof, the requirement of notice that an insanity defense will be offered, the form of the verdict and judgment, the appointment and selection of

63. Model Penal Code § 3.02(1) (Proposed Official Draft 1962).
64. Model Penal Code § 1.01 cmt. at 9–10 (Official Draft and Revised Comments 1985).
65. Model Penal Code §§ 1.12, 3.01 (Proposed Official Draft 1962).
66. See sections cited supra note 10.
67. Model Penal Code § 4.10 (Proposed Official Draft 1962).

psychiatric experts, the admissibility of statements made during the examination, the form of the psychiatrist's report, the hearing on the question of insanity or competency, and the commitment following an acquittal on the basis of insanity.

The Model Penal Code's extensive coverage of mental illness reflects the conflicts surrounding this issue during the decade of the code's drafting. The advisory committee included several members of the "Group for the Advancement of Psychiatry," whose members were determined to radically reform the criminal law in the name of the science of psychiatry. In 1954, three years into the code project, the federal appellate court for the District of Columbia, in the famous *Durham* case,[68] replaced the so-called right-wrong test of insanity derived from the 1843 English case of *M'Naghten*[69] with a test designed to reflect advances in the field of psychiatry as well as to soften the perceived harshness of the *M'Naghten* rule.

Characteristically, the Model Penal Code once again struck a compromise by retaining but softening the *M'Naghten* test while assigning psychiatric experts a central role in the test's interpretation and application. The *M'Naghten* rule in its original formulation required that, "at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." The Model Penal Code extended the defense to an actor who "lacks *substantial* capacity . . . to appreciate the criminality of his conduct."[70] In addition, the Model Penal Code made the defense available even to an actor who did not qualify under this cognitive prong, as long as he lacked "substantial" volitional capacity "to conform his conduct to the requirements of law."[71]

The Model Penal Code's insanity test proved popular in many American jurisdictions, including the District of Columbia after the abandonment of its *Durham* rule in 1972.[72] Following John Hinckley's acquittal

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68. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954). The *Durham* test was deceptively simple: "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." For later complications and the eventual demise of *Durham*, see United States v. Brawner, 471 F.2d 969 (1972) (en banc)

69. M'Naghten's Case, 1 C. & K. 130; 4 St. Tr. N.S. 847 (1843).

70. Model Penal Code § 4.01 (Proposed Official Draft 1962).

71. Id. § 4.01.

72. United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) (en banc).

under the volitional prong of the Model Penal Code's test for his assassination attempt on President Reagan in 1981, however, many states and the federal government restricted the defense of insanity by removing the volitional prong.[73]

5. Special Part

Most of the Model Penal Code's specific doctrinal innovations appeared in its General Part. The most important innovation in the Special Part was its revision of the law of homicide. The code's homicide article provides the best illustration of its new system of mental states.[74] In this article, the code drafters replaced the common law's multitude of homicide offenses with a single offense—"purposely, knowingly, recklessly or negligently caus[ing] the death of another human being"—with three defined grades. Murder, manslaughter, and negligent homicide thus differed primarily in their mental state, the first requiring purpose or knowledge, the second recklessness, and the third negligence.

The code's partial rejection of the felony murder rule already has been discussed. The common law defense of provocation was retained, though not without being transformed into the more general defense of "extreme mental or emotional disturbance."[75] The code made no attempt to connect this defense to other more general excuse defenses in its General Part. It therefore survives as a defense available only in homicide cases.

CONCLUSION

For almost half a century, the Model Penal Code has been the dominant force in American criminal code reform and a catalyst for American criminal law scholarship. In general, the Model Penal Code has stood the test of time. While individual provisions of the code, such as its definition of insanity and its grading of inchoate offenses, have been amended for one reason or another, no state has seen fit to undertake a wholesale reform of its criminal code away from the Model Penal Code. Even academic

73. See, e.g., Clark v. Arizona, 126 S. Ct. 2709 (2006).
74. Model Penal Code art. 210 (Proposed Official Draft 1962).
75. Id. § 210.3(1)(b).

commentary generally has come to focus on the code, albeit not always agreeing with it.[76]

Nonetheless, the code is showing its age as the theory and practice of American criminal law has long since rejected the code's emphasis on deterrence and rehabilitation and as attitudes toward criminalization have shifted. A reform of the model therefore is much needed. When that reform comes, however, there can be little doubt that it will build upon the foundations laid down in the Model Penal Code.

76. For collections of code commentary during its first twenty years, see Symposium, The Model Penal Code, 63 Colum. L. Rev. 589 (1963), and Symposium, The 25th Anniversary of the Model Penal Code, 19 Rutgers L.J. 519 (1988). For a more recent critical exchange regarding the Model Code, see George P. Fletcher, Dogmas of the Model Penal Code, 2 Buff. Crim. L. Rev. 3 (1998), and Paul H. Robinson, In Defense of the Model Penal Code: A Reply to Professor Fletcher, 2 Buff. Crim. L. Rev. 25 (1998).

C

Uniform Laws Annotated Currentness
Model Penal Code (Refs & Annos)
Part I. General Provisions
Article 2. General Principles of Liability
→→ § 2.06. Liability for Conduct of Another; Complicity.

(1) A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.

(2) A person is legally accountable for the conduct of another person when:

(a) acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct; or

(b) he is made accountable for the conduct of such other person by the Code or by the law defining the offense; or

(c) he is an accomplice of such other person in the commission of the offense.

(3) A person is an accomplice of another person in the commission of an offense if:

(a) with the purpose of promoting or facilitating the commission of the offense, he

(i) solicits such other person to commit it, or

(ii) aids or agrees or attempts to aid such other person in planning or committing it, or

(iii) having a legal duty to prevent the commission of the offense, fails to make proper effort so to do; or

(b) his conduct is expressly declared by law to establish his complicity.

(4) When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.

(5) A person who is legally incapable of committing a particular offense himself may be guilty thereof if it is committed by the conduct of another person for which he is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his incapacity.

(6) Unless otherwise provided by the Code or by the law defining the offense, a person is not an accomplice in an offense committed by another person if:

(a) he is a victim of that offense; or

(b) the offense is so defined that his conduct is inevitably incident to its commission; or

(c) he terminates his complicity prior to the commission of the offense and

(i) wholly deprives it of effectiveness in the commission of the offense; or

(ii) gives timely warning to the law enforcement authorities or otherwise makes proper effort to prevent the commission of the offense.

(7) An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity to prosecution or conviction or has been acquitted.

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UNITED STATES v. PEONI.

No. 155

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

100 F.2d 401*; *1938 U.S. App. LEXIS 2663

December 12, 1938

PRIOR HISTORY: [**1] Appeal from the District Court of the United States for the Eastern District of New York.

COUNSEL: Abraham Solomon, of New York City (Bernard Weiss, of New York City, of counsel), for appellant.

Michael F. Walsh, U.S. Atty., of Brooklyn, N.Y. (Vine H. Smith and James D. Saver, Asst. U.S. Attys., both of Brooklyn, N.Y., of counsel), for the United States.

OPINION BY: L. HAND

OPINION

[*401] Before L. HAND, SWAN and CHASE, Circuit Judges.

L. HAND, Circuit Judge.

Peoni was indicted in the Eastern District of New York upon three counts for possessing counterfeit money, and upon one for conspiracy to possess it. The jury convicted him on all counts, and the only question we need consider is whether the evidence was enough to sustain the verdict. It was this. In the Borough of the Bronx Peoni sold counterfeit bills to one, Regno; and Regno sold the same bills to one, Dorsey, also in the Bronx. All three knew that the bills were counterfeit, and Dorsey was arrested while trying to pass them in the Borough of Brooklyn. The question is whether Peoni was guilty as an accessory to Dorsey's possession, and [*402] whether he was party to a conspiracy by which Dorsey should possess [**2] the bills.

The prosecution's argument is that, as Peoni put the bills in circulation and knew that Regno would be likely, not to pass them himself, but to sell them to another guilty possessor, the possession of the second buyer was a natural consequence of Peoni's original act, with which he might be charged. If this were a civil case, that would be true; as innocent buyer from Dorsey could sue Peoni and get judgment against him for his loss. But the rule of criminal liability is not the same; since Dorsey's possession was not de facto Peoni's, and since Dorsey was not Peoni's agent, Peoni can be liable only as an accessory to Dorsey's act of possession. The test of that must be found in the appropriate federal statute (§ 550 of Title *18, U.S. Code, 18* U.S.C.A. § 550). The first statute dealing with the matter was passed in 1790 (1 St. at L. 114) and made those accessories who should "aid and assist, procure, command, counsel or advise", murder or robbery on land or sea, or piracy at sea. Section 10. This was broadened in 1870 (16 St. at L. 254) to include any felony, and by it an accessory was anyone who "counsels, advises or procures" the crime, section 2: this phrase [**3] was probably regarded as an equivalent of the first. Both those statutes were repealed in 1909 by § 341 of the Criminal Code (35 St. at L. 1088, 1153), and supplanted by § 332 of that act, which like § 550 of Title *18 U.S. Code, 18* U.S.C.A. § 550, read as follows: "aids, abets,

counsels, commands, induces, or procures". The substance of that formula goes back a long way. Pollock & Maitland, Vol. II, p. 507, in speaking of the English law at the beginning of the 14th Century, say that already "the law of homicide is quite wide enough to comprise * * * those who have 'procured, counselled, commanded or abetted' the felony"; citing Bracton, f. 142, as follows: "for it is colloquially said that he sufficiently kills who advises" (praecipit) the killing. In 1557, by chapter 4 of 4 & 5 P. & M., benefit of clergy was taken away from those who should "command, hire and counsel" another to commit petit treason, murder, robbery or "willful" arson; and the indictment in Parker's Case, 1560, Dyer 186 a, read that the accused had "counselled, commanded, procured and abetted" the murder. Code, Inst. II, p. 182, in commenting on the Stat. of West. 1, Chap. XIV, which dealt with accessories, [**4] declared that they were divided into three "branches"; "commandement, force et aide". "Commandement" was "praeceptum" which included those who "incite, set on or stir up" others to the deed. "Force" was to furnish a weapon; and "aide" ("auxilium") included "all persons counselling, abetting, plotting, assenting, consenting or encouraging to doe the act." In 1691, by Chapter 9 of 3 & 4 W. & M., benefit of clergy was denied those who "comfort, aid, abet, assist, counsel, hire or command" certain enumerated felonies. Hale, Pleas of the Crown p. 615, 1736, defined an accessory as one who "doth * * * procure, counsel, command or abet another". In The Case of Macdaniel & others, 1755, Foster, 125, the question was bruited whether one might be an accessory at one remove, and it was said, though obiter, that he might, for "whoever procured a felony to be committed though it be by the intervention of a third person is an accessory * * * For what is there in the notion of commanding, hiring, counselling, aiding or abetting which may not be effected by the intervention of a third person." Blackstone, 1768, Book IV, pp. 36 & 37, described an accessory as "he who in any wise commands or counsels [**5] another to commit an unlawful act." Hawkins, 1771, Pleas of the Crown Chap. 29 § 16, specified "Those who by Hire, Command, Counsel or Conspiracy; and it seems to be generally holden, That those who by showing an express Liking Approbation or Assent to another's felonious Design of committing Felony abet and encourage him to commit it".

It will be observed that all these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; and that they all demand that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used - even the most colorless, "abet" - carry an implication of purposive attitude towards it. So understood, Peoni was not an accessory to Dorsey's possession; his connection with the business ended when he got his money from Regno, who might dispose of the bills as he chose; it was of no moment to him whether Regno passed them himself, and so ended the possibility of further guilty possession, or [*403] whether he sold them to a second possible passer. His utterance [**6] of the bills was indeed a step in the causal chain which ended in Dorsey's possession, but that was all. Perhaps he was Regno's accessory. *Rudner v. United States 6 Cir., 281 F. 516*, and *Anstess v. United States, 7 Cir., 22 F.2d 594*, do indeed hold that a seller, knowing the buyer's criminal purpose, is a conspirator with him. On the other hand in Rex v. Lomas, 22 Cox's Cr. Cas. 765, the court acquitted the accused who had given back to a burglar a jimmy which the burglar had lent him, though he knew the burglar would use it to commit the crime; Lord Reading saying that in such cases "advice or procuring" was a necessary element. Moreover, the law is at least unsettled whether action for the price will not lie, though the seller knows that the buyer means to use the goods to commit a crime, Williston, § 1754, and in perhaps the leading case, *Graves v. Johnson, 179 Mass. 53 60 N.E. 383, 88 Am. St. Rep. 355* the seller recovered. Be that as it may, nobody, so far as we can find, has ever held that a contract is criminal, because the seller has reason to know, not that the buyer will use the goods unlawfully, but that some one further down the line may do so. Nor is it at all desirable [**7] that the seller should be held indefinitely. The real gravamen of the charge against him is his utterance of the bills; and he ought not to be tried for that wherever the prosecution may pick up any guilty possessor - perhaps thousands of miles away. The oppression against which the *Sixth Amendment* is directed could be easily compassed by this device, because if the seller be a real accessory he may be removed to the place of the crime. *Hoss v. United States, 8 Cir., 232 F. 328, 335*; *United States v. Littleton, D.C., 1 F.2d 751.*

The same reasoning applies to the conspiracy count. Assuming that Peoni and Regno agreed that Regno should have possession of the bills, it is absurd to say that Peoni agreed that Dorsey should have them from Regno. Peoni knew that somebody besides Regno might get

them, but a conspiracy also imports a concert of purpose, and again Peoni had no concern with the bills after Regno paid for them. At times it seemed to be supposed that, once some kind of criminal concert is established, all parties are liable for everything anyone of the original participants does, and even for what those do who join later. Nothing could be more untrue. Nobody is liable [**8] in conspiracy except for the fair import of the concerted purpose or agreement as he understands it; if later comes change that, he is not liable for the change; his liability is limited to the common purpose while he remains in it. The confusion is perhaps due to the fact that everything done by the conspirators - including the declarations of later entrants - is competent evidence against all, so far as it may fairly be thought to be in execution of the concert to which the accused is privy, though that doctrine too is often abused.

Conviction reversed; accused discharged.

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STATE OF OREGON, Respondent, v. ISIDRO JESUS MORENO, Appellant.

A119340

COURT OF APPEALS OF OREGON

197 Ore. App. 59*; *104 P.3d 628*; *2005 Ore. App. LEXIS 15

October 26, 2004, Argued and Submitted
January 12, 2005, Filed

PRIOR HISTORY: [***1] Appeal from Circuit Court, Josephine County. 02CR 0426. William Mackay, Judge.

DISPOSITION: Conviction of possession of a precursor substance with intent to manufacture reversed; otherwise affirmed.

COUNSEL: Rankin Johnson IV, Deputy Public Defender, argued the cause for appellant. With him on the brief were Peter A. Ozanne, Executive Director, Office of Public Defense Services, and Peter Gartlan, Chief Defender.

Joanna L. Jenkins, Assistant Attorney General, argued the cause for respondent. With her on the brief were Hardy Myers, Attorney General, and Mary H. Williams, Solicitor General.

JUDGES: Before Haselton, Presiding Judge, and Linder and Ortega, Judges.

OPINION BY: LINDER

OPINION

[*61] [**628] LINDER, J.

Defendant appeals his conviction for possession of a precursor substance with intent to manufacture, *ORS 475.967*, assigning error to the denial of his motion for a judgment of acquittal. On appeal, the only issue is whether stealing and possessing a large quantity of pseudoephedrine is sufficient to support a finding, beyond a reasonable doubt, that defendant intended to manufacture methamphetamine. We conclude that it is not, and we therefore reverse in part. [1]

1 Defendant was also charged with and convicted of unlawful possession of pseudoephedrine, *ORS 475.973*, and theft in the second degree, *ORS 164.045*. On appeal, defendant does not challenge those convictions.

[***2] The pertinent facts are relatively few. [2] Defendant stole five packages of Sudafed [**629] cold medicine, containing a total of approximately 15 grams of pseudoephedrine, from a Rite-Aid pharmacy. Police apprehended him at a nearby apartment complex. Defendant admitted to police that he stole the Sudafed and that he intended to sell it on the street for money, stating that "somebody on the street needs it." Defendant acknowledged to police that he knew that Sudafed contains pseudoephedrine and that pseudoephedrine is a precursor substance used to manufacture methamphetamine. Defendant denied, however, that he intended personally to manufacture methamphetamine or that he even knew how to manufacture it.

2 We set forth the facts in the light most favorable to the state. *State v. Evans, 161 Ore. App. 86, 89, 983 P.2d 1055 (1999)* (on judgment of conviction, facts are viewed in the light most

> favorable to the state to determine whether any rational trier of fact, accepting reasonable inferences and reasonable credibility choices, could have found the essential elements of the crime beyond a reasonable doubt).

[***3] Defendant was charged with and convicted of possession of a precursor substance (pseudoephedrine) with intent to manufacture a controlled substance (methamphetamine), *ORS 475.967*. At trial, in addition to establishing the facts of defendant's theft and his statements to police, the state also established the street uses to which pseudoephedrine is put and the ways in which the drug is obtained. In particular, according to police, the only plausible street use for such a large quantity of pseudoephedrine is to manufacture methamphetamine. Police therefore are involved in tracking [*62] suspicious purchases, and individuals who manufacture methamphetamine generally are aware of that fact. As a result, to avoid personal detection, individuals manufacturing methamphetamine commonly use other people to purchase drugs such as Sudafed that contain pseudoephedrine. On the street, Sudafed can sell for two to three times its normal retail value.

At the close of the state's case, defendant moved for a judgment of acquittal, arguing that there was no evidence from which the jury could find that he intended to personally manufacture methamphetamine. The trial court denied [***4] the motion, reasoning:

> "The information before the jury is that the defendant attempted to steal a larger than normal use quantity of Pseudoephedrine. That the defendant intended to sell that on the street. That Pseudoephedrine is a required product of the manufacture of meth. And that on the street it's sometimes worth two or three or four times more than what it would be in the store. That you can not legally purchase more than 9 grams, other than under certain circumstances. And is that sufficient for a reasonable juror to find the defendant guilty of Possession of a Precursor with Intent to Manufacture?
>
> "Looking at the evidence in the light most favorable to the State the motion is denied."

On appeal, the parties renew the arguments they made below. Defendant asserts that the state presented no evidence from which a jury reasonably could find that he intended personally to manufacture methamphetamine. At most, according to defendant, he intended to sell the Sudafed to someone else who would manufacture methamphetamine, which establishes his knowledge that the Sudafed would be used in that way but not his intent that it be so used. In response, the state points to [***5] the quantity of the Sudafed in defendant's possession, coupled with his admission that he knew that it is used to manufacture methamphetamine. According to the state, that evidence permitted an inference that defendant personally was going to manufacture methamphetamine or was acting "in concert" with someone else who would perform the actual manufacturing steps. Alternatively, the state argues that the evidence permitted the [*63] jury to find defendant guilty on the theory that he was aiding and abetting someone else in the manufacture of methamphetamine. As we explain below, we agree with defendant.

Under *ORS 475.967*,

> "[a] person commits the crime of possession of a precursor substance with intent to manufacture a controlled substance if the person possesses one or more precursor substances with the intent to manufacture a controlled substance in violation of *ORS 475.992(1)*."

[**630] "'Manufacture' means the production, preparation, propagation, compounding, conversion or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis[. [***6]]" *ORS 475.005(15)*. "Intent" means that "a person acts with a conscious objective to cause the result or to engage in the conduct so described." *ORS 161.085(7)*.

Thus, to convict a defendant of possession of a precursor substance with intent to manufacture, the state must prove the following: (1) the defendant possessed some amount of a precursor substance; and (2) the defendant did so with the conscious objective of extracting pseudoephedrine and converting it to methamphetamine.

The state's burden in that regard differs significantly from its burden in proving the offense of possession of pseudoephedrine, which is prohibited by *ORS 475.973(1)(a)*:

> "[A] person commits the crime of unlawful possession of ephedrine, pseudoephedrine or phenylpropanolamine if the person knowingly possesses more than nine grams of ephedrine, pseudoephedrine or phenylpropanolamine * * *."

Violation of that statute is a Class A misdemeanor. *ORS 475.973(5)(a)*. By contrast, possession of a precursor substance with intent to manufacture is a Class B felony. *ORS 475.967(2)* [***7] . The key distinctions between the two offenses are the person's mental state and the amount of the pseudoephedrine that the person must possess. The misdemeanor offense is committed by the knowing possession of more than nine grams of pseudoephedrine. The felony offense is committed by possession of any amount, as long as the possession [*64] is with the heightened and more specific mental state of intent to manufacture (*i.e.*, the conscious objective to extract pseudoephedrine and convert it to methamphetamine).

In this case, the evidence was ample to establish defendant's guilt of the misdemeanor offense, but it falls short of providing a basis for a reasonable jury to infer that defendant had the intent required for the felony offense. The direct evidence reduces to proof that defendant stole and possessed 15 grams of Sudafed and that he claimed to have done so to sell it for money on the street. As the state correctly argues, the jury was free to disbelieve defendant's statements to police about his intent to sell it. But, contrary to the state's position, simply disbelieving defendant in that regard does not provide a basis to reasonably infer that defendant consciously intended [***8] to extract the pseudoephedrine himself and make methamphetamine with it. The problem with drawing that inference here--or at least, with drawing it beyond a reasonable doubt--is that the only evidentiary support for it is the mere fact of defendant's possession of 15 grams of Sudafed. The state presented evidence that defendant knew how to extract the pseudoephedrine from Sudafed or how to turn that precursor substance into methamphetamine. Nor does the record suggest that defendant owned or possessed any paraphernalia or chemicals associated with methamphetamine manufacture or that he has a residence or other physical site where he could engage in manufacturing methamphetamine. *See State v. Brown, 109 Ore. App. 636, 644-45, 820 P.2d 878 (1991), rev den, 313 Ore. 210, 830 P.2d 596 (1992)* (evidence that defendant had taken the steps necessary to manufacture methamphetamine sufficient when defendant "possessed precursor chemicals, laboratory equipment, formulas and other" necessary materials).

In effect, the state asks us to conclude that a jury could infer the requisite "conscious objective to" manufacture methamphetamine from the same facts that constitute the [***9] misdemeanor offense of possession of pseudoephedrine. On this record, however, such an inference requires too great a leap and would require speculation, rather than logical inference. *See State v. Lopez-Medina, 143 Ore. App. 195, 201, 923 P.2d 1240 (1996)* (evidence is insufficient to support an inference when the conclusion to be drawn from it requires "too [*65] great an inferential leap" because the logic is too strained). The same is true of any inference that defendant was working "in concert" with a specific individual who had the wherewithal to manufacture methamphetamine and the physical equipment and site to do it. Not a shred of [**631] evidence in this record suggests the existence of such a person.

Nor is the state's case aided if, alternatively, the jury believed--as it reasonably could--that defendant stole the Sudafed intending to sell it on the street for money. To be sure, the jury in that event reasonably could then also conclude that defendant, in intending to sell it, knew that whoever bought it would likely--if not certainly--use it to make methamphetamine. But defendant is correct that such evidence establishes only that he acted with knowledge of how the [***10] Sudafed would be used, not with a "conscious objective" that it be used in that way. Nothing in the record suggests that defendant had a personal interest in selling the Sudafed that went beyond his desire to get money. For example, there is no evidence that he would be paid with some of the methamphetamine produced. Without anything more than defendant's admission that he hoped to sell the Sudafed on the street for money, the jury could not reasonably infer that defendant had the conscious *objective* to have the buyer make methamphetamine out of it, as opposed to the conscious *awareness*--that is, knowledge--that the

buyer likely would do so. Knowledge, however, is not enough to establish liability on the state's alternative theory that defendant aided and abetted another in the commission of the crime. The mental state required for criminal liability on an aid and abet theory is essentially the same as for a principal's liability in this circumstance. A person is guilty of a crime committed by another if that person, "*with the intent to promote or facilitate the commission of the crime*," aids and abets the "other person in planning or committing the crime." *ORS 161.155(2)* [***11] (emphasis added). [3]

3 Because of that conclusion, we need not reach defendant's argument that, in the context of aiding and abetting, an accomplice is criminally liable only for a crime that is actually committed.

For those reasons, we conclude that the established facts are too few and too limited to support the inference that [*66] the state needed to establish--namely, that defendant had the requisite intent to manufacture. Defendant's motion for a judgment of acquittal should have been granted.

Conviction of possession of a precursor substance with intent to manufacture reversed; otherwise affirmed.

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Criminal Code (R.S.C., 1985, c. C-46)
Act current to 2012-09-19 and last amended on 2012-08-20. Previous Versions

Compulsion of spouse

18. No presumption arises that a married person who commits an offence does so under compulsion by reason only that the offence is committed in the presence of the spouse of that married person.

R.S., c. C-34, s. 18; 1980-81-82-83, c. 125, s. 4.

Ignorance of the law

19. Ignorance of the law by a person who commits an offence is not an excuse for committing that offence.

R.S., c. C-34, s. 19.

Certain acts on holidays valid

20. A warrant or summons that is authorized by this Act or an appearance notice, promise to appear, undertaking or recognizance issued, given or entered into in accordance with Part XVI, XXI or XXVII may be issued, executed, given or entered into, as the case may be, on a holiday.

R.S., c. C-34, s. 20; R.S., c. 2(2nd Supp.), s. 2.

Parties to Offences

Parties to offence

21. (1) Every one is a party to an offence who

(*a*) actually commits it;

(*b*) does or omits to do anything for the purpose of aiding any person to commit it; or

(*c*) abets any person in committing it.

Common intention

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

R.S., c. C-34, s. 21.

Person counselling offence

22. (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.

Idem

(2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.

Definition of "counsel"

(3) For the purposes of this Act, "counsel" includes procure, solicit or incite.

R.S., 1985, c. C-46, s. 22; R.S., 1985, c. 27 (1st Supp.), s. 7.

1892

1974 CarswellOnt 454, 3 O.R. (2d) 629, 18 C.C.C. (2d) 23, 46 D.L.R. (3d) 345, 16 C.P.R. (2d) 272

R. v. F.W. Woolworth Co.

Regina v. F.W. Woolworth Co. Ltd.

Ontario Court of Appeal

Kelly, Dubin and Martin, JJ.A.

Judgment: March 21, 1974

Counsel: *A. Maloney, Q.C.*, for accused, appellant.

J.A. Isaac, for the Crown, respondent.

Subject: Intellectual Property; Criminal; Property; Corporate and Commercial

Criminal Law --- General principles involving criminal law — Elements of crime — Mens rea — Necessity of intention.

Knowledge — Courts recognizing both actual knowledge and imputed knowledge in criminal law — Imputed knowledge exemplified by accused refraining from making inquiries -- Constructive knowledge occurring where accused having means of knowledge not recognized by criminal law necessary to prove that aider knew he was — Mere constructive knowledge insufficient for liability — Accused acquitted.

Trade and Commerce --- Consumer protection — Misleading advertising — Untrue statements — Strict liability.

Combines Investigation Act, R.S.C. 1970, c. C-23.

Misrepresentation as to ordinary price -- Aiding and abetting with offence of strict liability -- Necessity still to prove mens rea in aider or abetter.

The judgment of the Court was delivered by *Kelly, J.A.*:

1 On the application made on behalf of F.W. Woolworth Co. Limited (Woolworth) pursuant to s. 762 of the *Criminal Code* the summary conviction Court stated a case in the following terms:

> STATED CASE by His Honour Judge R.B. Dnieper, Provincial Court Judge, in the Provincial Court (Criminal Division) Judicial District of York, under the provisions of Section 734 of the Criminal Code of Canada.
>
> I On the 29th day of March, 1971, an Information was laid under oath by Mr. Jules Arvay for that the above-named F.W. Woolworth Co. Limited:

Between the 3rd day of February, 1971, and the 10th day of February, 1971, at the Municipality of Metropolitan Toronto in the Judicial District of York, unlawfully did for the purpose of promoting the sale of "Ball Point" Pens, named — Auto Magic — make a misleading representation to the public concerning the price at which such articles have been, are, or will be ordinarily sold, contrary to Section 33C (1) of the Combines Investigation Act, R.S.C., 314, and its amendments.

II On the 17th day of May, 1971, the said charge was duly heard before me in the presence of the accused and after hearing the evidence adduced and the submissions made by counsel on behalf of the Crown and the accused, I found the said F.W. Woolworth Co. Limited guilty of the said offence and convicted it thereof, but at the request of counsel for the said F.W. Woolworth Co. Limited, I state the following case for the consideration of this Honourable Court:

It was shown before me and I found as a fact:

1. The accused, F.W. Woolworth Co. Limited, the Appellant herein ("Woolworth") is a corporation carrying on the business of a retail department store at the corner of Yonge Street and Queen Street in the Municipality of Metropolitan Toronto in the Judicial District of York (the "store premises").

2. The said store premises were managed at the material times hereinafter set out by one Peter Fawcett ("Fawcett"), a full-time store manager employed by the accused Woolworth. Fawcett, as store manager, had authority to enter into agreements on behalf of Woolworth with persons for the purpose of allowing such persons to demonstrate, display, and sell or give away wares owned by the said persons in the said store premises.

3. On or about January 15, 1971, Fawcett was approached by one James Healey ("Healey") who requested that Fawcett agree to allow Healey to demonstrate and sell certain pens hereinafter more particularly described in the said store premises. Fawcett on behalf of the accused Woolworth in consideration for Healey's agreement to pay Woolworth thirty per cent of the sales of the said pens agreed to rent Healey a store counter and an area of floor space in front thereof in the said store premises for the purpose of demonstrating and selling the said pens during Woolworth's normal store hours. There was no discussion with respect to Healey being an employee of Woolworth and the parties understood that Healey was in business for himself. There was no discussion of Healey being a representative or agent of the accused Woolworth. The agreement was oral and there was no document or other written evidence of same admitted in evidence.

4. Healey employed one John McPhee ("McPhee") on a day-to-day basis in consideration for twenty-five per cent of the sales of the said pens. McPhee demonstrated and sold the pens to the public in the manner hereinafter more particularly set out.

5. For a period of approximately five weeks in January and February of 1971, including the dates hereinafter referred to, Healey and McPhee were on the said store premises under the terms of the said agreement referred to in paragraph 3 hereof.

6. The property, fixtures, equipment and wares used in connection with the demonstration and sale of the said pens were as follows:

(i) a store counter, floor space and cash register, being part of the said store premises and equipment owned by the accused Woolworth;

(ii) a display booth which was placed on top of the said store counter and a sign affixed thereto with the wording "free sample" or similar words written on a sign attached thereto, and a small microphone and public address speaker, both of which were brought onto the premises and owned by Healey, and removed by him at the end of the said five week peri- od;

(iii) an inventory of the following types of pens and pen refills:

(a) a pen and pencil set consisting of a ball point pen named — "Auto Magic" ball point pen and a pencil said to be a liquid lead pencil also named — "Auto Magic",

(b) a ball point pen and pen stand with a clip called a "telephone clip-on" pen, and

(c) ball point pen refills.

Healey owned the inventory of "Auto Magic" ball point pen and pencil sets, telephone clip-on pens and ball point pen refills which he brought onto the said store premises at the commencement of the said five week period. Healey purchased further inventory of pens and pen refills in his own name which was ordered from a U.S. supplier, described as Speedy Sales, and picked up by Healey at the Toronto International Airport from time to time to replace pens and pen refills sold out of inventory. Healey removed the remainder of the inventory of pens and pen refills on the termination of the said five week period.

7. Any refunds requested by purchasers from time to time were the responsibility of Healey.

8. On February 4 of 1971 McPhee at the said counter and booth in the said store premises represented to a group of people in the course of a demonstration and sales speech in effect that he represented a large manufacturing company, that the said pen set which he called "Auto Magic" by Packard was made to retail for $7.95, that his company was giving the pens away free to persons who purchased the said telephone clip-on pen which was made to retail at $3.95, but which was being sold for $2.98, and that there were also further bonuses being refills for ball point pens.

9. On February 5 at the said store premises, McPhee made the following representations to a group of people in the course of demonstrating the said Auto Magic ball point pens and making a sales speech said to be for the purpose of launching a brand new product not yet on sale:

Now, remember the name, that's Auto Magic by Packard, the dual pen set, as you see. Designed to retail at $7.95, and

Now, remember the name, that is telephone clip-on pen by Packard. Goes on sale and designed to retail at $3.98.

10. On February 5 at the said store premises, McPhee made the following representations to a group of people in the course of demonstrating the said Auto Magic ball point pens and making a sales speech said to be for the purpose of launching a brand new product not yet on sale:

It's Packard Auto Magic, the dual pen set. The two, designed to retail at $7.95, get one, they're really worth it, and

Now remember the name. It's telephone clip-on pen by Packard. Designed to retail at $3.98, and

One of our Packard Auto Magic dual pen sets which you see here is $7.95, and

One of our new telephone clip-on pens at the nationally advertised price of $3.98.

11. On completion of each of the said sales speeches, McPhee sold a number of telephone clip-on pens for $2.98 and subsequently delivered to each purchaser one "Auto Magic" ball point pen set, and a number of ball point pen refills which were represented to be as bonuses to the purchasers. No receipts were given to persons making purchases.

12. I found that the aforesaid representations were made for the purpose of promoting the sale of the ball point pens named "Auto Magic".

13. I also found as a fact that McPhee made the following statement as part of his sales speech:

How many of you same people would take this set from me now, absolutely free? Now take it home and show it to your friends and help us to advertise our new product and take along with you one of our new telephone clip-on pens at the nationally advertised price of $3.98. Would you like to raise your hands? Thank you sir, thank you sir, thank you ladies.

14. I found that the aforesaid representations were false representations of the ordinary selling price of the ball point pens named "Auto Magic" since testimony from the several witnesses which I accepted placed the maximum selling price between $2.00 and $6.95 and not $7.95 as was stated by McPhee.

15. The said sales speeches including the representations aforesaid were prepared in writing by Healey. They were not considered or approved by Fawcett. There was no evidence of consideration or approval of the said representations by any other person on behalf of the accused Woolworth.

16. McPhee in his sales speeches represented that he was associated with a large manufacturing company, the Packard Pen Company. At no time during the said sales speeches did McPhee represent that he was an employee, agent, servant or representative of Woolworth or hold himself out as being associated with Woolworth.

17. Fawcett made no express arrangement directly with McPhee permitting him to be on the premises but understood that he was employed by Healey. Fawcett had no knowledge of the terms of the agreement between McPhee and Healey or of what they did with the proceeds gained from sales.

18. Fawcett had no control over the manner in which Healey or McPhee demonstrated and sold the said pens except to terminate their permission to be on the said store premises.

19. I found that the accused Woolworth:

(i) Knew or should have known by informing itself as to what was said by Mr. McPhee;

(ii) was a participant;

(iii) was a partner with Healey in this venture;

(iv) provided the facilities without charge for the selling of the ball point pens named "Auto Magic";

(v) received a commission from the accused Healey of 30% of the gross sales of the ball point pens named "Auto Magic".

20. Upon convicting the accused Woolworth, I pronounced the following Order pursuant to Section 31(1) of the Combines Investigation Act, R.S.C. 1952, Chapter 314, as amended:

F.W. Woolworth Company is ordered by this Court not to commit the offence of which the company was this day convicted; that is, the company is prohibited from making any materially misleading representation to the public by any means whatsoever for the purpose of promoting the sale of articles which have or will be sold.

The said F.W. Woolworth Co. Limited desires to question the validity of the said conviction on the grounds that it is erroneous in point of law, the questions submitted for the judgment of this Honourable Court being:

QUESTIONS

1. Whether the evidence constituted any evidence upon which the said appellant could be convicted of the said offence.

2. Whether the evidence constituted any evidence of a representation made for the purpose of promoting the sale of "Ball Point Pens named Auto Magic".

3. Whether the evidence constituted any evidence of the ordinary selling price of "Ball Point" Pens named Auto Magic.

4. Whether the Court erred in law in holding that F.W. Woolworth Co. Limited was a participant.

5. Whether the Court erred in law in holding that F.W. Woolworth Co. Limited was a partner with one Healey.

6. Whether the Court erred in law in granting an Order under Section 31(1) of the Combines Investigation Act R.S.C. 1952, Chapter 314.

7. Whether the Court erred in law in refusing to restrict the terms of the said Order to a continuation or repetition of the making of misleading representations to the public concerning the price at which "Ball Point" Pens named Auto Magic have been, are, or will be ordinarily sold for the purpose of promoting the sale of such article.

2 On May 15, 1973, Houlden, J., answered in the affirmative solely the first question propounded and dismissed the appeal [11 C.C.C. (2d) 572, 11 C.P.R. (2d) 229, 21 C.R.N.S. 371]. From that disposition this appeal was taken by Woolworth.

3 The grounds which were advanced in support of the appeal were the following:

1. That the representations made related to the distribution of the ball point pen named "telephone clip-

on" and not the sale of the pen as charged in the information.

2. That the learned trial Judge misdirected himself with respect to the necessary elements of *mens rea*.

3. That the learned trial Judge erred in law in granting an order under s. 31(1) [am 1953-54 c. 51, s. 750, 1960, c. 45, s. 12] of the *Combines Investigation Act*, R.S.C. 1952, c. 314, and amending Acts (now R.S.C. 1970, c. C-23, s. 30(1)).

4. That the learned trial Judge erred in refusing to restrict the order made under s. 31(1) to the repetition or the continuation of the offence of which Woolworth was convicted.

4 Before this Court it was conceded that Healey and his employee McPhee had violated s. 33C(1) of the Act (as enacted by 1960, c. 45, s. 13 [now s. 36]) and that Fawcett came within the class of employees whose acts were those of his corporate employer in relation to the arrangement made with Healey.

5 I am of the opinion that there was evidence to support the conviction of Healey and McPhee on the charge as particularized in the information.

6 Since the offence is the making of a misleading representation, to fix Woolworth with criminal responsibility for the making of it, the Crown was required to connect Woolworth with the "making" in some manner which would in law constitute Woolworth criminally liable for such representation. This could have been done only:

1. By fixing Woolworth with the vicarious liability for the acts of Healey and McPhee.

2. By establishing that Woolworth was a party to the offence by reason of s. 21 of the *Criminal Code*.

7 Before dealing with the legal responsibility flowing from the facts, some consideration must be given to the findings of the trial Court, particularly to those set out in para. 19 of the stated case:

1. "Woolworth knew, or ought to have known, by informing itself as to what was said by Mr. McPhee."

Devlin, J., in *Roper v. Taylor's Central Garages (Exeter), Ltd.*, [1951] 2 T.L.R. 284, described three degrees of knowledge — first, actual knowledge; second, the situation where the person to whom the knowledge is imputed deliberately refrains from making inquiries, the result of which he might not care to have, and third, constructive knowledge often described by the words "ought to have known" meaning that the person had in effect the means of knowledge. He stated at p. 289:

> There is a vast distinction between a state of mind which consists of deliberately refraining from making inquiries, the result of which the person does not care to have, and a state of mind which is merely neglecting to make such inquiries as a reasonable and prudent person would make. If that distinction is kept well in mind I think that justices will have less difficulty than this case appears to show they have had in determining what is the true position. The case of shutting the eyes is actual knowledge in the eyes of the law; the case of merely neglecting to make inquiries is not knowledge at all — it comes within the legal conception of constructive knowledge, a conception which, generally speaking, has no place in the criminal law.

Since there is no foundation for the conclusion that Fawcett deliberately refrained from making inquiries as to McPhee's conduct in making sales, the finding of the trial Court was one of constructive knowledge which in criminal law is not knowledge at all.

2. "Woolworth was a participant."

The Act contains for the limited purposes of s. 41 [am. *idem*, s. 18] thereof (now s. 45), a definition of "participant" but this term has no relevancy whatsoever to the determination of Woolworth's guilt; nor, in my view, does the section under which Woolworth was charged impose criminal liability on one who could be styled broadly a "participant" unless it can be held a party within the meaning of s. 21 of the *Criminal Code*.

3. "Woolworth was a partner with Healey in this venture."

The undisputed facts as to the relationship between the appellant and Healey will not support the existence of a partnership. The provision of the facilities was not without charge and even if that had been the case it would not have been determinative of the existence of a partnership. The receipt of a percentage of the gross sales does not of itself create a partnership: *Partnerships Act*, R.S.O. 1960, c. 288, s. 3, para. 2 [now R.S.O. 1970, c. 339]. The inventory was owned by Healey and Woolworth had no proprietary interest in it. There is a complete absence of the carrying on of business in common with a view to profit which is the essential character of a partnership.

8 Accepting, as Woolworth appeared to accept, that the offence created by s. 33 is one of [rep. & sub. *idem*, s. 13] is one of strict liability in order to hold it vicariously liable, there still must be proven such a relationship between the actual maker and defendant that the act of the maker may be imputed to the defend- ant.

9 Examples of such relationship are that of master and servant where the master may be responsible for his servant's acts within the scope of his employment — principal and agent where the principal may be responsible for his agent's acts and that where there has been delegation to another of a sphere of activity within which the acts of the delegate are performed on behalf of the delegator. There existed no such relationship between Woolworth and Healey and McPhee since Healey was conducting his own business and Woolworth had no control over the manner in which Healey and McPhee demonstrated or sold the pens except to terminate their permission to be on the store premises. The appellant and Healey were either lessor and lessee or licensor and licensee; neither relationship would justify imposing vicarious liability on Woolworth for the acts of either Healey or McPhee.

10 It remains to consider whether Woolworth was a party to the offence by virtue of s. 21 of the *Criminal Code* made applicable to the offence created by the Act by s. 27 of the *Interpretation Act*, 1967-68 (Can.), c. 7 (now R.S.C. 1970, c. I-23).

11 As has been stated by Lord Reid in *Sweet v. Parsley*, [1970] A.C. 132, there is a presumption that *mens rea* is an essential element of every offence unless some reason can be found for holding that it is not necessarily so; when Parliament has chosen to create an offence of absolute liability the Courts must carry out its will but only to the extent that Parliament's intention to displace the presumption is clearly stated. In enacting s. 33 Parliament had the option of including in the Act provisions extending culpability for the infraction of the section to those other than the actual perpetrators in which even the Courts would have been called upon to interpret the scope of the words used by Parliament to convey its intention. However, instead of so doing Parliament has chosen to rely upon the extension by s. 21 imported into any offence created by statute. Section 21 reads as follows:

21(1) Every one is a party to an offence who

(a) actually commits it,

(b) does or omits to do anything for the purpose of aiding any person to commit it, or

(c) abets any person in committing it.

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

12 It is sought to make Woolworth a party as having done or omitted to do something for the purpose of aiding Healey and McPhee to commit the substantive offence.

13 There are two principal reasons for holding that Woolworth was not a party to the offence charged:

1. Even with respect to offences of strict liability the alleged aider must know that he is aiding. Although it is not necessary that it be proven that he know that the conduct he is aiding constitutes an offence it is necessary that the accused be proven at least to have known the circumstances necessary to constitute the offence he is accused of aiding.

Counsel before Houlden, J., informed him that diligent search had not disclosed any authority in point. He was left to rely upon the following dictum in *R. v. Jacobs et al.*, [1944] K.B. 417 at p. 420, [1944] 1 All E.R. 485 at p. 487:

> We desire, however, to guard ourselves against being supposed to assent to the proposition that a person who aids and abets another in the commission of an offence not involving any mens rea in the principal cannot be convicted in the absence of proof of mens rea on his own part.

This dictum formed no essential part of the decision of the issue before the Court. The Court was dealing with the sufficiency of a direction given to a jury in the trial of charges of conspiracy as to what constituted aiding and abetting. After approving as correct the instructions given by the trial Judge the judgment went on to make, due perhaps to over-caution, a reservation as to what the Court was not deciding. It is sufficient to say that when a Court indicates the exact limits it wishes to be put upon its pronouncements no inference may be drawn as to what would have been its decision on the points it has disclaimed as part of its decision.

Subsequent cases appear to have more relevancy to the point at issue than has the case quoted. In *National Coal Board v. Gamble*, [1959] 1 Q.B. 11, the Board as the operator of a mine, through its employee, a weighmaster, gave to the driver of an independent haulage contractor a delivery ticket which indicated that the vehicle was overweight. The driver of the vehicle, who chose to risk driving as he had loaded, was apprehended and convicted. The Board which had no control over the driver, but whose ticket was necessary for the driver to leave the Board's premises, was charged as an aider and abettor. On the review of the conviction by the Queen's Bench Division, Lord Goddard, C.J., stated at p. 18:

> In *Ackroyds Air Travel, Ltd. v. Director of Public Prosecutions*, [1950] 1 All E.R. 933, 936, I stated the law with regard to aiding and abetting in this way: "...a person could only be convicted ... as an aider and abettor if he knew all the circumstances which constituted the offence. Whether he realized that those circumstances constituted an offence was immaterial. If he knew all the circumstances and those circumstances constituted the offence ... that was enough to convict him of being an aider and abettor." Humphreys J. in the same case said: "...it must be shown that the unlawful act has been committed, and, therefore, that the offence has been committed, and, further, that the person charged as an aider and abettor was aware of the facts sufficiently to enable him to know that

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the act was unlawful."

It may be noted that the judgment of Lord Goddard, C.J., in *Ackroyds Air Travel, Ltd. v. Director of Public Prosecutions*, [1950] 1 All E.R. 933, was delivered in 1950 and refers to an earlier statement to the same effect, in *Carter Patersons & Pickfords Carriers Ltd. v. Wessel*, [1947] 1 K.B. 849, [1947] 2 All E.R. 280.

The statement of Lord Goddard, C.J., above quoted was applied in *John Henshall (Quarries) Ltd. v. Harvey*, [1965] 2 W.L.R. 758.

In *Sweet v. Parsley, supra*, the attention of the Court was directed principally to another point: but there seems to have been no challenge to the Court's assumption that, even in offences of strict liability, to hold one guilty as an aider and abettor, the Crown had the onus of proving knowledge on the part of the alleged aider of the circumstances necessary to constitute the offence which he is alleged to have aided, although it is not required that it be proven the alleged aider knew that those circumstances constituted an offence.

In the light of the foregoing authorities I am of the view that, it not having been shown that Woolworth had knowledge of the facts which constituted the offence, it could not be convicted as an aider by the application of s. 21. I use knowledge in this connection as actual knowledge as defined by Devlin, J., that is, actual knowledge or deliberate ignorance which is the equivalent of actual knowledge.

2. There is another reason why I am of the opinion that the convictions cannot stand. Section 21 requires that an alleged party must do or omit to do something for the purpose of aiding the principal to commit the offence. That purpose must be the purpose of the one sought to be made a party to the offence (*Sweet v. Parsley, supra*) but if what is done incidentally and innocently assists in the commission of an offence that is not enough to involve the alleged party whose purpose was not that of furthering the perpetration of the offence.

If the owner of a car rents or loans it to one he knows contemplates using it for the purpose of committing a robbery, he would thereby render himself liable as a party, or if an owner of a house rents the house knowing it is to be used for recording bets, he similarly would be a party to the offence. But one does not render himself liable by renting or loaning a car for some legitimate business or recreational activity merely because the person to whom it is loaned or rented chooses in the course of his use to transport some stolen goods, or by renting a house for residential purposes to a tenant who surreptitiously uses it to store drugs.

Hence where, as here, the arrangement between Woolworth and the actual offender was for the purpose of merchandising in the normal conduct of which there would be no infraction of s. 33, the departure of Healey and McPhee from the legitimate course of business by making statements constituting an infraction of s. 33 was outside the purpose of the arrangement. There is no evidence that Woolworth's purpose in providing space and facilities in its store was for the purpose of aiding and abetting Healey in the commission of this offence. Woolworth, having no actual knowledge of the illegal conduct or of Healey's intention to commit it, cannot be held to have provided the facilities and premises for the purpose of aiding and abetting in the commission of an offence.

Since it is apparent that I consider there was no evidence upon which the appellant could be convicted of the offence charged, I would answer Q. 1 in the negative and, as I have already indicated, Qq. 2, 3, 4 and 5 in the affirmative.

On this disposition of the appeal it may be considered unnecessary to answer Qq. 6 and 7. However, as a

further appeal may be taken from the decision of this Court, it is desirable that views of the Court be expressed on all the questions stated.

Even if it be assumed that a proper case had been made out for the making of an order under s. 31(1), the scope of the order, as framed by the trial Court, exceeds the jurisdiction conferred on it by the section. Cases dealing with prohibitory orders have not been restrictive of the power of the Court to make orders in a proper case directed to preventing the continuation or repetition of the offence of which a conviction had been registered: *R. v. St. Lawrence Corp.*, [1969] 2 O.R. 305, 7 C.R.N.S. 265, [1969] 3 C.C.C. 263, 59 C.P.R. 97, 5 D.L.R. (3d) 263 (C.A.). Nonetheless the order to be made must relate to the continuation or repetition of the offence for which the conviction was made. Quite apart from the irrelevancy of prohibiting Woolworth from making any representations for the purpose of promoting a sale of articles which have been sold, I consider that the order herein does not bear a proper relationship in its terms to the terms of the offence charged in the information and it therefore offends as exceeding the authority conferred on the Court by the Act. It is on that account void or is at least unenforceable with respect to representations respecting articles which bear no generic similarity to the articles in respect of which the conviction has been registered. Orders which have been upheld by the Court in the past have been directed to the continuation or repetition, reasonably to be apprehended, of the unlawful conduct in respect of the class of goods which were the subject-matter of the charge. In *R. v. St. Lawrence Corp.* where a considerable period had elapsed between the impugned action and the prosecution, the order was confined to the repetition of the act complained of since continuation of the act which had terminated was at that time not possible. On this account I would answer Q. 7 in the affirmative.

Had Parliament so wished it could have made the prohibitory order a universal and necessary consequence of a conviction of an offence under Part V of the Act. It has not done so — it has made a separate provision in Part IV entitled "Special Remedies" whereby a convicting Court, or under certain circumstances a superior Court of criminal jurisdiction, within three years of a conviction may, but is not required to, make an order prohibiting the continuation or repetition of the offence. Since the making of such an order requires the judicial exercise by the Court of its discretion that discretion must be exercised for the purpose of achieving the purpose for which the section offended was intended to accomplish. The purpose of s. 33 is to prevent the making of misleading representations as to price for the purpose of promoting sales. It appears to me that Parliament has shown a clear intention that, in the usual course, the imposition of one or more of the penalties provided by the *Criminal Code* for the punishment of a person convicted of an offence punishable by summary conviction will be the adequate deterrent. In order to justify the Court in exercising the discretion to impose the special remedy under s. 31(1) a Court should be satisfied that there exist circumstances from which it is reasonably inferable that the purpose of the Act will not be accomplished unless the special remedy of a prohibitory order is invoked in addition to the normal penalty of fine and imprisonment. The evidence before the Court ought to show a deliberate and flagrant disobedience of this section and the likelihood of a continuation or repetition in the absence of prohibition. There has always been a reluctance on the part of Courts or Judges to invoke extraordinary powers unless satisfied that no other adequate remedy exists and that the use of the extraordinary power is necessary under the circumstances. In my opinion, the evidence before the trial Court related to a comparatively minor and isolated occurrence which did not merit or require the invocation of the special remedy of prohibition. For these reasons the answer to Q. 6 is in the affirmative.

14 As I am of the opinion that the evidence before the trial Court did not constitute any evidence upon which Woolworth could be convicted of the offence charged, I would allow the appeal and direct that the verdict be set aside on the ground that it cannot be supported by the evidence, and that the conviction recorded by the trial Court be quashed and a verdict of acquittal entered.

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Introduction to CRIME, LAW and JUSTICE in Hong Kong

Edited by

Mark S. Gaylord, Danny Gittings and Harold Traver

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Contents

If the accused wishes to raise any of these matters in defence, evidence of them must be adduced at trial. Once that is done, the prosecutor must then disprove the defence beyond reasonable doubt. If the evidence leaves a doubt, the prosecutor will have failed to disprove the defence and the accused will be entitled to an acquittal.

Parties

Criminal liability is not restricted to the persons, known as "principals", who actually committed the prohibited activity. Others who assisted or encouraged the principals in committing the offence, or caused its commission, may also be liable. These persons, known as "secondary parties" or "accessories", can be convicted of the same offence as the principal, and are subject to the same potential penalties, although they will generally be sentenced more leniently than the principal offender(s). A person may only be convicted as a secondary party, however, where the offence in question has actually been committed. Where it has not, a secondary party may instead be liable for inciting, conspiring or attempting an offence. These three offences, based on preparatory acts, are collectively called "inchoate" offences.

Secondary Party Liability

Secondary party liability will arise firstly if it is proved that the accused assisted or encouraged the principal in committing the offence, either then or at some earlier time, in either case with knowledge or foresight of what the principal intended to do and, further, with the intention of assisting or encouraging the principal. In addition, it must generally be shown that the principal was aware of the accused's assistance or encouragement. A person who is liable in this way is known as either an "aider", "abettor", "counsellor", or "procurer", depending on what exactly is proved, and whether the alleged secondary party was present at the scene when the principal committed the offence. A person who, for example, supplied a gun to another, knowing or foreseeing that the other intended to commit an armed robbery and intending to help, may be held liable as a secondary party to the armed robbery if it occurs. This action would be considered aiding if the supplier was present at the time of the armed robbery; otherwise it would be considered procuring.

A second means of establishing secondary liability is by proving that the offence in question was committed in the course of a "joint enterprise" or by "common design". In this case, every person (other than the person who actually committed the offence) who agreed to participate in the joint enterprise knowing or foreseeing the possible commission of the offence while carrying out the joint enterprise, may be convicted as a secondary party to the offence in question. For example, consider the hypothetical case where three persons agree to burgle an apartment. One of them acts as lookout while the other two physically break in. Since the lookout does not perform acts amounting to actual burglary he is not a principal. But he will be liable as a secondary party for burglary because burglary was contemplated or foreseen by him. Assume, however, that during the burglary one of the two actual burglars intentionally stabs and kills someone in the apartment. The lookout would not be liable as a secondary party to the murder committed by that other person unless the intentional use of a knife was contemplated or foreseen by the lookout as a possible incident of carrying out the burglary.

Vicarious Liability

In general, a person cannot be made criminally liable for the conduct of another on the ground solely that he was responsible for the conduct of that other. Thus, parents and employers cannot in general be held criminally liable for the acts of their children or employees. There are two general exceptions to this rule. First, a person may be liable for the acts of another if the offence in question is a strict liability offence and the prohibited activity can be read as applying to him or her. A shop owner, for example, may be held to have sold contaminated food (in breach of relevant regulations) even though the sale was actually made by a shop assistant. Second, a person who is under a statutory duty to do some specific act but who delegates its performance to another may be liable if that other fails to perform it.

The Impact of 1997 on the Criminal Law in Hong Kong

The law is not independent of prevailing political and social forces. Indeed, it is a product of, and must change to reflect, such forces. This is particularly true of the criminal law which, by its very nature, is one of the principal means of state control over the social and individual conduct of its citizens.

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Hong Kong Cases

R V LAM KIT

[1988] 1 HKC 679

MAGISTRACY APPEAL NO 1040 OF 1987

HIGH COURT

DECIDED-DATE-1: 20 JANUARY 1988

DE BASTO J

CATCHWORDS:

Criminal Law and Procedure - Theft - Aiding and abetting - Appellant present when offence committed - Whether mere presence sufficient - Whether intentional encouragement necessary

HEADNOTES:

The appellant and two other defendants were charged with and convicted of theft. The other defendants pleaded guilty. The magistrate found that the appellant was an aider and abettor 'in a form of encouragement in the circumstances'.

Held, allowing the appeal:

(1) It was not enough that the presence of the accused person had, in fact, given encouragement. It must be proved that he intended to give encouragement, that he wilfully encouraged. *R v Clarkson* (1971) 55 Cr App R 445 followed.

(2) The magistrate did not mention that he found that the appellant intentionally gave encouragement to the others by his presence at the scene, thus omitting an important finding, namely, the appellant wilfully encouraged the commission of the crime.

R v Allan (1963) 47 Cr App R 243
R v Clarkson (1971) 55 Cr App R 445
R v Jones and Mirrless (1977) 65 Cr App R 250
R v Leung Tak Yin [1987] 2 HKC 250

This was an appeal against conviction for aiding and abetting the commission of theft. The facts appear sufficiently in

the following judgment.

A Sedgwick QC and Selwyn So (Chan Lau & Wai) for the appellant.
J Shaw (Crown Prosecutor) for the respondent.

JUDGMENTBY: DE BASTO J

DE BASTO J The appellant was charged together with two other accused, D1 and D2 who pleaded guilty, with the offence of theft. He was convicted and placed on probation for a period of 12 months. He now appeals against his conviction

Very briefly, the appellant and the other two accused drove to a dead end road in Homantin at about 1am. They had all spent the evening together. D1 and D2 drove while the appellant drove his own car. D1 parked his car on one side of the road and the appellant on the other side. The appellant testified that he saw D1 and D2 tampering with the light covers of another car and he knew D1 had lost similar covers on his car. [*680] The police arrived and it is not disputed the car light in the appellant's car was on.

Upon being questioned, the appellant denied he knew D1 and D2 -- this was a lie and he said he lied because he did not want the police to think that he was associated with what D1 and D2 were doing.

I was referred to three cases -- *R v Allan & Ors* 1963 47 Cr App R 243, *R v Clarkson & Ors* 1971 55 Cr App R 445 and *R v Jones and Mirrless* 1977 65 Cr App R 250 -- and I referred to the case of *R v Leung Tak-yin* [1987] 2 HKC 250 in which the Court of Appeal approved the main principles set out in *R v Clarkson & Ors* 1971 55 Cr App R 445:

> It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had the power so to do, or at least to express his dissent, might, under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted. But it would be purely a question for a jury whether he did so or not.

It is not enough, then, that the presence of the accused person has, in fact, given encouragement. It must be proved that he intended to give encouragement; that he wilfully encouraged.

An accused person is entitled, as of right, to know precisely not only of that he was convicted, but the reasons therefore. The learned magistrate found that the appellant was an aider and abetter 'in a form of encouragement in the circumstances'. With respect, I found what the learned magistrate said at the bottom of p 51 and top of p 52 somewhat confusing. He appeared not to have chosen to say, of his findings of fact, that he found the appellant guilty because he was acting in concert with D1 and D2, for example, as a lookout. He may have had doubts about the appellant being a 'lookout' because when the police arrived at the scene, they found his car light on. A 'lookout' is highly unlikely to advertise his presence. By the same token, an aider and abetter is unlikely to do anything which might draw the attention of the police or of passers-by to the scene where a crime is being committed.

To find a person guilty as an aider and abetter, it is not only necessary to prove that he was present while the offence is committed, that he knew an offence was being committed and that his presence, in fact, gave encouragement to the perpetrators but it must be proved that he intended to give that encouragement, that he *wilfully* encouraged.

The learned magistrate makes no mention that he found that the appellant intentionally gave encouragement to the

others by his presence at the scene.

[*681]

The learned magistrate, having decided to find the appellant guilty not as a principal in the first degree but as an aider and abetter, omitted an important finding -- that the appellant wilfully encouraged the commission of the crime.

For these reasons, I allow the appeal, quash the conviction and set aside the sentence.

Hong Kong Cases

R V LEUNG TAK YIN

[1987] 2 HKC 250

CRIMINAL APPEAL NO 10 OF 1987

COURT OF APPEAL

DECIDED-DATE-1: 10 MARCH 1987

ROBERTS CJ, YANG AND SILKE JJA

CATCHWORDS:

Criminal Law and Procedure - Indecent assault - Aiding and abetting - Whether mere presence sufficient to make person aider and abettor - Requirement that person wilfully encouraged commission of offence

HEADNOTES:

The complainant owed a substantial sum of money to a group of men which included the second defendant and the appellant. They had rented a room in which the second defendant, the appellant and two other men played mahjong. The second defendant demanded the complainant to take off her clothes when she failed to raise money to repay him for the money owed. The second defendant threatened to beat her if she did not take her clothes off. After she had taken off her clothes, the second defendant indecently assaulted her while the other three were sitting in the room. The judge held that the appellant was also guilty of indecent assault because he shared with the second defendant a common purpose which the indecent assault was designed to further, though he took no part in the indecent assault.

Held, allowing the appeal: Non-interference to prevent a crime was not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, might, under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted. But it would be purely a question for a jury whether he did so or not. It was not enough that the presence of the accused person had given encouragement. It had to be proved that he intended to give encouragement and that he wilfully encouraged. *R v Clarkson* 1971 55 Cr App R 445 followed.

R v Clarkson (1971) 55 Cr App R 445
R v Coney (1882) 8 QBD 534

This was an appeal against conviction and sentence on a charge of indecent assault. The facts appear sufficiently in the

following judgment.

D MacKenzie-Ross (CW Leung & Co) for the appellant.
IG Cross (Crown Prosecutor) for the respondent.

JUDGMENTBY: ROBERTS CJ

ROBERTS CJ This is an application for leave to appeal against conviction and sentence on one charge of indecent assault.

The applicant, who was the first defendant at the trial, was jointly charged with another man with eight different charges, one of false [*251] imprisonment, three of blackmail, three of criminal intimidation and one of indecent assault.

At the conclusion of the Crown case, the judge ruled that there was no case to answer on seven of the eight charges against both defendants.

We observe, in passing, that it was a matter of some surprise to us that he should have reached this conclusion in relation to the second and third charges of blackmail and criminal intimidation, since the principal witness on whom the Crown relied, in relation to those charges was the same witness as the one on whose evidence the judge relied, in order to convict the first defendant on the charge of indecent assault.

It is unnecessary to go into any detail as to the background facts giving rise to these charges, other than to say that the girl who was the subject of the alleged indecent assault, whom I will refer to as the complainant, had been to Macau for the purposes of gambling and had borrowed a substantial sum of money from a group of men there, who expressed themselves willing to lend money on certain conditions to those who wished to continue gambling.

After various incidents, into which it is unnecessary to go, the complainant found herself with the two defendants and other men on 9 September, in the afternoon, on the premises of the Tak Fuk Association in Wanchai, where a room had been rented by the group of men who were there with the complainant.

The evidence in relation to the indecent assault falls within a short compass. I quote the relevant passage of the complainant's evidence:

> At the Tak Fuk Association, I was accompanied by D1, D2, Ah Kan and Ah Chuen. A room was rented and they played mahjong and I stayed there to make further phone calls to my sister.
>
> D1 had burnt my arm with a cigarette butt and caused it to be injured -- about 3 pm. I had made calls to my sister but nothing came of it then D1 burnt my arm.
>
> Then D2 demanded that I should take off all my clothes when I failed to raise money, he lost his temper and demanded me to do that. I refused but he threatened to beat me if I did not obey. At that time D1, Ah Chuan and Ah Kan were present in the room. I took off all my clothes. Then D2 committed an act of indecent assault -- he touched my breasts with his hand -- both hands -- the other three were sitting there.
>
> Ah Kan later told me to put back on my clothes. I was without clothes about five minutes.
>
> I cried and then they asked me to make further phone calls to my elder sister.
>
> I took off my clothes because D2 said if not, he would beat me.
>
> There was a phone in the room.

D1, D2 and Ah Kan made phone calls to their friends asking how much would be paid working as a prostitute.

D1 and D2 said to me if money not paid by 5pm, I would have to work as a prostitute, before and after I took off my clothes.

[*252]

Mr MacKenzie-Ross submitted on behalf of the applicant that the second defendant, although no doubt he and the applicant shared a common purpose to regain the money that they had lent, had gone further on his own than can reasonably be said to have been the common intention of the group.

In his very short reasons for verdict, the judge directs himself on this issue in the following terms:

> I also accept that both D1 and D2 were endeavouring to get the return of a loan from PW1 and that was their common purpose or design. In the course of that common purpose, D2 acted by losing his temper and getting PW1 to remove all her clothes. That in itself was an indecent assault as she was forced to strip in the presence of four men.

I have given much consideration to this point and take the view that since D1 and D2 had a common purpose, which this incident was used to pursue, that D1 is equally guilty as D2 of the indecent assault.

There can, I think, be no criticism, and none was raised by Mr MacKenzie-Ross, of the judge's finding that an order to a woman to undress, accompanied by threats, would amount to an indecent assault in law.

The question, however, is whether the judge has correctly directed himself on the question of common purpose. As we interpret his ruling, it can be summarized as follows.

Firstly, the two defendants had a common purpose, namely, to secure the return of the money which they had lent to the complainant.

Secondly, in the course of that common purpose, the second defendant forced the complainant to remove her clothes.

Thirdly, that constituted an indecent assault by the second defendant.

Fourthly, the first defendant is also guilty of indecent assault because he shared with the second defendant a common purpose which the indecent assault was designed to further, though he took no part in the indecent assault, and there is no evidence that he encouraged it, though he watched it.

In our view, this is an incorrect direction on the law governing aiders and abettors. The authorities state that, before a person may properly be convicted as an aider and abettor, it is not sufficient merely for him to be present while an offence is committed. If he takes no part in it and does not act in concert with those who commit it, it is insufficient merely for him not to try to prevent the offence being committed. We were referred by counsel for the Crown, to *R v Clarkson & Ors* 1971 55 Cr App R 445, in which the main principles are set out. At p 450, Lord Justice Megaw quoted an earlier passage from the case of *R v Coney* 1882 8 QBD 534:

> It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might [*253] reasonably be expected to prevent and had the power so to do, or at least to express his dissent, might, under some circumstances, afford cogent evidence upon

> which a jury would be justified in finding that he wilfully encouraged and so aided and abetted. But it would be purely a question for a jury whether he did so or not.

It is not enough, then,that the presence of the accused person has, in fact, given encouragement. It must be proved that he intended to give encouragement;that he wilfully encouraged.

Had the judge directed himself in the manner required by *R v Clarkson* default (1971) 55 Cr App R 445 and various other authorities, he might well have come to the same conclusion which he did. However, for the reasons which we have already given, we are satisfied the judge did misdirect himself and that his approach to the evidence was in error.

We therefore feel obliged to allow the application for leave to appeal against conviction and sentence and to quash both the conviction and sentence, though we do so with some regret because, as we have already commented, had the judge correctly directed himself properly, it might very well be that he would have reached the same conclusion.

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Edited by

KEVIN JON HELLER AND MARKUS D. DUBBER

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INDIA

Stanley Yeo

Stanley Yeo is Professor of Law at the National University of Singapore. His recent publications include (with Mark Findlay and Stephen Odgers) *Australian Criminal Justice* (Oxford, 4th ed., 2009) and (with Neil Morgan and Chan Wing Cheong) *Criminal Law in Malaysia and Singapore*

I. INTRODUCTION

A. Historical Sketch

The criminal law of India is governed principally by the Indian Penal Code of 1860 (hereinafter the Code). Before its advent the prevailing criminal law in India was a patchwork of Muslim and Hindu law. The Code's authors drew their inspiration from several sources, notably the English criminal law, the French Penal Code, and Edward Livingston's Code for Louisiana. When they were drafting the Code, they were very clear in their goal of making it exhaustive.

The Code's authors proposed a scheme whereby ambiguities or gaps in the Code were to be referred to Parliament, which should decide the point and, if necessary, amend the Code. Regrettably, this proposal was not adopted in India, so the courts have had to undertake the tasks of determining the meaning to be given to an ambiguous provision and filling a gap left by the Code.

Two points from legal history are worth noting because they provide useful background from which to consider the Code. The first is that English criminal law when the Code was drafted was in a state of chaos, and serious efforts at reforming the law were being made. Second, the Code's authors were heavily influenced by the individualistic libertarian philosophy of Jeremy Bentham. This philosophy imbued the Code with a utilitarian base and cast *mens rea* in largely subjective terms, in contrast to the prevailing retributionism and frequently objectively based *mens rea* of nineteenth-century English criminal law.

B. Jurisdiction

The Code specifies the extent of criminal jurisdiction over offences committed within and outside India. India's territory comprises its land, internal waters, territorial coastal waters, and airspace above its land and waters. Section 2 makes the Code applicable to every person irrespective of rank, caste, creed, or nationality. Section 108A also provides that a person who in India instigates the commission of an offence outside India is liable to be punished under the Code. Foreign nationals who commit a crime in India cannot plead ignorance of Indian law. It has also been held that a foreign national who in India instigates the commission of a crime outside India is also liable to punishment under the Code.[1]

Certain people are exempt from the criminal jurisdiction of the courts by virtue of the constitution of India, statutory provisions, or rules of international law. They include the president of India, the governor of an Indian state, Supreme Court and High Court judges, and foreign sovereigns and ambassadors.

Extraterritorial jurisdiction is afforded by section 3 of the Code, which stipulates that any person may be tried for an offence committed by him or her outside India provided he or she is liable to be punished for it by Indian law as if he or she had committed it within India. This section therefore postulates the trial of Indian citizens for crimes committed abroad even though their conduct may not be recognized as a crime in the place where it was committed.

Also, the section applies to foreigners who are covered by special laws bringing them under Indian jurisdiction.[2] Additionally, section 4 provides that the Code applies to any offence committed by any Indian citizen in any place outside India and to any person on any ship or aircraft registered in India, wherever it may be at the time of the offence.

There is no statute of limitations for the prosecution of offences mentioned in the Code. However, some offences created by special laws may be subject to a limitation period prescribed by those special laws.[3]

C. Legality Principle

Although the legislature has the power to enact both prospective and retrospective laws, those laws are subject to the maxim *nulla poena sine lege* (no punishment without law). This maxim is enshrined in article 20 of the constitution, which consists of two parts. The first proclaims that "no person shall be convicted of any offence except for a violation of law in force at the time of the commission of the act charged as an offence." The second declares that no person shall "be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence." Hence, if a trial is held with respect to a law which came into force after the date when the offence was committed, article 20 requires the court to consider whether the penalty imposed is higher than the penalty which could have been imposed under the previous law.[4] Article 20 would not be infringed if the court imposed a penalty which was not greater than the one prescribed under the previous law.

These two constitutionally entrenched limitations do not prevent the legislature from enacting retrospective procedural laws. Consequently, the Supreme Court has held that a trial under a procedure different from that which obtained at the time of the commission of the offence is not in itself unconstitutional.[5]

D. Sources of Criminal Law

1. Legislature

The general principles of criminal liability and major offences are contained in the Code. There are also various statutes enacted by the central and state legislatures criminalizing conduct which may apply generally,[6] specially,[7] or locally.[8] A special law is applicable to the particular subject, while a local law applies to a particular part of India. The defences provided for in the Code are available to persons charged with an offence under special or local laws.[9]

2. Judiciary

The courts have an important role in interpreting the provisions of the Code and other penal statutes and applying them to the case at hand. Since the legislature has not been forthcoming in clarifying or resolving many ambiguities or gaps in the Code, this task has fallen on the courts. Moreover, the courts have often displayed ingenuity in interpreting Code provisions in ways which accommodate the social, cultural, and religious diversity of Indian society. It would therefore be correct to assert that the criminal law of India

3. *Executive*

The executive cannot enact offences; that power belongs to the legislature. However, the legislature occasionally provides the executive with a range of powers to regulate activities which may be subjected to criminal sanction. For example, under special laws like the Unlawful Activities (Prevention) Act 1967 and the Armed Forces (Special Powers) Act 1958, wide powers are conferred on the executive to declare an organization "unlawful" or an area a disturbed area. Similarly, the Police Act 1861 confers on the police wide powers of surveillance over persons whom the police have reasonable grounds to believe are leading a life of crime.

4. *Scholars*

Several voluminous and long-standing commentaries on the Code have been edited by distinguished Indian jurists and judges of higher courts.[9] They are occasionally referred to in judgments. Recent editions of these commentaries have tended toward becoming mere repositories of case summaries.

E. Process

1. *Adversarial/Inquisitorial*

The Indian criminal justice process has inherited and maintained the English adversarial model with its underlying premise that a person is presumed innocent until he or she is proved guilty. The judge's role is more than that of a mere umpire; he or she takes an active interest in the proceedings by putting questions to witnesses to ascertain the truth.[10] As the state's representative, the prosecution assists the trier of fact to arrive at the truth. In doing so, the prosecutor is disallowed from urging an argument which in his or her opinion does not carry weight, nor can he or she exclude legal evidence which supports the interests of the defendant. Counsel for the defence, if there is one, is required to do everything he or she ethically can to protect the interest of the defendant. Criminal proceedings are held in open court and may be reported in the press, and judgments are accessible to the public.

2. *Jury/Written Opinions*

Under colonial rule, the British administration introduced a jury system very much like the one operating in England at the time. However, the system did not work well, largely because it was difficult in such a diverse country as India to find sufficient numbers of people with similar status and backgrounds to sit in judgment of their peers. This resulted in a modification of the jury system which effectively overrode the jury verdict by vesting in the judge the power to set aside verdicts of acquittal by juries. Jury trials were eventually abolished by the legislature in 1960 on the ground that they were susceptible to media and public influence.

II. GENERAL PART

A. Theories of Punishment

None of the penal statutes, including the Code, expressly specify the theories of punishment. The Benthamite philosophy with its emphasis on utilitarianism has had a strong influence on the Code's approach to punishment. This is evident in the types of punishment

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which the Code recognized when it was first enacted, namely, the death penalty, transportation, imprisonment, whipping, and fines of sizable amounts. Likewise, the severe maximum penalties imposed for most offences in the Code attest to the view that the meting out and threat of punishment are essential for the control and prevention of crime.

Courts and commentators have suggested that the main theories of punishment are deterrence, retribution, and rehabilitation. The deterrent theory of punishment aims to deter the particular offender from reoffending and also to deter prospective offenders from committing the type of crime for which the offender was convicted.[12] The retributive theory views punishment as necessary to satiate the desire of crime victims and other members of society for vengeance. However, "[N]o sentence should ever appear to be vindictive [since] an excessive sentence defeats its own object and tends to further undermine respect for the law."[13] The rehabilitative theory of punishment seeks to make offenders harmless by curing them of those drawbacks which caused them to commit crime. Proponents of rehabilitation regard the punishment structure of the Code as brutal and harsh and a relic of former regressive times. They contend that in modern Indian society, sentencing should be seen as a process of reshaping a person who has degenerated into criminality. As a leading commentary has colorfully put it, "[A] therapeutic rather than an 'in terrorem' outlook should prevail in our criminal courts since brutal incarceration of the person merely produces laceration of his mind."[14]

Although these various theories of punishment may appear incompatible, they have in common the general aim of social defence. The Supreme Court endorsed this view when it dictated that the "sentence should bring home to the guilty party the consciousness that the offence committed by him was against his own interest and also against the interest of the society of which he happens to be a member."[15]

B. Liability Requirements

1. Objective/Actus Reus

i. Act

The word *act* is not defined in the Code. The courts have advised interpreting it in a commonsensical way by stating that "['act'] must necessarily be something short of a transaction which is composed of a series of acts . . . it means the action taken as a whole and not the numerous separate movements involved."[16]

There is a fundamental principle of criminal law which declares that, where the physical elements of the crime include conduct (whether an act or an omission), such conduct must be voluntary. This is implicit in all the offence-creating provisions of the Code. Where conduct is involuntary, the defendant cannot be held criminally liable for the crime charged. Voluntariness comprises the will or ability of the person to control his or her conduct.[17]

In cases where the defendant has performed a series of acts, it may be important to determine when the conduct element of the crime in question is concluded. This will be so in relation to *mens rea* crimes which require the defendant to have possessed the requisite

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dead, hangs V from a tree, is D liable for murder? This type of case raises the issue of the need for concurrence between the *actus reus* and the *mens rea* of a crime before D may be held liable. The courts have dealt with this issue by holding that D is liable if his or her subsequent act was morally congruent with his or earlier act.[18] Thus, in the example given, D would be liable for murder if his act of hanging V was prompted by D's desire to conceal his or her previous act of strangulation which was done with the requisite *mens rea* for that offence.

ii. Omission

The general rule is that criminal liability is attached to conduct comprising positive activity by the defendant, but not to his or her failure to act. However, the law recognizes exceptions to this general rule. Section 43 of the Code confines these exceptions to omissions which are "illegal," by which is meant "everything which is an offence or which is prohibited by law, or which furnishes a ground for a civil action." Briefly stated, "[A]n illegal omission would apply to omissions of everything which [a person] is legally bound to do."[19]

There are three types of circumstances described in section 43 which render omissions illegal for the purposes of criminal liability. The first is omissions which are expressly made offences by the Code or other penal statutes. The second circumstance envisaged by section 43 is where the omission was prohibited by law. What is "prohibited by law" certainly includes omissions which are expressly made offences, but the term is not restricted to these offences. For example, shipping legislation may impose a duty on a captain to provide medical treatment to sick persons on board. Although the legislation does not make a captain's failure to discharge this duty an offence, it does prohibit such failure, which would therefore constitute an illegal omission under section 43.[20]

The third circumstance requires a court to determine whether the particular defendant's omission would attract civil liability. Failures to act which furnish ground for a civil action are most commonly related to tort law, in particular, the tort of negligence. Like criminal law, tort law has a general rule imposing a legal duty of care in respect of positive activity which might harm others, and it imposes such a duty of care for omissions in exceptional situations. Civil law imposes a legal duty to act where a special relationship exists between the defendant and the person injured by the defendant's omission. Examples include the relationship between a parent and his or her young child, or when a person voluntarily assumes responsibility for a physically and mentally infirm adult who is incapable of looking after himself or herself. Civil law also imposes a duty of care in respect of omissions when the defendant has negligently created the dangerous situation. Besides tort law, a failure to act may furnish ground for a civil action based on contract law.

iii. Status

There are some offences which base criminal liability on the defendant's status, that is, relationship with a specified state of affairs, which may be a circumstance or an event. These offences are invariably created by statute and are relatively minor in nature. An example is provided in section 3 of the Public Gambling Act 1867 of being the occupier of any premises used as a common gaming house. The crime is established upon proof that the defendant was the occupier of the premises fitting the specified description, and there

is no formal requirement of an act or omission by him or her. Furthermore, the defendant cannot escape liability on the ground of ignorance.

As in the case of omissions, criminal law is circumspect in imposing criminal liability based merely on status, for otherwise, freedom of individuals to be connected to a circumstance or an event would be greatly stifled. Such a form of liability is therefore limited to persons who have responsibility for, or are in control of, the proscribed situation. Thus, in the example just given, the statute creating the offence confines liability to the occupier of the premises used as a common gaming house and does not extend it to other occupants or visitors who have no control over the state of affairs of those premises.

2. Subjective/Mens Rea/*Mental Element*

i. Intent

The term *intention* is not defined in the Code, and the task of doing so is thus left to the courts. The Supreme Court has held that it comprises "a conscious state in which mental faculties are aroused into activity and summoned into action for the purpose of achieving a conceived end. It means shaping of one's conduct so as to bring about a certain event."[21] It is uncertain whether the meaning of intention extends beyond its purposive sense to include knowledge of the virtual certainty of an event occurring (sometimes described as "oblique" or "indirect" intention). Against such an extension is the fact that many Code offences include, besides intention, the *mens rea* of knowing the likelihood of the proscribed result. For these offences, oblique intention would more than satisfy this type of knowledge.

The courts have ruled that the concept of intention is distinguishable from desire. Desire introduces an emotional or motivational element that may or may not be present in intention. Similarly, intention is not to be confused with motive.[22] Motive is the emotional force behind the defendant's conduct and is distinguished from intention, which is a technical concept denoting a mental state in which the defendant acts with the purpose to bring about a result.

ii. Recklessness

Although the term *reckless* does not appear in the Code, this type of *mens rea* is expressed in other ways in the Code insofar as it denotes advertence to a risk. The most common expression of this nature in the Code is "knows to be likely" to cause a proscribed result, an instance of which is section 299(3) concerning the offence of culpable homicide. Another expression used by the Code is "rashness," which is the *mens rea* for the crime of causing death by a rash act under section 304A. This term has been judicially interpreted as "acting with the consciousness that mischievous and illegal consequences may follow, but with the hope that they will not and often with the belief that the actor has taken sufficient precautions to prevent their happening."[23] The difference between "rash" and "knows to be likely" is one of degree, with the former requiring only knowledge that the proscribed harm was possible, while the latter requires knowledge that a harm was probable.[24] Clearly, oblique intention will satisfy either of these forms of recklessness.

iii. Negligence

There are some offences in the Code which are based on negligence.[25] The Code does not

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and proper care and precaution to guard against injury . . . , which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the defendant person to have adopted."[26] A gross degree of negligence is required before criminal liability will lie.[27]

The defendant's conduct is measured against what a reasonable person, judged according to the knowledge, experience, and skill expected of such a person, would have done in the same or similar circumstances as those of the defendant. The courts have been prepared to partially subjectivize this objective standard of care by taking into account the mental incapacity of a particular defendant which prevented him or her from appreciating the danger at the material time.[28]

Although the concept of "good faith" as used in the Code is not strictly a form of *mens rea*, it is closely related to that of negligence. Section 52 of the Code states that "[n]othing is said to be done or believed in good faith which is done or believed without due care and attention."

3. Theories of Liability

i. Inchoate Crimes

a. Attempt

The Code provisions on attempt comprise a general provision[29] coupled with specific provisions[30] for the punishment of attempt. All these provisions serve only to regulate the extent of punishment for an attempt and do not contain a definition of what constitutes an attempt. Consequently, the courts have had to pronounce on the elements of attempt.

In relation to the *actus reus*, the courts have applied several tests. One is that the defendant's conduct must have gone beyond the stage of preparation and have been sufficiently proximate to the substantive offence. However, this does not require such conduct to have been the last act which the defendant was capable of doing.[31] Another test is whether the defendant's conduct was such as to unequivocally indicate his or her intention to commit the offence.[32]

With respect to the *mens rea*, the courts have held that, insofar as the general provision on attempt is concerned, criminal liability requires nothing less than an intention by the defendant to commit the substantive offence.[33] The words appearing in the general provision, "Whoever attempts . . . to cause such an offence to be committed," make it possible to convict a person of attempting to abet, or attempting to conspire with, another person to commit an offence. This is because abetment and conspiracy are recognized as offences in their own right by the Code. Conviction for attempt will lie even if the person abetted or conspired with does not proceed to commit the substantive offence.

The courts have ruled that a person may be liable for attempt even if what he or she had set out to do was factually impossible to achieve.[34] Supporting this ruling are the illustrations accompanying section 511 of the Code, which show that a person may be guilty of attempting to steal from an empty receptacle.

b. Conspiracy

The Code defines the offence of criminal conspiracy as constituting an agreement by two or more persons to do or cause to be done an illegal act, or an act which is not illegal by

illegal means.[35] Furthermore, where the agreement is not to commit an offence, an overt act done by one or more of the parties in pursuance of the agreement is required. The *actus reus* of criminal conspiracy is the agreement which involves a meeting of minds and unity of purpose between the conspirators.[36] There need not be a physical meeting of the parties, nor does a person have to be a party to the agreement from the start.[37] A person may be convicted of criminal conspiracy even though the other party involved is still at large, dead, unknown, or has been acquitted on a technical ground.[38] The Code does not explicitly exclude agreements between spouses or with the intended victim of the offence from the scope of criminal conspiracy.

The *mens rea* of criminal conspiracy consists of an intention by the parties to carry out the object of the agreement. Such an intention is absent from a party who merely pretends to join a criminal conspiracy but does not share the object of the scheme. Each party to the agreement is not required to know all the details of the scheme.[39]

People may be liable for criminal conspiracy whose object was factually impossible to achieve, provided the agreement was to commit an offence. Thus, in one case, two men who had agreed with each other to kill their intended victim by witchcraft were held liable for criminal conspiracy to commit murder, since they had agreed to commit murder and not merely to perform acts of witchcraft.[40]

ii. Complicity

The Code contains a number of provisions dealing with complicity, which is described as "abetment." The main provision is section 107, which provides for three types of abetment: by instigation, by conspiracy, and by intentional aiding. Abetment is recognized as an offence in its own right and, subject to one qualification, is not dependent on the person abetted committing the substantive offence.[41] The courts have held that this is true for cases of abetment by instigation and abetment by conspiracy. The qualification is that, for abetment by aiding, the person abetted must be proved to have committed the offence since the word *aid* suggests that the act aided was committed.[42] The Code recognizes a double inchoate crime by stipulating that "[t]he abetment of an offence being an offence, the abetment of such an abetment is also an offence."[43]

Regarding the *actus reus*, abetment by instigation requires the defendant to have actively suggested or stimulated the commission of the substantive offence.[44] As for abetment by conspiracy, the abettor must have engaged with one or more persons in a conspiracy, the conspiracy must be for the doing of the act abetted, and an act or illegal omission must have taken place in pursuance of the conspiracy and in order to the doing of the act abetted. A person cannot be convicted of abetment by conspiracy if the charges against all the other alleged conspirators have failed.[45] Regarding abetment by aiding, "aid" involves facilitating the commission of the act[46] and, therefore, must have been given before or at the time of the commission of the act. It has been held that mere presence at or near the scene of the crime does not itself amount to abetment by aiding.[47]

In relation to the [illegible]

such conduct amounted to a crime.[48] The law does not require the person abetted to have any guilty intention or knowledge or even to be capable of committing the crime.[49]

The Code has provisions dealing with cases where the person abetted committed an offence which differed from that intended by the abettor. Section 111 provides that when an act was abetted but a "different act" was done, the abettor is liable for that act provided it was "a probable consequence of the abetment and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment." Section 113 provides that when the act abetted causes a "different effect" than that which was intended by the abettor, the abettor is liable for the effect caused, provided he or she "knew that the act abetted was likely to cause that effect." It has been observed that the test for criminal liability under section 111 is objective, while that under section 113 is subjective.

The Code also specifies the law in relation to joint criminal liability. The main provision is section 34, which states that "[w]hen a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone." The offence for which the secondary offender may be liable on the basis of section 34 is that which was committed by the principal offender; they cannot be liable for different offences. Participation in some form or other in the criminal act constitutes the main feature of section 34. For participation to be made out, the defendant must have been physically or constructively present when the offence occurred.[50]

The term *common intention* in section 34 refers to the common design of two or more persons acting together and signifies the reason for doing the acts collectively forming the "criminal act."[51] The phrase "in furtherance of a common intention" contained in this section enables criminal liability for collateral offences to be imputed to persons acting in concert even though those offences may not have formed part of the common design. Case authorities recognize three situations when this could occur. The first is the act which was intended by all the parties;[52] the second is the act which, though not intended, was known by the parties to be a possible consequence of the criminal enterprise; and the third is the act which any one of the parties commits "in order to avoid or remove any obstruction or resistance put up in the way of the proper execution of the common intention."[53]

iii. Corporate Criminal Liability

In spite of its antiquity, the Code does criminalize and punish corporations for offences having a *mens rea* element. For example, a corporation can be liable for certain offences of personal violence, including culpable homicide, by virtue of the particular definitions given to these offences, read with section 11 of the Code. That section provides that the word *person* appearing in the Code includes a company, association, or body of persons, whether incorporated or not. However, other offences such as rape and perjury are excluded because the wording of these offences shows that they can be committed only by a natural person.[54]

A difficulty arises in establishing the *mens rea* element of an offence where a corporate

entity is involved. Since the Code is silent on this issue, the courts have adopted the doctrine of identification developed by English common law.[55] Under this doctrine, a corporation will be held criminally liable if its "directing mind" (which could be an individual person or the board of directors of the corporation) possessed the requisite *mens rea*.[56] Where individuals are concerned, they have to be sufficiently high up in the organizational hierarchy of the corporation to satisfy this test.[57]

Since a corporation is a fictitious entity, it is incapable of receiving bodily punishments such as imprisonment. Consequently, a corporation can be prosecuted for offences which are punishable only by a fine.[58] There is also case authority holding that corporations may be prosecuted for offences where a fine and imprisonment term are mandatory, in which case it would be punished only by a fine.[59]

4. Causation

The authors of the Code considered prescribing general rules on causation but eventually decided that the infinite variety of cases made the rules a matter for the courts to develop. Although the Code's authors chose not to devise general principles on causation, they thought it necessary to include specific provisions on causation in respect of the offence of culpable homicide. The relevant provisions appear as explanations to section 299 (the section on culpable homicide) and read as follows:

> *Explanation 1*
> A person who causes bodily injury to another who is labouring under a disorder, disease, or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.
>
> *Explanation 2*
> Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

The courts have generally applied a two-stage inquiry to the issue of causation.[60] The first stage involves inquiring whether the defendant caused the proscribed result in fact. This is resolved by applying the "but-for" test, which, if met, shows that the defendant's conduct was a *causa sine qua non* (a necessary or indispensable condition) of the victim's harm. The second stage involves inquiring whether the defendant's conduct had caused the victim's harm as a matter of law (a *causa causans*). This involves a value judgment whether the defendant was sufficiently blameworthy for causing the harm to warrant conviction and punishment. The courts have occasionally applied the test of "a substantial cause" in relatively straightforward cases of causation. However, the judicial preference appears to be for a test of reasonable foresight by the defendant of the harm. For example, it was held in a murder case that "any act is said to cause death . . . when the death results either from the act itself or from some consequences necessarily or naturally flowing from that act, and reasonably contemplated as its result."[61]

or event occurs (a *novus actus interveniens*), thereby raising the question whether the defendant's conduct continued to play a causal role or merely formed part of the factual background. The Indian courts have, in many cases, used the reasonable-foresight test to resolve these more complicated cases of causation.[62]

C. Defences

1. Types of Defence

The principal defences are contained in the Code. They consist of the "general exceptions" contained in part IV[63] of the Code, which apply to offences found within[64] the Code, as well as without,[65] unless excluded by statute. In addition, there are the "special exceptions" to murder as spelled out in section 300 of the Code. These various exculpatory defences can be categorized into three types. The first denies personal responsibility for what occurred, such as the defences of mistake of fact and accident. The second type is where the offence elements are proved, but the broader context in which the conduct transpired offers a justification or excuse which negates criminal liability. Examples of justificatory defences are consent, self-defence, necessity (choice of evils), and superior orders. Excusatory defences include duress, mistake, and provocation. The third type of exculpatory defences has mental impairment as its core. Although evidence of mental impairment may be used to deny an offence element such as knowledge or intent, such evidence can support an independent defence. For example, mental impairment can prevent a person from having the capacity to judge the rightness or wrongness of his or her conduct or can affect his or her capacity to control conduct. Examples include the defences of unsoundness of mind, intoxication, and infanticide.

2. Burden of Proof

There are a number of broad principles which are applicable to all criminal trials. The first is that it is the responsibility of the prosecution to prove its case beyond a reasonable doubt. If it fails to do so, the defendant is entitled to be acquitted on the basis that he or she is presumed innocent of the crime charged unless proved otherwise. Once the prosecution has proved beyond a reasonable doubt facts which, if unanswered, would establish the charge against the defendant, it is the responsibility of the defendant who seeks to be exculpated to adduce evidence in support of one of the legally recognized defences. The court decides on the case after taking into consideration the evidence as a whole.

The Indian Evidence Act 1872 contains two provisions which endorse these broad principles. The first is section 101, the relevant parts of which provide that "[w]hoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist," and that "[w]hen a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person." This section clearly provides that in a criminal trial the legal burden of proving that the defendant is guilty of the crime charged lies throughout with the prosecution.

The second provision is section 105, which stipulates that the defendant bears the burden of proving a full or partial defence. The Supreme Court has interpreted this provision to mean that the defendant bears the burden, as in a civil case, of raising some evidence in

support of a defence.[66] In other words, the court will presume the absence of circumstances which bring the case under one of the recognized defences, and it will cast the burden on the defendant to rebut this presumption by adducing evidence showing that the preponderance of probabilities is in favor of his or her plea. Should this occur, the prosecution has to rebut the evidence supporting a defence beyond a reasonable doubt, in keeping with the prosecution's obligation to discharge the legal burden of proof that the defendant is guilty of the crime as charged.

D. Justifications

1. Necessity

Section 81 of the Code recognizes a defence of necessity which is available to all offences, including murder. The requirements of the defence are contained in the rather sparsely worded section and the explanation and illustrations accompanying it.

Although no mention is made of a requirement of proportionality, this is evidenced by the illustrations. Illustration (a) is of a ship captain who chooses to run the risk of running down a boat with two passengers on board in order to avoid inevitably colliding with a boat holding thirty passengers. The illustration declares that the captain is not guilty of any offence if he runs down the first boat, provided he satisfies all the requirements of section 81. The "choice-of-evils" doctrine is apparent here, with the defendant justified in risking the lives of a few to save many. To the same effect, illustration (b) is of a defendant who pulls down houses in order to stop a great fire from spreading and causing loss of human life and property.

Besides the requirement of proportionate response, section 81 requires the defendant to have lacked any "criminal intention" to cause the harm. The meaning of this provision is unclear. It is likely to refer to the defendant's objective in committing the proscribed conduct; if the objective was to prevent other harm, the defendant's intention would not have been "criminal." Another requirement is that the defendant must have incurred the risk "in good faith" (i.e., "with due care and attention") for the purpose of preventing or avoiding "imminent"[67] harm. This may be contrasted with the more demanding test of "instant" harm for the closely related defence of duress.[68] It has also been noted that section 81 does not specify the types of threatened harms, leaving them open ended. Third, the defendant must have been "without any fault or negligence"[69] in creating the circumstances of necessity.

2. Self-Defence

The provisions dealing with the defence of person and of property are spelled out in great detail in the Code.[70] Two preconditions have to be met before the right of self-defence arises. The first is that an offence affecting the human body or property was being committed against the defendant or some other person.[71] A supplementary provision specifies circumstances when the law will recognize the right of self-defence even though the act confronting the defendant was not an offence. These circumstances include the aggressor's youth, want of maturity of understanding, unsoundness of mind, intoxication, and mis-

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If the preconditions are met, there are certain other requirements that have to be satisfied for the defence to succeed. One requirement is that the defendant must have reasonably apprehended the particular danger which he or she claims compelled him or her to take defensive action. In relation to defence of the person, the Code expressly provides that the right to self-defence extends to the causing of death if the defendant reasonably apprehended a threat of death or grievous hurt or, in the case of an assault for the purpose of wrongful confinement, reasonably apprehended that he or she would be unable to have recourse to the public authorities for his or her release.[71] With regard to defence of property, fatal force may be used against certain specified threats, such as where the defendant reasonably apprehended death or grievous hurt to be a consequence of theft, mischief, or house trespass.[72] The duration of the right of self-defence is commensurate with the duration of the danger as reasonably apprehended by the defendant.[76]

A further requirement of self-defence is that the defendant must not have inflicted "more harm than it is necessary to inflict for the purpose of defence."[77] When dealing with this requirement, the courts have held that the force used by the defendant "should not be weighed in golden scales."[78] A person need not wait till the attack has commenced to exercise his or her right of self-defence. Depending on the circumstances, such a preemptive strike could satisfy the requirement of necessary harm.[79] There is also no legal duty to retreat; although having an opportunity to retreat may tell against the defendant in respect of satisfying the requirement of necessary harm, it is not conclusive about that requirement.

3. Consent

The Code devotes several sections to outlining different sets of circumstances when consent would be a full defence.[80] The term *consent* is not defined in the Code. The courts have held that for consent to be valid, the giver must have fully understood the nature and consequences of the conduct consented to, and that mere submission or passivity is not consent.[81] Furthermore, section 90 provides that consent is vitiated if it was given by a person under fear of injury or under a misconception of fact, or of unsound mind or intoxicated so as not to understand what he or she consented to, or who was under twelve years of age. The Code adopts the individualistic libertarian stance that the criminal law should intervene only where there was harm to others. Accordingly, where a "victim" consents to harm and no other person is hurt, the criminal law should not intervene, whether on moral, paternalistic, or utilitarian grounds.

The main provisions of the defence of consent are sections 87 and 88. Section 87 embraces most fully the individualistic libertarian philosophy concerning consensual harm. It provides that so long as the consenting party was above eighteen years of age, the doer is not criminally responsible for the harm consented to which the doer intentionally caused or knew he or she was likely to cause to the consenting party. There is no requirement that the harm-causing act have been beneficial in some way to the consenting party. The only restriction imposed by section 87 is that the doer must not have intended or known that death or grievous hurt would be caused.

The other main provision, section 88, differs materially from section 87 in several important respects. First, section 88 applies so long as the consenting party is twelve years of

age or above,[82] whereas section 87 imposes the eighteen-year age restriction. Additionally, the doer under section 88 can intentionally or knowingly cause harm short of death. The explanation for this wider scope of section 88 is due to yet another difference between them, which is that under section 88, the act causing the harm must have been done for the benefit of the consenting party. The Code does not define the meaning of the term *benefit* other than that it excludes "mere pecuniary benefit."[83] The individualistic libertarian premise of the defence lets the doer and consenting party decide whether the harm-causing act had been done for the consenting party's benefit. However, the doer of the harm-causing act must have "in good faith" (i.e., with "due care and attention") intended the consenting party to benefit from that act.

4. Superior Orders

The defence of superior orders is recognized under section 76 of the Code, the relevant part of which reads: "Nothing is an offence which is done by a person who is . . . bound by law to do it." One of the accompanying illustrations is of a soldier who, in conformity with the law, obeys the order of his superior officer to fire at a mob. The soldier commits no offence by virtue of this provision. For these types of cases, it is immaterial whether the defendant believed that the order was lawful.[84] Such a belief is relevant only where the superior's order was found to have been unlawful, in which event the case will attract the excusatory defence, to be described in section II.E.6 in this chapter, that the subordinate mistakenly believed as a matter of fact that he or she was bound by law to obey the order.

Civil legislation will generally dictate what orders can be lawfully issued by a superior officer. During states of emergency or a period of martial law, the duties and attendant extraordinary powers exercised by police or military personnel will have received the endorsement of the civil law. Accordingly, an order which is authorized by the emergency legislation or martial law will be lawful for the purposes of the defence of superior orders.

A member of the police or armed forces should refuse to obey an order which he or she knows would result in a breach of the criminal law, even if such refusal may render him or her subject to military discipline. The judicial explanation for this stance is that "military discipline, while it regulates the conduct of a soldier in military matters, is made subject to a higher law in favor of public safety, when the act which the military discipline attempts to enforce or to justify is one which affects the person or property of another."[85]

E. Excuses

1. Mistake/Ignorance of Law or Fact

The primary Code provision on mistake is section 79, which concerns a person who, under a mistake of fact, believes that he or she was justified by law in committing an offence. The expression *justified by law* requires only that the actor's conduct have been lawful, while the term *law* denotes the general municipal law of the land. Section 79 expressly declares that mistake of law is not a defence. It imposes a blanket rule preventing mistakes of law from operating as a defence to a criminal charge. The strictness of this exclusionary

subsequently been held not to express the correct law.[86] Mistake of law is, however, recognized as a mitigating factor in sentencing.[87]

The term *mistake* is not defined in the Code. It has been suggested that a mistake of fact consists of "an unconsciousness, ignorance, or forgetfulness of a fact, past or present, material to the transaction, or in the belief of the present existence of a thing material to the transaction, which does not exist, or in the past existence of a thing which has not existed."[88] Section 79 requires that the defendant's mistake pertain to a factual matter, as opposed to a legal one. A mistake of mixed fact and law has been treated by the courts as a mistake of fact for the purposes of these provisions.[89]

Section 79 requires the defendant to have "in good faith" (i.e., with "due care and attention") believed himself or herself to be bound or justified by law in doing a criminal act. The element "in good faith" under section 79 relates to the defendant's perception of the factual circumstances rather than to his or her performance of the criminal act. Furthermore, that perception must have led the defendant to believe that he or she was justified by law in doing the thing complained of. Certainly a defendant's careful performance of conduct would often support his or her belief that he or she was justified by law in doing it. But the inquiry into "in good faith" under section 79 does not stop at the defendant's conduct but proceeds from there to consider his or her belief. Although the concept "in good faith" is appraised objectively, account will be taken of certain personal characteristics of the defendant, together with the particular circumstances he or she experienced.[90]

2. Insanity/Diminished Capacity

The defence of insanity or diminished capacity, known as "unsoundness of mind," is contained in section 84 of the Code. It has been modeled after the principal rule pronounced in *M'Naghten's Case*,[91] the leading English common law authority on the defence of insanity. The Code does not define the term *unsoundness of mind* contained in section 84, and the courts have not elaborated upon it. The suggestion has been made that the term is wider than "disease of the mind" under the M'Naghten rules. Although *unsoundness of mind* is a legal term with a clinical component, it is finally the responsibility of the court to determine its application in any particular case.

A person is not exempt from criminal liability simply because he or she was of unsound mind at the time of the alleged offence. It must be shown that the unsoundness of mind was of a kind and severity which rendered the defendant "incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law."

The meaning of "nature of an act" is not elaborated in section 84. The courts have interpreted the expression as signifying the mental impairment of either the surface features of the act (such as cutting a person's throat believing it to be a loaf of bread) or the harmful consequences to the victim (such as causing his or her death). Under this interpretation, a defendant who was capable of knowing the surface features of his or her act but was too mentally disordered to be capable of knowing the harmful consequences of that act would be covered by the section 84 defence.

It has been held that the word *wrong* appearing in the phrase "either wrong or contrary to law" in section 84 refers to moral wrongness as opposed to legal wrongness (i.e., contrary to

law).[92] The defence will apply where the defendant knew that his or her act was contrary to law but thought that it was morally right to do the act, and vice versa.[93]

3. Intoxication

The defence of intoxication is very narrowly circumscribed under section 85 of the Code. For the defence to succeed, the intoxication must have been involuntary; the relevant words of the provision state that "the thing which intoxicated him was administered to him without his knowledge or against his will." The defence is therefore limited to cases where the defendant was mistaken about the nature of the drink or drugs, or else the defendant's drink or medication was spiked or had been forced on him or her.

Even if this was the case, the defendant must go on to prove that his or her intoxicated condition was so severe as to have incapacitated his or her cognitive faculties in the same way and degree as that required for the defence of unsoundness of mind (i.e., insanity). The relevant part of section 85 states that "[n]othing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law." Since the form of incapacity is the same for both the defences of intoxication and unsoundness of mind, what distinguishes them is the cause of the incapacity. In respect of intoxication, it is drink or drugs, whose effect is transient by nature, compared with the cause of unsoundness of mind, which is of a longer-lasting nature.

Section 86 of the Code provides that in cases of voluntary intoxication, the same liability may be imposed on the defendant as could be imposed on a sober person who may have the knowledge to foresee the consequences of his or her conduct. With regard to crimes whose *mens rea* consists of an intention by the defendant to achieve the consequences of his or her conduct, voluntary intoxication could be a defence if the degree of intoxication was so severe as to negate that intention.[94]

4. Duress

The Code provides for the defence of duress under section 94, but murder and offences against the state punishable by death are excluded from its scope of operation. Section 94 unequivocally specifies that nothing short of a threat of instant death to the defendant will suffice. Thus the defence will be unavailable in cases where the threat was of some lesser harm, was not immediate, or was directed at a third party.

Another requirement of the defence is that the threat must have "reasonably cause[d] the apprehension" of instant death, so that it is not simply the defendant's belief but what he or she reasonably believed to be the nature of the threat. There is also a proviso in section 94 which requires that the defendant "did not of his own accord . . . place himself in the situation by which he became the subject" of the threat. The example given in the Code is that of a person who voluntarily joins a gang of robbers with knowledge of their character. He is not entitled to the benefit of the defence should he subsequently be compelled by his associates to do anything which is an offence. The wording of the proviso is also capable of being interpreted so as to require the defendant to have taken a reasonable opportunity to

5. *Entrapment*

The Code does not have a provision recognizing entrapment as a defence, and the courts have refused to do so, treating the issue as an evidentiary matter. The courts have drawn a distinction between so-called legitimate and illegitimate traps. The former consists of cases where the offence was going to be committed in any event, and the trap was laid in order for the offence to be detected. The latter involves cases where there was no thought of committing an offence, and a temptation was offered to see if an offence would be committed in succumbing to it.

In respect of a legitimate trap, the law-enforcement officer taking part in the trap and witnesses to the trap are not accomplices in any sense, and their evidence will not require corroboration, although prudence will require that the evidence be carefully scrutinized and accepted as true before a conviction can be secured.[95] With regard to an illegitimate trap, the evidence obtained will be admissible only if it is corroborated. Furthermore, the persons participating in the trap will be guilty of an offence unless such entrapment was authorized by the legislature.[96]

6. *Superior Orders*

The Code recognizes that there may be instances where a subordinate mistakenly believed that he or she was bound by law to obey an order which turned out to be unlawful. This recognition is afforded by section 76, the relevant part of which states that "[n]othing is an offence which is done by a person . . . who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be bound by law to do it." Where the subordinate knew that the order was unlawful, he or she is prevented from pleading section 76.

This defence comes into play only where the subordinate did not know that the order was unlawful. It is crucial to determine just what the subordinate did not know concerning the legality of the order. If the subordinate thought that the superior officer had legal authority to make the order when he or she did not, this is a mistake of law and therefore falls outside the operation of section 76. It is only where the subordinate mistakenly believed that the factual circumstances warranted giving the order and that he or she was therefore bound to obey it that the defence under section 76 is applicable. The defendant will be acquitted of any offence if he or she had "in good faith" (i.e., with "due care and attention") believed that the circumstances were such as to make the order lawful.[97] Although some judgments have described unlawful orders attracting section 76 as being "manifestly unlawful,"[98] this concept should not be regarded separately from the wording and tenor of section 76 with its focus on the reasonableness of the subordinate's mistake concerning the lawfulness of the order.

F. Sanctions

1. *Punishment*

As noted in section II.A, the strong utilitarian underpinnings of the Code gave no room for the theory of rehabilitation. In recent times there has been a move to humanize punishment by considering not only the criminal conduct but the offender as a person. Some

results of this shift are the abolition of whipping as a type of punishment on account of its brutality, and the introduction of probation as an alternative to imprisonment.

There are five types of punishment available: the death penalty, life imprisonment, imprisonment, forfeiture, and fine. The death penalty is discussed in section II.F.3. Life imprisonment means rigorous (as opposed to simple) imprisonment for the remainder of an offender's life. Although the executive is empowered to commute the sentence, an embargo is imposed on the lifer to serve at least fourteen years of imprisonment.[99] There are two kinds of imprisonment, rigorous and simple. An offender sentenced to rigorous imprisonment is required to perform hard labor, such as digging earth and grinding corn, whereas one who is undergoing simple imprisonment does not have to do any kind of work. A court which imposes a sentence of imprisonment is required to state its reasons for not extending the benefit of probation to the offender.[100]

The punishment of forfeiture used to be available for quite a number of offences but is now confined to three offences in which the offender has to give up specific property. They are depredations on the territories of any power in alliance or at peace with the government of India (s. 126), knowingly receiving property taken by war or depredations under section 126 (s. 127), and a public servant unlawfully buying property which the public servant by virtue of his or her office is prohibited from buying (s. 169). Fines are forfeitures of a sum of money by way of penalty. They may be imposed as the sole punishment, as an alternative punishment, or as an additional punishment.

2. Quantity/Quality of Punishment

The sentencing decision is generally left entirely to the discretion of the judge. In deciding the appropriate punishment, the judge will consider the nature and magnitude of the offence, as well as the need for the penalty to be proportionate to the offence.[101]

Judges are empowered to impose concurrent or consecutive sentences and are inclined to have sentences run concurrently where the ends of justice are met. There are also statutory provisions which limit the amount of punishment. For example, section 71 of the Code protects an offender against multiplicity of punishment by providing that where he or she intended to commit an offence the commission of which involved perpetration of acts which are themselves punishable, the offender shall not be punished for them separately.

Except for a few offences, only the maximum punishments are prescribed for offences; the rationale is that the imposition of minimum punishments unduly restrains the sentencing judge from tailoring the penalty to fit the offender. The practice of the courts has been to impose the maximum punishment, whether of imprisonment or a fine, only in extreme cases.

The Code does not distinguish between positive activity and an omission in specifying the penalty to be imposed on an offender. Persons convicted of abetment are liable for the same penalty as that prescribed for the substantive offence.[102] Those convicted of attempt are generally liable for up to one-half the maximum term of imprisonment provided for the complete offence.[103]

Life imprisonment aside, the maximum term of imprisonment that a court may impose

four hours. The judge has discretion to impose either rigorous or simple imprisonment unless otherwise directed by the law. Some offences, such as armed robbery or attempting such robbery, attract a minimum term of imprisonment. The amount of a fine may be limited or unlimited, depending on the offence. Some provisions specify that the convict "shall be punished with imprisonment and shall also be liable to fine." This has been judicially interpreted to mean that a sentence of imprisonment must be imposed, but that the court has discretion whether to add a fine.[105]

3. Death Penalty

The death penalty may be imposed for a small number of offences—murder, robbery accompanied by murder, attempted murder by a person serving a life sentence if hurt is caused, waging war against the government of India, abetting mutiny actually committed, and giving false evidence upon which an innocent person suffers death.

The courts have upheld the constitutionality of the death penalty and have affirmed the view that hanging by the neck until death ensues is scientific and one of the least painful methods of execution.[106] Furthermore, they have striven to confine the imposition of the death penalty to the gravest cases of extreme culpability. In particular, the Supreme Court has declared that life imprisonment is the rule and the death penalty the exception and that any mitigating factors should be given their full weight.[107]

III. SPECIAL PART

A. Structure

The Code has chapters which classify offences according to the interests protected, namely, those of the state, the state apparatus, the public, the person, and property. Offences against the state aim to prevent the state's legal authority from being undermined. They include treasonable offences and seditious conduct causing hatred, contempt, or disaffection toward the state. Offences against the state apparatus protect the processes of justice and prohibit the corruption of public servants. Examples are obstructing public servants in the discharge of their duties, fabricating false evidence, and bribing a public servant. The use of criminal sanctions to protect the state and the state apparatus seeks to preserve the security of the social order.

Offences against the public seek to maintain public tranquility, public health, and public morals. Examples are unlawful assembly, rioting, affray, promoting disharmony between racial or religious groups, selling adulterated food, spreading infectious diseases, and the sale, publication, or distribution of obscene materials with a view to corrupting the morals of susceptible persons.

Offences against the person and property aim to protect the human body and the proprietary interests of individuals. Examples of offences against the person are culpable homicide, causing hurt, rape, criminal force, endangering human life or personal safety, and wrongful confinement. Offences against property include theft, cheating, criminal breach of trust, extortion, robbery, criminal trespass, housebreaking, and receiving stolen property.

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B. Homicide

1. Murder/Manslaughter

The Code uses the term *culpable homicide* to describe killings involving a very high degree of culpability. There are two types of culpable homicide: murder and culpable homicide not amounting to murder. The Code commences with a definition of culpable homicide (s. 299), which is followed by a definition of murder (s. 300). Under this structure, culpable homicide not amounting to murder is what is left of section 299 which does not overlap with murder. The various types of *mens rea* for murder and culpable homicide not amounting to murder can be categorized as intention-based and knowledge-based. These types of *mens rea* fit into a structure where the degrees of fault are carefully graded in comparison with one another.

In relation to intention-based *mens rea*, the Code structure places at the apex the paradigm mental element of murder, that of an intention to cause death (s. 300(1)). Below this is an intention to cause such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused (s. 300(2)). This comes very close to the paradigm mental element for murder, given that the offender intended the bodily harm knowing that it was likely to cause death. Consequently, he or she deserves to be convicted of murder. Next in order of degree of culpability is an intention to cause bodily injury to any person, where the injury intended is sufficient in the ordinary course of nature to cause death (s. 300(3)). This is a hybrid subjective/objective form of *mens rea*, with the offender intending to cause the bodily injury which is objectively appraised to "most probably"[108] cause death. Therefore, it is not as culpable as the offence in section 300(2) but nevertheless comes close to it and therefore warrants liability for murder. Where an offender intends to cause bodily injury which is objectively appraised to be "likely" (that is, "probably" as opposed to "most probably") to cause death, he or she is regarded as not displaying the *mens rea* required for murder but for culpable homicide not amounting to murder (s. 299(2)).

With regard to knowledge-based *mens rea*, an offender who does an act knowing that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death and who lacks any excuse for incurring the risk is regarded by the Code as displaying the fault for murder (s. 300(4)). Although knowledge is generally not in the same league as intention, knowledge of the virtual certainty[109] of causing death or bodily injury likely to cause death is comparable in degree of culpability with the forms of intentional murder under section 300(3). Where an offender does an act knowing that it is "likely" (i.e., "probable" as opposed to virtually certain) to cause death, this lesser degree of knowledge compared with section 300(4) warrants him or her being convicted of culpable homicide not amounting to murder (s. 299(3)). Where an offender has done an act knowing that it could possibly (as opposed to "be likely to/probably") cause death, he or she has not displayed the *mens rea* required for culpable homicide under the Code. Consequently, such an offender is guilty of the much less serious crime of

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ous offence of causing death by a negligent act under section 304A of the Code.[110] The *mens rea* for this offence consists of a gross departure from the standard of care expected of a reasonable person.[111]

A defendant charged with murder may seek to have his or her offence reduced to culpable homicide not amounting to murder by relying on one of the "special exceptions" (i.e., partial defences) to section 300. These exceptions are provocation,[112] exceeding the exercise of self-defence,[113] exceeding the exercise of legal powers,[114] sudden fight,[115] and consent.[116] Provocation is dealt with in section III.B.2 in this chapter. Exceeding self-defence is made out in two situations. The first is where the defendant honestly, albeit mistakenly and unreasonably, apprehended that the nature of the attack was of a type[117] against which the Code permitted the use of fatal force. The second situation is where the defendant honestly believed that the fatal force used was necessary when it was not. The Code is also prepared to partially excuse public servants who had exceeded their powers by using fatal force in circumstances which did not warrant their doing so. They would be liable for culpable homicide not amounting to murder if they believed in good faith that their act was lawful and necessary for the due discharge of their duty as a public servant, and without ill will toward the victim.

The partial defence to murder of sudden fight requires that the defendant have killed his or her victim in a sudden fight in the heat of passion upon a sudden quarrel, without premeditation and without the defendant having taken undue advantage or acted in a cruel or unusual manner. With respect to consent, it was noted in section II.D.3 in this chapter that sections 87 and 88 of the Code expressly exclude cases where the doer intended his or her act to cause death to the consenting party or else knew that it was likely to cause death.[118] Exception 5 to section 300 of the Code provides that in such a case the defendant is liable only for culpable homicide not amounting to murder if the victim was above the age of eighteen years and had consented to suffer death or take the risk of death. This defence has been successfully pleaded by survivors of suicide pacts and in cases of mercy killings.

2. Provocation

Provocation is covered in exception 1 to section 300 of the Code and, if successfully pleaded, reduces the offence of murder to culpable homicide not amounting to murder. For the defence to succeed, the offender must have been deprived of his or her power of self-control as a result of grave and sudden provocation offered by the deceased, which caused the offender to kill the deceased. The provocation can constitute conduct or words, and there is case authority which recognizes hearsay provocation provided the defendant had reasonable grounds to believe that the provocation had actually occurred.[119] Furthermore, the provocation need not have been directed at the defendant but could have been aimed at someone else.[120]

Although the exception does not specify an objective test, the courts have read one into the exception by requiring that for the defence to succeed, "a reasonable man, belonging to the same class of society to which the defendant belongs, and placed in the situation in which the defendant was placed, would be so provoked as to lose his self-control."[121] On this basis, there have been cases which have held that a defendant's ethnic background can

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be taken into account when applying the objective test, both in relation to its effect on the gravity of the provocation and with regard to the power of self-control expected of the reasonable person.[122]

A proviso accompanying the exception disallows the defence where the provocation was "sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person." A second proviso renders the defence unavailable where the provocation consisted of conduct performed by a public servant in the lawful exercise of his or her powers, and a third does the same in respect of conduct involving the lawful exercise of the right of self-defence.

C. Sex Offences

The Code recognizes several sex offences, which can be categorized into those based on the victim's lack of consent and those where conduct is criminal irrespective of consent. The major offences under the first category are rape and assault with intent to outrage modesty. Those in the second category include carnal intercourse against the order of nature, incest, and sexual conduct involving children.

Rape occurs when a man penetrates a woman's vagina with his penis without her consent.[123] The offence is therefore gender specific and excludes penetration of other bodily orifices by the penis, as well as penetration of the vagina by another object. The Code does not define the term *consent* but assumes that its meaning is clear and then refers to circumstances when consent is vitiated.[124] The provision on rape supplements these circumstances by stipulating that the victim has not consented when the defendant has put her in fear of bodily injury, and also when the defendant knew that the victim had mistakenly believed him to be her husband.[125] The prosecution does not need to prove that the defendant knew that the victim was not consenting to sexual intercourse with him. Rather, it is for the defendant to contend that he lacked such knowledge by relying on the defence of mistake of fact provided for under the Code.[126] This requires the defendant to show that he had "in good faith" (i.e., with "due care and attention") believed that the victim had consented. Consequently, the defendant's belief must have been reasonable if it is to relieve him of liability. A husband can be convicted of raping his wife only if she was under fifteen years of age. The Code also makes it an offence for a husband to have sexual intercourse with his wife without her consent if she is living separately from him under a decree of separation.[127]

The offence of assaulting or using criminal force with intent to outrage the modesty of a woman can be committed by both men and women.[128] For the charge to be established, the prosecution must prove that the defendant used or threatened to use force on the victim without her consent, and that the defendant intended to outrage modesty or knew that his or her conduct was likely to outrage modesty. The Code does not define the meaning of the term *modesty*; the likely reason is that the concept can vary over time and depends on the context in which the conduct occurs. The Supreme Court has stated that "the quality of being modest in relation to women means 'womanly propriety of behavior,

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could contend that he or she lacked the *mens rea* of the offence because he or she honestly (albeit unreasonably) believed that the victim had consented.[130]

The offence of carnal intercourse against the order of nature is committed when the defendant penetrates a person's anus or mouth with his penis.[131] It follows that the offence can be committed only by a male, although the "victim" can be either a male or a female. All such acts are covered by the offence, including those which were consensual and performed in private. If the act was consensual, the "victim" can be charged with abetting the offence.

D. Theft and Fraud

Theft is defined in section 378 of the Code as follows: "Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking is said to commit theft." The physical element of the offence is that the defendant must have moved (however slightly) the victim's movable property, and it is unnecessary for the property to have been removed from the victim's possession. The explanations accompanying section 378 show that movement can occur indirectly, such as where the defendant has caused an animal to move so that the item of the alleged theft is also moved, or where the defendant has removed obstacles to the subject matter's movement.[132] The Code defines "movable property" as "corporeal property of every description, except land and things attached to the earth, or permanently fastened to anything which is attached to the earth."[133] It has been observed that the offence of theft protects possessory rather than ownership interests. Consequently, a person can be held criminally liable for stealing his or her own property, provided that it can be proved that he or she acted dishonestly.

The *mens rea* of theft is that the defendant must have intended to take the property dishonestly out of the victim's possession without his or her consent. The Code defines "dishonestly" in terms of a person "intending to cause wrongful gain or wrongful loss."[134] "Wrongful gain" is in turn defined as "gain by unlawful means of property to which the person gaining is not legally entitled," and "wrongful loss" constitutes "loss by unlawful means of property to which the person losing it is legally entitled."[135] In particular, the courts have held that the concept of wrongful loss is broad enough to cover short-term as well as longer-term deprivations. It is unnecessary to prove any actual loss or gain—what is material is that the defendant intended to cause wrongful loss or gain. Accordingly, other forms of *mens rea*, such as knowledge, rashness, or negligence, will not suffice.

There is some judicial uncertainty whether the issue of consent forms part of the *actus reus* or *mens rea* elements of theft.[136] However, if one takes into account the syntax and punctuation in section 378, it is clear that lack of consent forms part of the *mens rea*. Accordingly, the issue is not whether the victim consented to the taking but whether the defendant intended to take without consent.

Cases of fraud are dealt with under the offence of cheating, which is provided for under section 415 of the Code. For the *actus reus* of cheating to be made out, the prosecution must prove that the defendant deceived the victim and thereby induced him or her (1) to deliver property to any person; (2) to consent to another person retaining property; or (3)

to do or omit to do something which caused or was likely to cause damage or harm to that person in body, mind, reputation, or property. The *mens rea* for (1) and (2) is "fraudulently or "dishonestly," and for (3) it is "intentionally."

Unlike theft, cheating is not limited to movable property, nor is it an offence against possession or ownership; it relates simply to the delivery or retention of property. Deception and dishonesty are separate elements of the offence, so that it is incumbent on the prosecution to particularize the deception and not merely to allege dishonesty. An explanation accompanying section 415 states that a "dishonest concealment of facts" can constitute deception.

The meaning of "dishonestly" has been dealt with in the discussion of theft. "Fraudulently" is defined unhelpfully by the Code as follows: "A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise."[137] The courts have held that a person acts with intent to defraud if he or she intends that some person be deceived and that, through such deception, an advantage should accrue to him or her, or that injury, loss, or detriment should befall some other person.[138] Therefore, in contrast to dishonesty, fraudulence can exist even where there was no intention to cause any property gain or loss or a detriment that can be measured in financial terms. It appears to be sufficient that the defendant intended to cause some advantage or to imperil another person's interests in some way.

E. "Victimless" Crimes

Many of the common forms of victimless crimes are also found in India, such as the failure to wear seat belts in motor vehicles or crash helmets when riding motorcycles.[139] It is also an offence to engage in gambling other than the forms of gambling authorized by the state.[140] Another example is the use of prohibited drugs except for medical or scientific purposes.[141] Furthermore, homosexual intercourse between consenting adults is covered by the offence of "carnal intercourse against the order of nature" under the Code.[142] Although engaging in prostitution voluntarily is legal, it is an offence to solicit or loiter in or near public places.[143]

Other offences falling within the description of victimless crimes are those against public order and morals which, by their nature, may annoy or cause affront (as opposed to physical injury) to members of the public in general. One example is the offence of public nuisance, which is committed when a person "does any act which causes annoyance to the public,"[144] such as urinating in a public place. Another is the sale of obscene material, which is defined as "tend[ing] to deprave and corrupt persons who are likely to read, see or hear" the material.[145]

To these offences may be added specifically political offences recognized by the Code which are directed against the body politic, so that no individuals are injured as such. Examples are flag desecration, treason, abuse of political power which does not involve specific persons, and electoral fraud.

F. Offences Involving Cruelty to Wives and Dowry Deaths

The phenomenon of wives in northern Indian communities being killed by their husbands

the 1980s that legislation was enacted creating new offences and making their prosecution easier. Section 498A of the Code makes both physical and mental cruelty by husbands or their relatives for the purpose of obtaining the wife's dowry an offence punishable by three years' imprisonment and a fine. The offence has been designated as cognizable (arrestable without a warrant) and non-bailable to provide the wife immediate relief from such cruelty.

Additionally, section 304B of the Code creates the offence of "dowry death." It provides that where the death of a woman is caused by burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and this occurrence is preceded by cruelty or harassment by the husband or his relatives in connection with the demand for the dowry, the husband or his relatives shall be deemed to have caused the death. Accordingly, the normal rules of causation do not apply; it is sufficient that there was a connection between the death and the cruelty or harassment. The offence is punishable by imprisonment for not less than seven years but may extend to life imprisonment.

Section 498A of the Code and section 113A of the Evidence Act raise a rebuttable presumption that the husband or his relatives have abetted the suicide of his wife if she died within seven years of her marriage under suspicious circumstances.[146] This provision is attracted whenever there is evidence that the deceased woman had been subjected to cruelty by her husband or his relatives, who then have to prove their innocence.

Although these initiatives are commendable, they have been criticized for not going far enough to protect battered wives. In particular, they fail to protect wives who are subjected to beatings and cruelty by their husbands and relatives for reasons unconnected with the obtaining of dowries. For these types of cases, the usual Code offences of causing hurt or grievous hurt apply. A problem with these offences is that they are concerned only with bodily injury and not with mental harm. Also, because they are bailable offences, they enable the offender to be released immediately upon furnishing bail, which poses a grave risk to the wife's personal safety.

G. Voluntary Active Euthanasia and Physician-Assisted Suicide

Suicide is not an offence, but attempted suicide is under section 309 of the Code. The Law Commission of India in its *42nd Report, Penal Code* recommended the repeal of this offence on the ground that it was harsh and unjustifiable to punish a person who had already found life so unbearable.[147] The recommendation was accepted by the government but has yet to become law.[148] Abetting (or assisting) suicide is an offence under section 306 of the Code. So too is abetting attempted suicide by virtue of section 309 read with section 107 (the main provision on abetment) of the Code.

These various provisions criminalize both voluntary active euthanasia and assisted suicide performed by physicians on their patients. What role, if any, does the law give to the patient's consent in such cases? If voluntary active euthanasia and assisting suicide are regarded as acts of mercy killing, reference may be made to section 88 of the Code, which states in part that "nothing . . . is an offence by reason of any harm which it may cause, or be intended by the doer to cause . . . to any person for whose benefit it is done in good faith, and who has given consent . . . to suffer that harm."[149] However, this provision is unavailable to a person performing voluntary active euthanasia or assisting suicide because it expressly

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excludes cases where the accused "intended to cause death." In this regard, it has been observed that section 88 could be relied on by a physician who engages in the accepted medical practice of withdrawing treatment from a terminally ill patient to hasten the process of dying from a disease.[150] The physician does not intend to cause his or her patient's death as such, although he or she knows that the termination of treatment will cause the patient to die more quickly. The same may be said of a physician who administers strong doses of pain-relieving drugs to a patient knowing that a side effect of these drugs is to hasten the patient's death. In both cases the physician could invoke section 88 because he or she had withdrawn the treatment or administered the pain-relieving drugs in good faith for the benefit of the patient, because the patient (who had consented to the medical procedure) was relieved from suffering prolonged and severe pain. Insofar as cases of voluntary active euthanasia by physicians are concerned, consent of the patient is given some significance by reducing what would otherwise be the crime of murder to the lesser offence of culpable homicide not amounting to murder.[151]

There have been several challenges before the Supreme Court to the constitutional validity of the offence of abetting suicide under section 306 of the Code. The leading decision is the Supreme Court case *Gian Kaur v. State of Punjab*,[152] which involved an appeal by the appellants against their convictions for abetting the commission of suicide by one Kulwant Kaur on the basis that the offence under section 306 was unconstitutional. The court held unanimously that section 309 and, consequently, section 306 did not violate article 21 of the constitution, which embodies the fundamental right to "protection of life."[153] The appellants had argued that this right included both the positive and negative aspects so that the right to live includes the right not to live, that is, the right to die or to end one's life.[154] Accordingly, section 309 violated article 21 by criminalizing attempted suicide. The court rejected this argument by noting that "by no stretch of imagination can 'extinction of life' be read to be included in 'protection of life.'"[155]

On the basis of *Gian Kaur*, the constitutional validity of the offence of abetting suicide under section 306 can safely be put to rest. However, this does not in any way prevent the legislature from abolishing or qualifying that offence. Although the constitutional basis for the offence may be sound, it is the prerogative of Parliament to decide whether the offence should remain or be qualified in some way. The beginning of the twenty-first century has witnessed India's economy growing as never before, making an increasingly sizable portion of the society able both to afford and to demand medical treatment and services which will prolong life. It will be a matter of time before this social phenomenon spawns the debate, occurring elsewhere, concerning the prohibition of assisted suicide and voluntary active euthanasia conducted by physicians.

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NOTES

1. *Emperor v. Chhotalal Babar* (1912) ILR 36 Bom 524.
2. For example, the Indian Army Act 1950.
3. For example, the Indian Merchandise Marks Act 1889, s. 15.
4. *Satwant Singh v. State of Punjab* AIR 1960 SC 266.
5. *Rao Shiv Bahadur Singh v. State of Uttar Pradesh* 1953 SCR 1188.
6. The General Clauses Act 1897, s. 8(38), reads: "'Offence' shall mean any act or omission made punishable by any law for the time being in force."
7. Penal Code, s. 41.
8. Ibid., s. 42.
9. Ibid., s. 40.
10. Some of the major ones appear in the selected bibliography in this chapter.
11. *Ram Chander v. State of Haryana* 1981 SCC (Cri) 683.
12. *State v. Bhalchandra Waman Pethe* AIR 1966 Bom 122 at 126.
13. *Dulla v. State* AIR 1958 All 198 at 203.
14. Y. V. Chandra Chud, V. R. Manoher, and Avtar Singh, *Ratanlal and Dhirajlal's The Indian Penal Code*, 31st ed. (Nagpur: Wadha & Co., 2006), 236.
15. *Modiram v. State of Madhya Pradesh* AIR 1972 SC 2438 at 2439.
16. *Emperor v. Bhogilal Chimanal Nanavati* AIR 1931 Bom 409 at [5]. Likewise, s. 3 of the Code states that the word *act* denotes as well a series of acts.
17. *Emperor v. Bhogilal Chimanal Nanavati* AIR 1931 Bom 409.
18. *Emperor v. Kaliappa Goundan* AIR 1933 Madras 798; *Emperor v. Nebal Mahto* (1939) ILR Pat 485.
19. Ramesh Chandra Nigam, *Law of Crimes in India*, vol. 1, *Principles of Criminal Law*, (Bombay: Asia Publishing House, 1965), 43.
20. *D'Souza v. Pashupati Nath Sarkar* 1968 Cri LJ 405.

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21. *Jai Prakash v. State (Delhi Administration)* 1991 2 SCC 32 (Cri) at 42.
22. *Basdev v. State of Pepsu* AIR 1956 SC 488.
23. *In re. Nidarmati Nagabhushanam* (1872) 7 MHCR 119 at 120.
24. *Empress of India v. Idu Beg* (1881) 3 All 776 at 780.
25. Examples are s. 304 (causing death by negligent act); s. 284 (negligent conduct in respect to a poisonous substance); and s. 336 (negligently endangering human life or personal safety).
26. *Empress of India v. Idu Beg* (1881) 3 All 776 at 780.
27. *Bala Chandra v. State of Maharashtra* AIR 1968 SC 1319.
28. *Emperor v. Waryam Singh* 1927 Cri LJ 39.
29. Penal Code, s. 511.
30. For example, Penal Code, s. 307 (attempted murder); s. 308 (attempted culpable homicide not amounting to murder).
31. *Abhayanand Mishra v. State of Bihar* AIR 1961 SC 1698.
32. *State of Maharashtra v. Mohd Yakub* AIR 1980 SC 1111.
33. *Om Prakash v. State of Punjab* AIR 1961 SC 1712.
34. *Asgarali Pradhania v. Emperor* (1933) ILR 61 Cal 54.
35. Penal Code, s. 120A.
36. *Ajay Aggarwal v. Union of India* 1993 SCC (Cri) 961.
37. *Saleem-Ud-Din v. State* (1971) ILR 1 Delhi 432.
38. *Pradumna Shriniwas Auradkar v. State of Maharashtra* 1981 Cri LJ 1873.
39. *Yash Pal Mittal v. State of Punjab* AIR 1977 SC 2433.
40. *Emperor v. Shankaraya Gurushiddhayya Hiremath* AIR 1940 Bom 365.
41. Penal Code, explanation 2 to s. 108.
42. *Jamuna Singh v. State of Bihar* AIR 1967 SC 553.
43. Penal Code, explanation 4 to s. 108.
44. *Girjashankar v. State of Madhra Pradesh* 1989 Cri LJ 242.
45. *Harachan Chakrabarty v. Union of India* 1990 SCC (Cri) 280.
46. Penal Code, explanation 2 to s. 107.
47. *Harji v. State of Rajasthan* 1978 Raj LW 1.
48. *Mohd Jamal v. Emperor* AIR 1930 Sind 64.
49. Penal Code, explanation 3 to s. 108.
50. *Noor Mohammad Mohd Yusuf Momin v. State of Maharashtra* 1971 AIR SC 885. In *Jaikrishnadas Manohardas Desai v. State of Bombay* AIR 1960 SC 899 it was held that physical presence, though evidential of participation, was not invariably required.
51. *Bashir v. State* AIR 1953 All 668.
52. This first situation is subscribed to in several decisions of the Supreme Court, e.g., *Hardev Singh v. State of Punjab* AIR 1975 SC 179. However, there are lower-court case authorities which support the other two situations described in the text.
53. C. K. Thakker and M. C. Thakker, *Ratanlal and Dhirajlal's Law of Crimes*, 26th ed. (New Delhi: Bharat House, 2007), 143.
54. *State of Maharashtra v Syndicate Transport Co Ltd* AIR 1964 Bom 195.

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56. *Gopal Khaitan v. State* AIR 1969 Cal 132.
57. *Dharma Pratishtan v. B Mandal* (1988) 173 ITR 487, following the English case *Tesco Supermarkets v. Nattrass* [1972] AC 153.
58. *Girdharilal v. Lalchand* AIR 1970 Raj 145.
59. *Municipal Corporation of Delhi v. JB Bottling Company Private Limited* 1975 Cri LJ 1148.
60. For example, see *Rangawalla v. State of Maharashtra* AIR 1965 SC 1616.
61. *Yohanan v. State* AIR 1958 Ker 207 at 210, cited by several commentators.
62. For example, *Yohanan v. State* AIR 1958 Ker 207; *Nga Moe v. The King* AIR Rang 141; *Nandkumar Natha v. State* 1988 Cri LJ 1313.
63. Constituting ss. 76 to 106 of the Penal Code.
64. Penal Code, s. 6.
65. Ibid., s. 40.
66. *James Martin v. State of Kerala* (2004) 2 SCC 203.
67. This element is found in the explanation to s. 81.
68. Penal Code, s. 94. Duress is discussed in section II.E.4 in this chapter.
69. This requirement is found in illustration (a) of s. 81.
70. Penal Code, ss. 96–106. The term "self-defence" is used here to cover both defence of person and of property.
71. Ibid., s. 97.
72. Ibid., s. 98.
73. Ibid., s. 99(3).
74. Ibid., s. 100.
75. Ibid., s. 103.
76. Ibid., s. 102.
77. Ibid., s. 99(4).
78. *Jai Dev v. State of Punjab* AIR 1963 SC 612 at 617.
79. *Govindan v. State* AIR 1960 Ker 258.
80. Penal Code, ss. 87–92.
81. *Dalip Singh v. State of Bihar* (2005) SCC 88.
82. By virtue of Penal Code, s. 90(d).
83. Penal Code, explanation to s. 92.
84. See *State of West Bengal v. Shew Mangal Singh* AIR 1981 SC 1917.
85. *Niamat Khan v. Empress* (1883) PR No. 17 of 1883 at 29.
86. *State v. Krishna Murari* 1955 Cr LJ 1025.
87. *State of Maharashtra v. Mayer Hans George* AIR 1965 SC 722.
88. Thakker and Thakker, *Ratanlal and Dhirajlal's Law of Crimes*, 276.
89. *State of Bombay v. Jaswantlal Manilal Akhaney* AIR 1956 SC 575.
90. *Chirangi v. State* AIR 1952 Nag 282.
91. (1843) 10 Cl. & Fin. 200.
92. *Shivraj Singh v. State* 1975 Cr LJ 1458.
93. *Ashiruddin Ahmed v. The King* AIR 1949 Cal 182.
94. *Basdev v. State of Pepsu* AIR 1956 SC 488.
95. *PP v. A Thomas* AIR 1959 Mad 166.

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96. *Ramjanam Singh v. State of Bihar* AIR 1956 SC 643.

97. The requirements of mistake of fact and good faith are the same as for the closely related defence under Penal Code, s. 79, discussed in section II.E.1 in this chapter, of mistake of fact that one was justified by law in doing an act.

98. For example, see *Queen Empress v. Subba Naik* (1898) 21 Mad 249 at 251.

99. Criminal Procedure Code 1973, s. 433A.

100. Probation of Offenders Act 1958, s. 361.

101. *Sham Sunder v. Puran* AIR 1991 SC 8.

102. Penal Code, s. 109.

103. Ibid., s. 511.

104. Criminal Procedure Code, s. 31(2)(a).

105. *Emperor v. Durg* AIR 1929 All 260.

106. *Deena v. Union of India* AIR 1983 SC 1155.

107. *Machhi Singh v. State of Punjab* AIR 1983 SC 957.

108. Paraphrasing the words "sufficient in the ordinary course of nature to cause death" appearing in Penal Code, s. 300(3).

109. Paraphrasing the words "so imminently dangerous that it must in all probability cause death" appearing in Penal Code, s. 300(4).

110. The maximum penalty is two years' imprisonment.

111. *State v. Lazarus AW* AIR 1953 All 72.

112. Penal Code, exception 1 to s. 300.

113. Ibid., exception 2 to s. 300.

114. Ibid., exception 3 to s. 300.

115. Ibid., exception 4 to s. 300.

116. Ibid., exception 5 to s. 300.

117. These are specified in Penal Code, ss. 100 and 103.

118. See the discussion under the subheading "Consent," section II.D.3 in this chapter.

119. *Gohra v. Emperor* (1890) PR No. 7 of 1890; *Chanan Khan v. Emperor* 1943 Cri LJ 595.

120. *Indreswar Kalita v. State* 1981 Cri LJ 1887.

121. *Nanavati v. State of Maharashtra* AIR 1962 SC 605 at 630.

122. *Jamu Majhi v. State* 1989 Cri LJ 753; *Atma Ram v. State* 1967 Cri LJ 1697.

123. Penal Code, s. 375.

124. Ibid., s. 90. See the discussion under the subheading "Consent," section II.D.3 in this chapter.

125. Penal Code, s 375, fourth limb.

126. Ibid., s. 79. See the discussion of this plea under the subheading "Mistake/ Ignorance of Law or Fact," section II.E 1 in this chapter.

127. Penal Code, s. 376A.

128. Ibid., s. 354. The offences of assault and criminal force are defined in ss. 351 and 350, respectively, of the Code.

129. *Rupan Deol Bajaj v. KPS Gill* AIR 1996 SC 309 at [14], quoting from the *Shorter English Dictionary*, 3d ed. (Oxford: Oxford University Press, 1944).

131. Penal Code, s. 377.
132. Ibid., explanations 3 and 4 to s. 378.
133. Ibid., s. 22.
134. Ibid., s. 24.
135. Ibid., s. 23.
136. For a case example favoring the former, see *KN Mehra v. State of Rajasthan* AIR 1957 SC 369; and for a case favoring the latter, see *Packeer Ally v. Svarimuttu* (1926) 2 CWR 216.
137. Penal Code, s. 25.
138. *Dr Vimla v. The Delhi Administration* AIR 1963 SC 1572.
139. Motor Vehicles Act 1988.
140. Public Gambling Act 1867.
141. Narcotic Drugs and Psychotropic Substances Act 1985.
142. Penal Code, s. 377.
143. Immoral Traffic (Prevention) Act 1956.
144. Penal Code, s. 268.
145. Ibid., s. 292.
146. Abetment of suicide is an offence under s. 306 of the Code.
147. Law Commission of India. *42nd Report, Penal Code* (New Delhi: Government of India, 1971), at [16.33].
148. The Law Commission of India has again recently recommended abolition; see *Report No. 210, Humanization and Decriminalization of Attempt to Suicide* (New Delhi: Government of India, 2008).
149. See further the discussion of this provision in the subheading "Consent," section II.D.3 in this chapter.
150. This is a form of passive euthanasia; see *Airedale National Health Authority Trust v. Bland* [1993] AC 789, referred to with approval by the Supreme Court of India in *Gian Kaur v. State of Punjab* AIR 1996 SC 1257 at [40].
151. Penal Code, Exception 4 to s. 300. See further the discussion of this partial defence to murder under the subheading "Murder/Manslaughter," section III.B.1 in this chapter.
152. AIR 1996 SC 1257.
153. Article 21 reads: "*Protection of life and personal liberty*: No person shall be deprived of his life or personal liberty except according to procedure established by law."
154. Relying on the judgment of the Supreme Court of India in *Rathinam* v. *Union of India* AIR 1994 SC 1844, which had held on this basis that s. 309 violated article 21 of the constitution.
155. *Gian Kaur v. State of Punjab* AIR 1996 SC 1257 at [22], thereby overruling *Rathinam* on this issue. See also *State of Maharashtra v. Maruti Shripati Dubal* AIR 1997 SC 411.

Libya: Protect Civilians in Sirte Fighting [1]

Ensure Humane Treatment of Prisoners

October 12, 2011

(New York) – Forces on both sides fighting in the Libyan city of Sirte should minimize harm to civilians and treat all prisoners humanely, Human Rights Watch said today. Fighters aligned with the National Transitional Council (NTC) have reached the center of the city, after attacking Sirte for more than three weeks.

NTC-aligned forces that capture pro-Gaddafi fighters and civilians suspected of actively supporting Gaddafi forces should promptly transfer their detainees to NTC facilities in Tripoli or Benghazi to minimize the danger of abuse from forces that were engaged in combat, Human Rights Watch said.

"Commanders on the ground in Sirte need to make sure that their forces protect civilians and allow them to flee the combat zone," said Fred Abrahams [2], special advisor at Human Rights Watch. "All prisoners should be treated humanely and transferred to the NTC authorities who can better ensure their safety."

The NTC political leadership has repeatedly called on fighters not to loot or commit revenge attacks, but forces on the ground do not always heed those calls, Human Rights Watch said.

Since mid-September 2011, various NTC-aligned forces have attacked Sirte, Muammar Gaddafi's hometown and one of two places still held by pro-Gaddafi forces. NATO warplanes have repeatedly attacked targets inside the city, in apparent coordination with allied forces on the ground.

NTC field commanders said on October 9 that they had seized Sirte's Ouagadougou conference center, Ibn Sina hospital, and Sirte University. But intense fighting continues in the city center.

Many of Sirte's pre-war population of roughly 100,000 have fled, but an unknown number of civilians remain in the city's center. According to the International Committee of the Red Cross [3], which evacuated 25 war-wounded and other patients from Ibn Sina Hospital on October 10 and 11, more than 20,000 people have left their homes so far, but "thousands" of civilians are still caught in the city. On October 11, hundreds of civilians fled the city during a lull in fighting, including residents and migrant workers, media reported.

All parties to the armed conflict in Libya are required to abide by the laws of war. People who commit serious laws-of-war violations deliberately or recklessly are subject to prosecution for war crimes, including by domestic courts or the International Criminal Court, which has jurisdiction for international crimes committed in Libya since February 15.

The laws of war require that all persons in custody be treated humanely, and be protected from torture or other ill-treatment. Looting and destruction of property not being used for military purposes is prohibited.

Human Rights Watch expressed particular concern that fighters and civilians from the town of Tawerga who are now in Sirte are especially vulnerable to abuse. The NTC-aligned forces attacking Sirte include people from Misrata, who allege that Tawerga residents were part of the Gaddafi forces who committed atrocities in Misrata. In early October, Human Rights Watch documented abuses, including torture, in and around Misrata by Misrata fighters against people from Tawerga.

Fighters from Misrata have also reportedly been looting private property in Abu Hadi, a suburb of Sirte. They have reportedly burned the homes of families suspected of supporting Gaddafi.

Between September 24 and October 8, 2011, Human Rights Watch interviewed 28 families who had recently fled Sirte. They described fierce fighting, a lack of electricity since late August, and dangerously low supplies of food and medicine.

Fleeing residents said that NTC-aligned forces had repeatedly shelled some residential neighborhoods over the past two weeks. The residents had mostly huddled in their homes for safety during the attacks and were unable to say where pro-Gaddafi forces were positioned at the time.

Three families said shells from NTC-aligned forces in the south and west had hit their homes. One family said its home was hit by a NATO airstrike. No civilian casualties resulted from these attacks, the families said. Without access to Sirte, Human Rights Watch could not verify the claims.

The laws of war require warring forces to attack only military targets. Attacks that do not discriminate between combatants and civilians, or that can be expected to cause harm to civilians disproportionate to the expected military gain, are unlawful. Forces must take all feasible steps to protect civilians under their control from attacks and avoid deploying in densely populated areas.

Two Sirte residents said they had seen Grad rockets strike the city from areas controlled by NTC-aligned fighters, but this could not be confirmed. News media outside Sirte have reported that Gaddafi forces also fired Grads from inside the city.

Grad rockets, with a range of 4 to 40 kilometers, have no guidance system and are inherently indiscriminate when fired into populated areas. When fired in groups, they have an impact over a wide area and can inflict extensive casualties in civilian-inhabited areas.

"Indiscriminate Grad rockets should not be fired into Sirte so long as civilians inhabit the city," Abrahams said.

While some families reported no problems leaving Sirte, others alleged that Gaddafi forces had tried to block their exit from the city by firing at them or above their vehicles. These families said they took circuitous routes to escape, sometimes through agricultural fields. Deliberate attacks on civilians are war crimes, Human Rights Watch said.

Several families said that NATO bombing had caused civilian casualties. One displaced resident said that around September 22 at 10 p.m., NATO struck the Imartameen building on Dubai Street, killing and wounding a large number of residents. At the time of the attack, about 10 pro-Gaddafi snipers were positioned on the roof, the resident said. The man said he was part of the crew who spent two days using heavy equipment to remove the bodies. Among the dead, he said, was Sadik Abuazoum, 43, a secondary school teacher, and Sadik's wife.

If snipers were deployed on the roof, that would have made the building a legitimate military target, Human Rights Watch said. It would raise concerns over whether pro-Gaddafi forces had taken all feasible steps to remove civilians from the building and whether NATO conducted an attack that caused disproportionate civilian harm.

Several fleeing residents said that NATO bombs had struck schools. One resident identified those schools as Ibn Khaldoun, Al-Merkezia, Al-Bayan al-Awal, and Al-Majed. He and the others knew of no civilian casualties in those attacks. It is not known whether Gaddafi forces were using the schools at the time, which would have made them military targets.

In addition to Sirte, pro-Gaddafi forces still hold the desert town of Bani Walid, about 120 kilometers southeast of Tripoli.

"The forces fighting the last Gaddafi areas should protect civilians caught in the fighting, and avoid looting and revenge," Abrahams said.

Source URL: http://www.hrw.org/news/2011/10/12/libya-protect-civilians-sirte-fighting

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Agenda item 4
Human rights situations that require the Council's attention

Report of the independent international commission of inquiry on the Syrian Arab Republic*

Summary

The situation of human rights in the Syrian Arab Republic has deteriorated significantly since 15 February 2012. Armed violence increased in intensity and spread to new areas. Active hostilities raged between Government forces (and the *Shabbiha*) and anti-Government armed groups. Sporadic clashes between the armed actors evolved into continuous combat, involving more brutal tactics and new military capabilities on both sides. The level of armed violence varied throughout the country.

During the reporting period, the commission of inquiry determined that the intensity and duration of the conflict, combined with the increased organizational capabilities of anti-Government armed groups, had met the legal threshold for a non-international armed conflict. The commission therefore applied both international humanitarian law and international human rights law in its assessment of the actions of the parties to the hostilities.

The commission found reasonable grounds to believe that Government forces and the *Shabbiha* had committed the crimes against humanity of murder and of torture, war crimes and gross violations of international human rights law and international humanitarian law, including unlawful killing, torture, arbitrary arrest and detention, sexual violence, indiscriminate attack, pillaging and destruction of property. The commission found that Government forces and *Shabbiha* members were responsible for the killings in Al-Houla.

The commission confirms its previous finding that violations were committed pursuant to State policy. Large-scale operations conducted in different governorates, their similar modus operandi, their complexity and integrated military-security apparatus indicate the involvement at the highest levels of the armed and security forces and the Government. The *Shabbiha* were identified as perpetrators of many of the crimes described in the present report. Although the nature, composition and hierarchy of the *Shabbiha*

* The annexes to the present report are reproduced as received, in the language of submission only.

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remains unclear, credible information led to the conclusion that they acted in concert with Government forces.

The commission found reasonable grounds to believe that war crimes, including murder, extrajudicial execution and torture, had been perpetrated by organized anti-Government armed groups. Although not a party to the Geneva Conventions, these groups must abide by the principles of international humanitarian law. The violations and abuses committed by anti-Government armed groups did not reach the gravity, frequency and scale of those committed by Government forces and the *Shabbiha*.

Both groups violated the rights of children.

The commission is unaware of efforts meeting international standards made by either the Government or anti-Government armed groups to prevent or punish the crimes documented in the present report.

The lack of access significantly hampered the commission's ability to fulfil its mandate. Its access to Government officials and to members of the armed and security forces was negligible. Importantly, victims and witnesses inside the country could not be interviewed in person.

A confidential list of individuals and units believed to be responsible for crimes against humanity, breaches of international humanitarian law and gross human rights violations will be submitted to the United Nations High Commissioner for Human Rights at the close of the commission's current mandate, in September 2012.

The commission reiterates that the best solution is a negotiated settlement involving an inclusive and meaningful dialogue among all parties, leading to a political transition that reflects the legitimate aspirations of all segments of Syrian society, including ethnic and religious minorities.

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United Nations S/2012/348/Add.1

Security Council

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27 June 2012

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Letter dated 26 June 2012 from the Chair of the Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council

In connection with my letter dated 21 June 2012 addressed to you, by which I submitted the interim report of the Group of Experts on the Democratic Republic of the Congo and requested its issuance as a document of the Council (S/2012/348), I have the honour to submit herewith the addendum to the Group's interim report (see annex).

(*Signed*) Agshin **Mehdiyev**
Chair

12-39339 (E) 020712

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Annex

Addendum to the interim report of the Group of Experts on the Democratic Republic of the Congo (S/2012/348) concerning violations of the arms embargo and sanctions regime by the Government of Rwanda

I. Introduction

1. Pursuant to its oral briefing to the Sanctions Committee on 13 June 2012 and in fulfilment of its commitment to provide timely information on arms embargo and sanctions violations to the Committee, the Group of Experts on the Democratic Republic of the Congo submits the present addendum to its interim report (S/2012/348).[1]

2. Since the outset of its current mandate, the Group has gathered evidence of arms embargo and sanctions regime violations committed by the Rwandan Government. These violations consist of the provision of material and financial support to armed groups operating in the eastern Democratic Republic of the Congo, including the recently established M23, in contravention of paragraph 1 of Security Council resolution 1807 (2008).[2] The arms embargo and sanctions regimes violations include the following:

- Direct assistance in the creation of M23 through the transport of weapons and soldiers through Rwandan territory
- Recruitment of Rwandan youth and demobilized ex-combatants as well as Congolese refugees for M23
- Provision of weapons and ammunition to M23
- Mobilization and lobbying of Congolese political and financial leaders for the benefit of M23
- Direct Rwandan Defence Forces (RDF) interventions into Congolese territory to reinforce M23
- Support to several other armed groups as well as Forces armées de la République démocratique du Congo (FARDC) mutinies in the eastern Congo
- Violation of the assets freeze and travel ban through supporting sanctioned individuals.[3]

[1] The Group submitted its interim report to the Sanctions Committee on 18 May 2012, which in turn transmitted it to the Security Council on 21 June 2012.

[2] In paragraph 1 of its resolution 1807 (2008) the Security Council decided that "all States shall take the necessary measures to prevent the direct or indirect supply, sale or transfer, from their territories or by their nationals, or using their flag vessels or aircraft, of arms and any related materiel, and the provision of any assistance, advice or training related to military activities, including financing and financial assistance, to all non-governmental entities and individuals operating in the territory of the Democratic Republic of the Congo;".

[3] See official list of designated individuals and entities for Sanctions Committee 1533 (2004) available from www.un.org/sc/committees/1533/pdf/1533_list.pdf.

3. Over the course of its investigation since late 2011, the Group has found substantial evidence attesting to support from Rwandan officials to armed groups operating in the eastern Democratic Republic of the Congo. Initially the RDF appeared to establish these alliances to facilitate a wave of targeted assassinations against key officers of the Forces démocratique pour la libération du Rwanda (FDLR) thus significantly weakening the rebel movement (see S/2012/348, paras. 37 and 38). However, these activities quickly extended to support for a series of post-electoral mutinies within the FARDC and eventually included the direct facilitation, through the use of Rwandan territory, of the creation of the M23 rebellion. The latter is comprised of ex-CNDP officers integrated into the Congolese army (FARDC) in January 2009. Since M23 established itself in strategic positions along the Rwandan border in May 2012, the Group has gathered overwhelming evidence demonstrating that senior RDF officers, in their official capacities, have been backstopping the rebels through providing weapons, military supplies, and new recruits.

4. In turn, M23 continues to solidify alliances with many other armed groups and mutineer movements, including those previously benefiting from RDF support. This has created enormous security challenges, extending from Ituri district in the north to Fizi territory in the south, for the already overstretched Congolese army (FARDC). Through such arms embargo violations, Rwandan officials have also been in contravention of the sanctions regime's travel ban and assets freeze measures, by including three designated individuals among their direct allies.

5. In an attempt to solve the crisis which this Rwandan support to armed groups had exacerbated, the Governments of the Democratic Republic of the Congo and Rwanda have held a series of high-level bilateral meetings since early in April 2012. During these discussions, Rwandan officials have insisted on impunity for their armed group and mutineer allies, including ex-CNDP General Bosco Ntaganda, and the deployment of additional RDF units to the Kivus to conduct large-scale joint operations against the FDLR. The latter request has been repeatedly made despite the fact that: (a) the RDF halted its unilateral initiatives to weaken the FDLR in late-February;[4] (b) RDF Special Forces have already been deployed officially in Rutshuru territory for over a year; (c) RDF operational units are periodically reinforcing the M23 on the battlefield against the Congolese army; (d) M23 is directly and indirectly allied with several FDLR splinter groups; and (e) the RDF is remobilizing previously repatriated FDLR to boost the ranks of M23.

Elevated standards of evidence

6. In the light of the serious nature of these findings, the Group has adopted elevated methodological standards. Since early in April 2012, the Group has interviewed over 80 deserters of FARDC mutinies and Congolese armed groups, including from M23. Among the latter, the Group has interviewed 31 Rwandan nationals. Furthermore, the Group has also photographed weapons and military equipment found in arms caches and on the battlefield, and has obtained official documents and intercepts of radio communications. The Group has also consulted dozens of senior Congolese military commanders and intelligence officials as well as political and community leaders with intricate knowledge of developments between the Democratic Republic of the Congo and Rwanda. Moreover, the Group

[4] The last FDLR officer to be assassinated was Captain Theophile, the S3 of the Military Police Battalion, in late-February 2012.

has communicated regularly with several active participants of the ex-CNDP mutiny, the M23 rebellion, and other armed groups. Finally, while the Group's standard methodology requires a minimum of three sources, assessed to be credible and independent of one another, it has raised this to five sources when naming specific individuals involved in these cases of arms embargo and sanctions regime violations.

II. Rwandan support to M23

7. Since the earliest stages of its inception, the Group documented a systematic pattern of military and political support provided to the M23 rebellion by Rwandan authorities. Upon taking control over the strategic position of Runyoni, along the Rwandan border with the Democratic Republic of the Congo, M23 officers opened two supply routes going from Runyoni to Kinigi or Njerima in Rwanda, which RDF officers used to deliver such support as troops, recruits and weapons. The Group also found evidence that Rwandan officials mobilized ex-CNDP cadres and officers, North Kivu politicians, business leaders and youth in support of M23.

A. Direct assistance in the creation of M23 through Rwandan territory

8. Colonel Sultani Makenga deserted the FARDC in order to create the M23 rebellion using Rwandan territory and benefiting directly from RDF facilitation (see S/2012/348, para. 104). On 4 May, Makenga crossed the border from Goma into Gisenyi, Rwanda, and waited for his soldiers to join him from Goma and Bukavu. Intelligence sources, M23 collaborators and local politicians confirmed for the Group that RDF Western Division commander, General Emmanuel Ruvusha, welcomed Makenga upon his arrival to Gisenyi. The same sources indicated that Ruvusha subsequently held a series of coordination meetings with other RDF officers in Gisenyi and Ruhengeri over the following days with Makenga.

9. According to ex-CNDP and FARDC officers, also on 4 May, Col. Kazarama, Col. Munyakazi and Col. Masozera, and an estimated 30 of Makenga's loyal troops departed from Goma crossing into Rwanda through fields close to the Kanyamuyagha border. Several FARDC officers, civilian border officials, and intelligence officers stationed at Kanyamuyagha confirmed that they saw clear boot tracks of Makenga's troops crossing the border into Rwanda only a few metres away from an RDF position on the Rwandan side. These same sources also recovered several FARDC uniforms discarded by the deserters at that location the same night.

10. A second group of Makenga's loyal troops deserted the FARDC ranks in Bukavu, also via Rwanda. Three former M23 combatants who took part in the operation told the Group that ahead of his desertion, Makenga had gathered about 60 troops under the command of Maj. Imani Nzenze, his secretary, as well as Col. Seraphin Mirindi and Col. Jimmy Nzamuyein at his residence by Lake Kivu in the Nguba neighbourhood of Bukavu (see image 1). At 2030 hours on 4 May, the two large motorized boats transported the 60 troops and several tons of ammunitions and weapons 200 metres across the lake to the Rwandan town of Cyangugu (see S/2012/348, para. 118). The same sources indicated that upon arrival to Rwanda, the boats were sent back once again to Makenga's residence to recover the remainder of the weapons and ammunition (see image 2). According to one of the M23

combatants who later deserted the movement, and Congolese intelligence services, the evacuated weapons included such heavy weapons as Katyusha rocket launchers, RPG 7, and 14.5 mm machine guns, some of which were brought from Makenga's weapons caches at Nyamunyoni (see S/2012/348, para. 118).

Image 1

Colonel Makenga's home and private dock on Lake Kivu in Bukavu

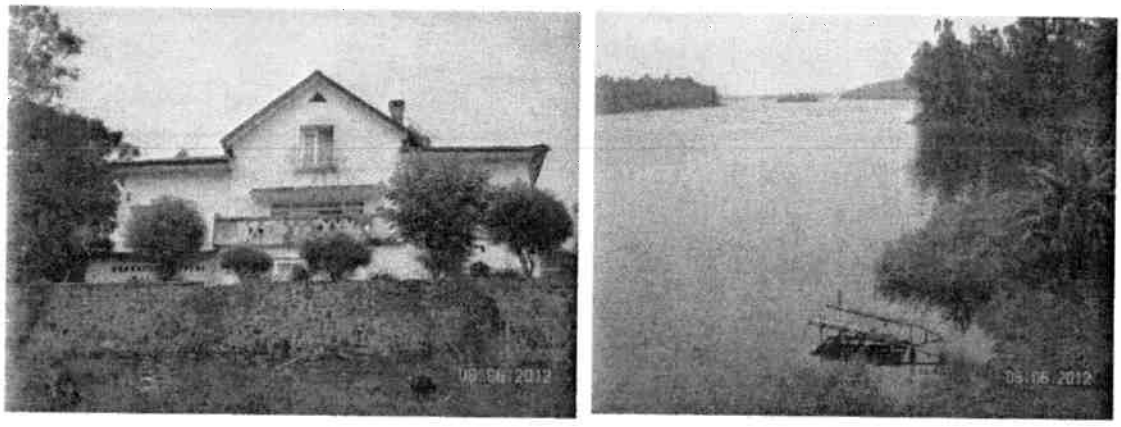
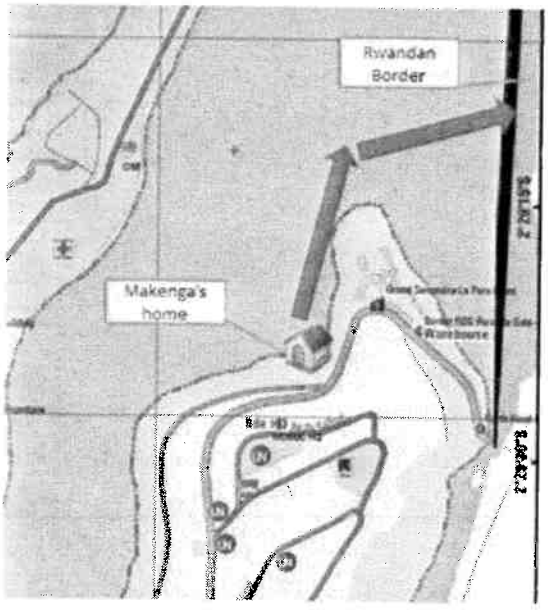


Image 2

Map of the transport of weapons and troops from Col. Makenga's home on 4 May 2012



11. The three former M23 combatants who participated in the operation also told the Group that upon arrival in Cyangugu, RDF and Rwandan police brought them to a military camp. The RDF subsequently provided them with full Rwandan army uniforms to be worn while travelling within Rwanda. The troops and the military

equipment were afterwards loaded onto three RDF trucks, and transported via the towns of Kamembe, Gikongoro, Butare, Ngororero, Nkamira and brought to the RDF position at Kabuhanga. This military position is situated on the Democratic Republic of the Congo-Rwanda border, near the village of Gasizi in Rwanda (roughly 27 km north of Goma). This ex-combatant testimony was corroborated by several sources interviewed by the Group, who all attested to the movement of troops from Rwanda into the DRC:

(a) Four local leaders interviewed separately in Kibumba personally witnessed Rwandan soldiers offloading equipment and soldiers from RDF trucks and jeeps at Gasizi on those same dates;

(b) Two Congolese border agents observed the RDF trucks which brought the troops and military equipment to Gasizi;

(c) A civilian intelligence officer reported that the troops had been brought to Gasizi in trucks;

(d) An FARDC internal intelligence report states that the troops were brought to join Makenga at Gasizi (see annex 1).

12. Several former M23 combatants also told the Group that General Ruvusha accompanied Makenga to meet with his troops in the RDF base at Kabuhanga (see image 3). RDF commanders ordered the Congolese soldiers to once again put on their FARDC uniforms and provided them with plastic sheets, food, soap and kitchen utensils. RDF officers also instructed the soldiers to remove any signs identifying Rwanda, such as labels on uniforms and water bottles.

Image 3
M23 travel through Rwanda facilitated by the RDF

13. That night, RDF officers ordered the FARDC deserters to offload and transport the weapons brought from Bukavu through the Virunga National Park, to Gasizi on the Democratic Republic of the Congo side,[5] between Karisimbi and Mikeno volcanoes. On 8 May, these soldiers joined up with the mutineers who came from Masisi territory to the assembly point at Gasizi. Military and police officers, as well as local authorities from Kibumba reported on the arrival of the mutineers from Masisi near the border, and the movement of Makenga's troops from Rwanda into the Democratic Republic of the Congo. A local authority gathered reports from Rwandan civilians who had been forced to carry the weapons from Gasizi, in Rwanda, to the Democratic Republic of the Congo border. After Ntaganda's and Makenga's groups merged, they advanced further through the park and took control of Runyoni on 10 May to officially launch military operations of the M23 rebellion (see S/2012/348, para. 104).[6]

B. RDF recruitment for M23

14. Once M23 established their positions near the Rwandan border at Runyoni,[7] the RDF began facilitating the arrival of new civilian recruits and demobilized former combatants of the FDLR to strengthen the ranks of the rebels.

Civilian new recruits

15. The Group interviewed 30 Rwandan nationals who had been recruited into M23 and managed to escape. Interviewed separately, each confirmed that they had been recruited in Rwanda. While some interacted with civilian "sensitizers", most stated that RDF officers directly participated in their recruitment process. M23 collaborators, ex-CNDP officers, politicians, ex-M23 combatants, and Congolese refugees in Rwanda, informed the Group that a wide network of mobilization had been established in the main Rwandan towns bordering the Democratic Republic of the Congo, as well as in refugee camps, targeting Rwandan nationals and Congolese refugees for recruitment. Recruitment focal points operating at Kinigi, Ruhengeri, Mudende, Gisenyi, Mukamira, and Bigogwe, are tasked with identifying and gathering young men for recruitment and handing them over to RDF soldiers. Two Congolese refugees, as well as a visitor of Nkamira refugee camp (situated 27 km from Gisenyi in Rwanda) told the Group that there had been a systematic campaign in the camp to encourage young men to join M23.

16. Former M23 combatants from Rwanda stated that the main transit point for recruitment is the RDF position at Kinigi, where recruits are regrouped and sent to the Democratic Republic of the Congo (see image 4). This pattern has also been independently confirmed by Congolese intelligence services and a former RDF officer. According to some of the recruits, they often receive a meal in Hotel Bishokoro, which belongs to General Bosco Ntaganda and his brother at Kinigi. Afterwards, RDF soldiers escort large groups of new recruits to the border and send them into the Democratic Republic of the Congo.

[5] The corresponding village along the border in the Democratic Republic of the Congo is also called Gasizi.

[6] CNDP issued an official communiqué announcing the creation of M23 on 6 May 2012, just after the desertion of Colonel Makenga.

[7] CNDP held a stronghold in Runyoni in 2008. See S/2008/773, para. 64 (b).

PENAL CODE
SECTION 2-24

1961

2. This Code takes effect at twelve o'clock, noon, on the first day of January, eighteen hundred and seventy-three.

3. No part of it is retroactive, unless expressly so declared.

4. The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice.

5. The provisions of this Code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments.

6. No act or omission, commenced after twelve o'clock noon of the day on which this Code takes effect as a law, is criminal or punishable, except as prescribed or authorized by this Code, or by some of the statutes which it specifies as continuing in force and as not affected by its provisions, or by some ordinance, municipal, county, or township regulation, passed or adopted, under such statutes and in force when this Code takes effect. Any act or omission commenced prior to that time may be inquired of, prosecuted, and punished in the same manner as if this Code had not been passed.

7. Words used in this code in the present tense include the future as well as the present; words used in the masculine gender include the feminine and neuter; the singular number includes the plural, and the plural the singular; the word "person" includes a corporation as well as a natural person; the word "county" includes "city and county"; writing includes printing and typewriting; oath includes affirmation or declaration; and every mode of oral statement, under oath or affirmation, is embraced by the term "testify," and every written one in the term "depose"; signature or subscription includes mark, when the person cannot write, his or her name being written near it, by a person who writes his or her own name as a witness; provided, that when a signature is made by mark it must, in order that the same may be acknowledged or serve as the signature to any sworn statement, be witnessed by two persons who must subscribe their own names as witnesses thereto.

The following words have in this code the signification attached to them in this section, unless otherwise apparent from the context:

1962

1. The word "willfully," when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.

2. The words "neglect," "negligence," "negligent," and "negligently" import a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns.

3. The word "corruptly" imports a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act or omission referred to, or to some other person.

4. The words "malice" and "maliciously" import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law.

5. The word "knowingly" imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission.

6. The word "bribe" signifies anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given, in his or her action, vote, or opinion, in any public or official capacity.

7. The word "vessel," when used with reference to shipping, includes ships of all kinds, steamboats, canalboats, barges, and every structure adapted to be navigated from place to place for the transportation of merchandise or persons, except that, as used in Sections 192.5 and 193.5, the word "vessel" means a vessel as defined in subdivision (c) of Section 651 of the Harbors and Navigation Code.

8. The words "peace officer" signify any one of the officers mentioned in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2.

9. The word "magistrate" signifies any one of the officers mentioned in Section 808.

10. The word "property" includes both real and personal property.

11. The words "real property" are coextensive with lands, tenements, and hereditaments.

12. The words "personal property" include money, goods, chattels, things in action, and evidences of debt.

13. The word "month" means a calendar month, unless otherwise expressed; the word "daytime" means the period between sunrise and sunset, and the word "nighttime" means the period between sunset and sunrise.

14. The word "will" includes codicil.

15. The word "writ" signifies an order or precept in writing, issued in the name of the people, or of a court or judicial officer, and the word "process" a writ or summons issued in the course of judicial proceedings.

16. Words and phrases must be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, must be construed according to such peculiar and appropriate meaning.

17. Words giving a joint authority to three or more public officers or other persons, are construed as giving such authority to a majority of them, unless it is otherwise expressed in the act giving the authority.

18. When the seal of a court or public officer is required by law to be affixed to any paper, the word "seal" includes an impression of

such seal upon the paper alone, or upon any substance attached to the paper capable of receiving a visible impression. The seal of a private person may be made in like manner, or by the scroll of a pen, or by writing the word "seal" against his or her name.

19. The word "state," when applied to the different parts of the United States, includes the District of Columbia and the territories, and the words "United States" may include the district and territories.

20. The word "section," whenever hereinafter employed, refers to a section of this code, unless some other code or statute is expressly mentioned.

21. To "book" signifies the recordation of an arrest in official police records, and the taking by the police of fingerprints and photographs of the person arrested, or any of these acts following an arrest.

7.5. Whenever any offense is described in this code, the Uniform Controlled Substances Act (Division 10 (commencing with Section 11000) of the Health and Safety Code), or the Welfare and Institutions Code, as criminal conduct and as a violation of a specified code section or a particular provision of a code section, in the case of any ambiguity or conflict in interpretation, the code section or particular provision of the code section shall take precedence over the descriptive language. The descriptive language shall be deemed as being offered only for ease of reference unless it is otherwise clearly apparent from the context that the descriptive language is intended to narrow the application of the referenced code section or particular provision of the code section.

8. Whenever, by any of the provisions of this Code, an intent to defraud is required in order to constitute any offense, it is sufficient if an intent appears to defraud any person, association, or body politic or corporate, whatever.

9. The omission to specify or affirm in this Code any liability to damages, penalty, forfeiture, or other remedy imposed by law and allowed to be recovered or enforced in any civil action or proceeding, for any act or omission declared punishable herein, does not affect any right to recover or enforce the same.

10. The omission to specify or affirm in this Code any ground of forfeiture of a public office, or other trust or special authority conferred by law, or any power conferred by law to impeach, remove, depose, or suspend any public officer or other person holding any trust, appointment, or other special authority conferred by law, does not affect such forfeiture or power, or any proceeding authorized by law to carry into effect such impeachment, removal, deposition, or suspension.

11. This code does not affect any power conferred by law upon any court-martial, or other military authority or officer, to impose or inflict punishment upon offenders; nor, except as provided in Section

19.2 of this code, any power conferred by law upon any public body, tribunal, or officer, to impose or inflict punishment for a contempt.

1964

12. The several sections of this Code which declare certain crimes to be punishable as therein mentioned, devolve a duty upon the Court authorized to pass sentence, to determine and impose the punishment prescribed.

13. Whenever in this Code the punishment for a crime is left undetermined between certain limits, the punishment to be inflicted in a particular case must be determined by the Court authorized to pass sentence, within such limits as may be prescribed by this Code.

14. The various sections of this Code which declare that evidence obtained upon the examination of a person as a witness cannot be received against him in any criminal proceeding, do not forbid such evidence being proved against such person upon any proceedings founded upon a charge of perjury committed in such examination.

15. A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments:

1. Death;
2. Imprisonment;
3. Fine;
4. Removal from office; or,
5. Disqualification to hold and enjoy any office of honor, trust, or profit in this State.

16. Crimes and public offenses include:

1. Felonies;
2. Misdemeanors; and
3. Infractions.

17. (a) A felony is a crime that is punishable with death, by imprisonment in the state prison, or notwithstanding any other provision of law, by imprisonment in a county jail under the provisions of subdivision (h) of Section 1170. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions.

(b) When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:

(1) After a judgment imposing a punishment other than imprisonment in the state prison or imprisonment in a county jail under the

provisions of subdivision (h) of Section 1170.

(2) When the court, upon committing the defendant to the Division of Juvenile Justice, designates the offense to be a misdemeanor.

(3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.

(4) When the prosecuting attorney files in a court having jurisdiction over misdemeanor offenses a complaint specifying that the offense is a misdemeanor, unless the defendant at the time of his or her arraignment or plea objects to the offense being made a misdemeanor, in which event the complaint shall be amended to charge the felony and the case shall proceed on the felony complaint.

(5) When, at or before the preliminary examination or prior to filing an order pursuant to Section 872, the magistrate determines that the offense is a misdemeanor, in which event the case shall proceed as if the defendant had been arraigned on a misdemeanor complaint.

(c) When a defendant is committed to the Division of Juvenile Justice for a crime punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail not exceeding one year, the offense shall, upon the discharge of the defendant from the Division of Juvenile Justice, thereafter be deemed a misdemeanor for all purposes.

(d) A violation of any code section listed in Section 19.8 is an infraction subject to the procedures described in Sections 19.6 and 19.7 when:

(1) The prosecutor files a complaint charging the offense as an infraction unless the defendant, at the time he or she is arraigned, after being informed of his or her rights, elects to have the case proceed as a misdemeanor, or;

(2) The court, with the consent of the defendant, determines that the offense is an infraction in which event the case shall proceed as if the defendant had been arraigned on an infraction complaint.

(e) Nothing in this section authorizes a judge to relieve a defendant of the duty to register as a sex offender pursuant to Section 290 if the defendant is charged with an offense for which registration as a sex offender is required pursuant to Section 290, and for which the trier of fact has found the defendant guilty.

17.5. (a) The Legislature finds and declares all of the following:

(1) The Legislature reaffirms its commitment to reducing recidivism among criminal offenders.

(2) Despite the dramatic increase in corrections spending over the past two decades, national reincarceration rates for people released from prison remain unchanged or have worsened. National data show that about 40 percent of released individuals are reincarcerated within three years. In California, the recidivism rate for persons who have served time in prison is even greater than the national average.

(3) Criminal justice policies that rely on building and operating more prisons to address community safety concerns are not sustainable, and will not result in improved public safety.

(4) California must reinvest its criminal justice resources to support community-based corrections programs and evidence-based practices that will achieve improved public safety returns on this state's substantial investment in its criminal justice system.

(5) Realigning low-level felony offenders who do not have prior convictions for serious, violent, or sex offenses to locally run community-based corrections programs, which are strengthened through community-based punishment, evidence-based practices, improved supervision strategies, and enhanced secured capacity, will improve public safety outcomes among adult felons and facilitate their reintegration back into society.

(6) Community-based corrections programs require a partnership between local public safety entities and the county to provide and expand the use of community-based punishment for low-level offender populations. Each county's Local Community Corrections Partnership, as established in paragraph (2) of subdivision (b) of Section 1230, should play a critical role in developing programs and ensuring appropriate outcomes for low-level offenders.

(7) Fiscal policy and correctional practices should align to promote a justice reinvestment strategy that fits each county. "Justice reinvestment" is a data-driven approach to reduce corrections and related criminal justice spending and reinvest savings in strategies designed to increase public safety. The purpose of justice reinvestment is to manage and allocate criminal justice populations more cost-effectively, generating savings that can be reinvested in evidence-based strategies that increase public safety while holding offenders accountable.

(8) "Community-based punishment" means correctional sanctions and programming encompassing a range of custodial and noncustodial responses to criminal or noncompliant offender activity. Community-based punishment may be provided by local public safety entities directly or through community-based public or private correctional service providers, and include, but are not limited to, the following:

(A) Short-term flash incarceration in jail for a period of not more than 10 days.

(B) Intensive community supervision.

(C) Home detention with electronic monitoring or GPS monitoring.

(D) Mandatory community service.

(E) Restorative justice programs such as mandatory victim restitution and victim-offender reconciliation.

(F) Work, training, or education in a furlough program pursuant to Section 1208.

(G) Work, in lieu of confinement, in a work release program pursuant to Section 4024.2.

(H) Day reporting.

(I) Mandatory residential or nonresidential substance abuse treatment programs.

(J) Mandatory random drug testing.

(K) Mother-infant care programs.

(L) Community-based residential programs offering structure, supervision, drug treatment, alcohol treatment, literacy programming, employment counseling, psychological counseling, mental health treatment, or any combination of these and other interventions.

(9) "Evidence-based practices" refers to supervision policies, procedures, programs, and practices demonstrated by scientific research to reduce recidivism among individuals under probation, parole, or post release supervision.

(b) The provisions of this act are not intended to alleviate state prison overcrowding.

18. (a) Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a felony is

punishable by imprisonment for 16 months, or two or three years in the state prison unless the offense is punishable pursuant to subdivision (h) of Section 1170.

(b) Every offense which is prescribed by any law of the state to be a felony punishable by imprisonment or by a fine, but without an alternate sentence to the county jail for a period not exceeding one year, may be punishable by imprisonment in the county jail not exceeding one year or by a fine, or by both.

19. Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars ($1,000), or by both.

19.2. In no case shall any person sentenced to confinement in a county or city jail, or in a county or joint county penal farm, road camp, work camp, or other county adult detention facility, or committed to the sheriff for placement in any county adult detention facility, on conviction of a misdemeanor, or as a condition of probation upon conviction of either a felony or a misdemeanor, or upon commitment for civil contempt, or upon default in the payment of a fine upon conviction of either a felony or a misdemeanor, or for any reason except upon conviction of a crime that specifies a felony punishment pursuant to subdivision (h) of Section 1170 or a conviction of more than one offense when consecutive sentences have been imposed, be committed for a period in excess of one year; provided, however, that the time allowed on parole shall not be considered as a part of the period of confinement.

19.4. When an act or omission is declared by a statute to be a public offense and no penalty for the offense is prescribed in any statute, the act or omission is punishable as a misdemeanor.

19.6. An infraction is not punishable by imprisonment. A person charged with an infraction shall not be entitled to a trial by jury. A person charged with an infraction shall not be entitled to have the public defender or other counsel appointed at public expense to represent him or her unless he or she is arrested and not released on his or her written promise to appear, his or her own recognizance, or a deposit of bail.

19.7. Except as otherwise provided by law, all provisions of law relating to misdemeanors shall apply to infractions including, but not limited to, powers of peace officers, jurisdiction of courts, periods for commencing action and for bringing a case to trial and burden of proof.

19.8. The following offenses are subject to subdivision (d) of

Section 17: Sections 193.8, 330, 415, 485, 490.7, 555, 602.13, 652, and 853.7 of this code; subdivision (c) of Section 532b, and subdivision (n) of Section 602 of this code; subdivision (b) of Section 25658 and Sections 21672, 25658.5, 25661, and 25662 of the Business and Professions Code; Section 27204 of the Government Code; subdivision (c) of Section 23109 and Sections 12500, 14601.1, 27150.1, 40508, and 42005 of the Vehicle Code, and any other offense which the Legislature makes subject to subdivision (d) of Section 17. Except where a lesser maximum fine is expressly provided for a violation of any of those sections, any violation which is an infraction is punishable by a fine not exceeding two hundred fifty dollars ($250).

Except for the violations enumerated in subdivision (d) of Section 13202.5 of the Vehicle Code, and Section 14601.1 of the Vehicle Code based upon failure to appear, a conviction for any offense made an infraction under subdivision (d) of Section 17 is not grounds for the suspension, revocation, or denial of any license, or for the revocation of probation or parole of the person convicted.

19.9. For purposes of this code, "mandatory supervision" shall mean the portion of a defendant's sentenced term during which time he or she is supervised by the county probation officer pursuant to subparagraph (B) of paragraph (5) of subdivision (h) of Section 1170.

20. In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence.

21. (a) The intent or intention is manifested by the circumstances connected with the offense.

(b) In the guilt phase of a criminal action or a juvenile adjudication hearing, evidence that the accused lacked the capacity or ability to control his conduct for any reason shall not be admissible on the issue of whether the accused actually had any mental state with respect to the commission of any crime. This subdivision is not applicable to Section 26.

21a. An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission.

22. (a) No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in that condition. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act.

(b) Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant

premeditated, deliberated, or harbored express malice aforethought.

(c) Voluntary intoxication includes the voluntary ingestion, injection, or taking by any other means of any intoxicating liquor, drug, or other substance.

23. In any criminal proceeding against a person who has been issued a license to engage in a business or profession by a state agency pursuant to provisions of the Business and Professions Code or the Education Code, or the Chiropractic Initiative Act, the state agency which issued the license may voluntarily appear to furnish pertinent information, make recommendations regarding specific conditions of probation, or provide any other assistance necessary to promote the interests of justice and protect the interests of the public, or may be ordered by the court to do so, if the crime charged is substantially related to the qualifications, functions, or duties of a licensee.

For purposes of this section, the term "license" shall include a permit or a certificate issued by a state agency.

For purposes of this section, the term "state agency" shall include any state board, commission, bureau, or division created pursuant to the provisions of the Business and Professions Code, the Education Code, or the Chiropractic Initiative Act to license and regulate individuals who engage in certain businesses and professions.

24. This Act, whenever cited, enumerated, referred to, or amended, may be designated simply as THE PENAL CODE, adding, when necessary, the number of the section.

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theguardian

Al-Qaida: US support for Yemen crackdown led to attack

US has increased military aid package to Yemen from less than $11m in 2006 to more than $70m in 2009

Hugh Macleod in Sana'a
The Guardian, Monday 28 December 2009 22.00 GMT

Al-Qaida in Yemen has been galvanised into winning local support over recent months by direct US and British support for Yemen's counter-terrorism efforts, according to sources close to the group.

Its statement yesterday saying the attempted bombing on Christmas Day was in retaliation for US attacks on the group in Yemen follows a year in which the US spent tens of millions of dollars boosting Yemen's coastguard and border security and providing helicopters with night-vision cameras.

Defence analysts and Yemen observers say that the US has also provided intelligence gathered over Yemen by unmanned drones.

The US has increased its military aid package to Yemen from less than $11m in 2006 to more than $70m this year, as well as providing up to $121m for development over the next three years.

The UK has also invested heavily in aid to Yemen. It has quadrupled its development assistance since 2007, allocating £105m between 2009 and 2011, though no figures on funds for military training were available.

Both the US and UK have trained Yemen's counter-terrorism unit, an elite squad of several hundred, including women, who specialise in intelligence gathering and raids on suspected al-Qaida bases.

On 15 December, the Yemeni airforce and ground troops launched a three-day offensive against al-Qaida training camps and bases in the eastern governorates of Marib, al-Jawf, Shebwa and Abyan, claiming to have killed or arrested scores of fighters and foiled a series of suicide bombings planned to mark the Islamic new year.

Following further airstrikes in Shebwa on 24 December, authorities claimed to have killed at least 30 al-Qaida members who had gathered for a meeting, though it remains unconfirmed whether the dead included the top leadership. Yemen's defence ministry said that the strikes had foiled an al-Qaida plot to attack the British embassy in Sana'a, which has been threatened several times since 2005.

A Foreign Office spokeswoman said she was unable to comment on security issues but confirmed that the UK was continuing to work closely with Yemeni authorities to counter the threat of terrorism.

Opposition news sources in Yemen reported that the airstrikes on Christmas Eve had killed members of local tribes, including women and children.

A senior Yemeni military source, speaking anonymously to the Guardian at the time of

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the first attack, said the operation had been launched after al-Qaida made direct threats against Yemen's president, Ali Abdullah Saleh, and his family.

American media reported that the attacks involved US warplanes, launched from carriers in the Gulf, but the Yemeni source said that the US had co-operated on the intelligence side only. According to the source, Barack Obama telephoned to congratulate Saleh immediately after the operation.

Sources with knowledge of al-Qaida's thinking in Yemen warn that the offensive risks plunging Saleh's regime into another war it would struggle to win, and that it could put Yemen into a situation similar to that existing in Afghanistan and Pakistan.

"The US airforce has been flying over eastern and southern areas of Yemen taking pictures of what they think are training camps for al-Qaida. The Yemeni airforce attacked these places. Just as in Waziristan [Pakistan], the US involvement led to civilian casualties, which mean people will join al-Qaida in revenge," said Shaea, an al-Qaida expert.

ALJAZEERA

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Yemen denies warplane shot down

Army official denies claim by fighters that they brought down MiG fighter in Saada.

Last Modified: 02 Oct 2009 11:38 GMT

The United Nations estimates that 55,000 people have fled their homes because of the conflict [AFP]

A senior Yemeni military official has denied a claim that rebel Houthi fighters have shot down a MiG 21 warplane which was raiding their strongholds in the northem region of Saada.

State media quoted the official as saying the plane ran into a mountain peak because of a technical fault.

The fighters, from the Zaidi sect of Shia Islam, said in a statement that the jet was downed "this moming in the Shaaf area of Saada province, while it was bombing civilians in villages and markets".

Contradicting state media, another Yemeni military commander told the AFP news agency that the aircraft had been "flying at low attitude" when it was hit.

Mohammed Abdel Salam, a Houthi spokesman, identified the pilot as Lieutenant Shamsan Mohammed Abdu Meflih.

'Scorched Earth' campaign

Troops continue to press their seven-week-old offensive against the Houthis in the northem mountains, with no sign of the conflict ending.

Five fighters and four soldiers are reported to have been killed in fighting in the Harf Sufyan district of Amran province, on the road linking the capital Sanaa with Saada, the centre of the region of the same name which borders Saudi Arabia.

On Wednesday, 28 fighters were also killed in clashes near Saada.

The army launched operation "Scorched Earth" on August 11 in an attempt to finally crush an uprising in which thousands of people have been killed since it first broke out in 2004.

The United Nations estimates that 55,000 people have fled their homes because of the conflict.

The authorities accuse the Houthi fighters of seeking to restore the Zaidi Shia imamate that was overthrown in a republican coup in 1962, triggering an eight-year civil war.

The fighters deny the charge and say they are fighting to defend their community against govemment aggression and marginalisation.

A minority in mainly Sunni Yemen, the Zaidis are the majority community in the north.

Source: Agencies

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Afghanistan

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Afghanistan Human Rights

Human Rights Concerns

The Islamic Republic of Afghanistan is home to 28.2 million people, a number which includes hundreds of thousands of refugees from various neighboring countries. The life expectancy is 42.9 years, under 5-mortality for both male and females is 223/237 per 1,000 and adult literacy is 28 per cent. Millions of people living in southern and eastern Afghanistan are terrorized by the Taleban, other insurgent groups, and local militias ostensibly allied with the government. People continue to suffer insecurity that further restricts their limited access to food, health care and schooling. While access to education has greatly improved since the years of Taleban rule and is now open to girls, many boys and girls still aren't in school. Education however continues to shine a beacon of hope for many Afghans who would like to see their country move toward a more democratic and peaceful place to live.

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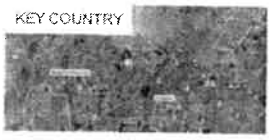

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Amnesty releases new satellite images from Aleppo, Syria, showing increased use of heavy weapons near civilian areas.

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Pakistan

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Pakistan Human Rights

Human Rights Concerns

Amnesty International has long been concerned about the persistent pattern human rights violations occurring in Pakistan. Arbitrary detention, torture, deaths in custody, forced disappearances, and extrajudicial execution are rampant. The government of Pakistan has failed to protect individuals – particularly women, religious minorities and children – from violence and other human rights abuses committed in the home, in the community, and while in legal custody. It has failed to ensure legal redress after violations have occurred. In addition, Pakistan continues to impose the death penalty on persons convicted of crimes.

Since 9-11, individuals suspected of having links with "terrorist" organizations have been arbitrarily detained, denied access to lawyers, and turned over to U.S. custody or to the custody of their home country in violation of local and international law.

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Yemen

Yemen Human Rights

Human Rights Concerns

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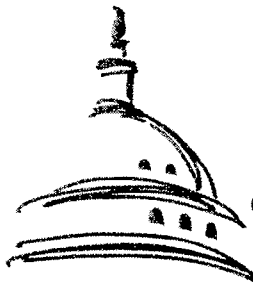

Security Assistance Reform: "Section 1206" Background and Issues for Congress

Nina M. Serafino
Specialist in International Security Affairs

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CRS Report for Congress
Prepared for Members and Committees of Congress

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Summary

Section 1206 of the National Defense Authorization Act (NDAA) for Fiscal Year 2006, as amended and regularly extended, provides the Secretary of Defense with authority to train and equip foreign military forces for two specified purposes—counterterrorism and stability operations—and foreign maritime security forces for counterterrorism operations. The Department of Defense (DOD) values this authority as an important tool to train and equip military partners. Funds may be obligated only with the concurrence of the Secretary of State. Thus far, the Department of Defense (DOD) has used Section 1206 authority primarily to provide counterterrorism (CT) support. In FY2010 and FY2011, Section 1206 funds were also used to provide significant assistance to train and equip foreign military forces for military and stability operations in which U.S. forces participate. This authority will expire in FY2013.

Section 1206 allocations or notifications for FY2006-FY2011totaled $1.574 billion. (FY2012 plans are still under consideration.) During this period, Section 1206 supported bilateral programs in 40 countries, 16 multilateral programs, and a global human rights program.

FY2011 funding totaled $247.5 million, significantly below the $350 million cap on Section 1206 funding. The largest amount, totaling $44.8 million or some 18% of the funding, was provided to Uganda and Burundi to improve the tactical effectiveness of their military forces (the Ugandan Peoples Defense Force and the Burundian National Defense Forces) engaged in counterterrorism operations in Somalia. Over $20 million was provided to each Mauritania (for 1 fixed-wing aircraft and the modernization of others) and Georgia (to support Georgian deployments to Afghanistan under the International Security Assistance Force.) By region, FY2012 funding was as follows: Africa $113.9 million; Greater Europe, $88.7 million, Middle East and South/Southwestern Asia, $19.2 million.

Some Members have been concerned with several issues related to Section 1206 authority, both narrow and broad. Specific current concerns include whether Section 1206 funds are being used appropriately and effectively, and whether the authority should be expanded to provide training not only military forces but also to a wide range of foreign security forces. (Currently, Section 1206 limits security force training to maritime security forces.) An overarching issue is whether Congress should place Section 1206 train and equip (T&E) authority under the State Department with other T&E authorities. (Members have thus far refrained from codifying Section 1206 in permanent law, as requested by DOD.) Finally, some Members may wish to examine the status of Section 1206 in the context of broader security assistance reform.

Appendix A. FY2006-FY2010 Recipients and Funding

The $1.3 billion in FY2006-FY2010 Section 1206 funding was divided among more than 34 bilateral recipients and 14 multilateral groups of 2-15 members. Of these, three—Yemen, Pakistan, and Lebanon—received 44% of total Section 1206 assistance for these years. The top seven recipients (i.e., the top three recipients plus the Philippines, Indonesia, Bahrain, and Malaysia) received 63%, or a bit short of two-thirds of total Section 1206 funding. These seven countries constituent one-fifth of all bilateral recipients. Over half the bilateral and multilateral recipients received under $15 million in Section 1206 assistance.

Yemen was the largest recipient during this period. The $252.6 million it received from FY2006 through FY20010 constituted almost a fifth of total Section 1206 funding during this period. Over 60% of Section 1206 assistance to Yemen during this period was provided with FY2010 funds, most used to supply small airplanes and helicopters and other aircraft support to the Yemeni air force, to enable it to support Yemeni CT units, and the rest to enhance the CT capability of Yemeni SOF.

Over a quarter of Section 1206 aid to Yemen was provided through FY2009 funding. This assistance included not only trucks, radio systems (with operation and maintenance training), and body armor to help the Yemeni Border Security Force deter, detect, and detain terrorists along the Yemen, Saudi Arabia, and Oman borders, but also equipment for the Yemeni Coast Guard (patrol boats and accessories, and shipboard radios) and for the Yemini Air Force (helicopter spare parts and surveillance cameras) to enhance CT capability. FY2009 funds also supported Yemen's Ministry of Defense with an explosive ordnance disposal program. Section 1206 assistance to Yemen started in FY2006 with a relatively small package of equipment (small arms and ammunition, computers, radios and their installation, and light tactical vehicles) to aid the Yemeni Armed Forces in preventing cross-border arms trafficking. Significantly more FY2007 funds, about 10% of the current total, were devoted to enhance Yemen's border security CT capability, with vehicles of various types (as well as maintenance training and support), spare parts, crisis action center equipment, and transportation

Pakistan, the second-largest recipient with $203.4 million, or about 15% of total Section 1206 funding, did not receive funds in FY2010. Some $113.5 million, or over half Pakistan's funding, was provided in FY2009. Most Section 1206 funding to Pakistan provided equipment and training to increase the government's ability to counter terrorism threats emanating from the Federally Administered Tribal Areas (FATA).

- A central feature was helicopter support. In FY2006, Section 1206 assistance was first used to address spare part shortages that limited availability from Pakistan's "impressive inventory of helicopters."[66] These funds provided spare parts for Mi-17 and Cobra helicopters, as well as aviation body armor, night vision goggles, and limited visibility training for pilots. FY2008 and FY2009 funds also have provided the means, technical support, and training to repair,

[66] CNA Corporation, *Assessments of the Impact of 1206-Funded Projects in Selected Countries: Lebanon, Pakistan, Yemen, Sao Tome and Principe*, by Eric Thompson and Patricio Asfura-Heim, CRM D0017988.A4/1Rev. July 2008, p. 25, http://www.cna.org/documents/D0017988.A4.pdf. Hereafter referred to as *CNA Corporation Assessments*.

1982

YEMEN

Yemen, with a population of approximately 23 million, is a republic whose law provides for presidential election by popular vote from among at least two candidates endorsed by parliament. In 2006 citizens reelected President Ali Abdullah Saleh to another seven-year term in a generally open and competitive election, but one characterized by multiple problems with the voting process and the use of state resources on behalf of the ruling party. Saleh has led the country since 1978. The president appoints the prime minister, who is the head of government. The prime minister, in consultation with the president, selects the Council of Ministers. Although there are a number of parties, President Saleh's General People's Congress (GPC) dominated the government. Armed conflicts with the Houthi rebels in the North and with elements of the Southern Mobility Movement in southern governorates, as well as with Al-Qaida in the Arabian Peninsula (AQAP) terrorists, affected the government's human rights performance. There were instances in which elements of the security forces acted independently of civilian control.

Armed conflict in the northern Saada region declined markedly after a February 11 ceasefire. Nonetheless, violence and abuses persisted in connection with ongoing protests by the Southern Mobility Movement, a decentralized umbrella group formed in 2008 as a result of widespread antigovernment protests that sought more rights for southerners and during the year increasingly became associated with activists seeking to reestablish an independent South Yemen.

During the year attacks, often by unknown actors, occurred on government security forces, usually attributed to AQAP, although government claims of AQAP responsibility could not be verified in many cases.

The main government human rights abuses included severe limitations on citizens' ability to change their government due to, among other factors, corruption, fraudulent voter registration, administrative weakness, and close political-military relationships at high levels. Arbitrary and unlawful killings, politically motivated disappearances, and reports of torture and other physical abuse accompanied the use of excessive force against civilians in internal conflict. Prisons and detention centers were in poor condition, and some private, largely tribal, ones operated without legal authorization or control. Arbitrary arrest and detention, sometimes incommunicado, and denial of fair public trial were widespread. Official impunity was common. The government restricted civil liberties, including freedoms of

In northern Saada Governorate another round of intense fighting started in August 2009 and lasted until the parties announced partially observed January 23, then February 11 cease-fires, followed by President Saleh officially declaring the war "over" in a March 19 television interview. Large-scale conflict erupted again in August-September and continued sporadically at low levels at year's end.

According to the NGO Human Rights Watch (HRW) and other humanitarian organizations, witnesses reported four separate air raids on September 16 in which government bombs killed almost 90 civilians, mostly women, children, and the elderly in Adl, near Harf Sufyan in Amran Governorate. On September 18, the government announced a plan to investigate the deaths. By year's end no results of an investigation had been presented. Independent investigation into the shelling did not occur because of heightened insecurity in the region.

YODPRL recorded more than 20 forcible disappearances attributed to government forces during the year in connection with the fighting in Saada.

In fighting between government forces and Houthi rebels between August 2009 and February, international NGOs providing humanitarian assistance in Saada estimated more than 300,000 persons were displaced from their homes, then spreading across four northern governorates in search of aid (see section 2.d.).

There were reports during the year of the use by both sides of antipersonnel mines, including antitank and improvised mines, during the conflict in northern Saada Governorate between rebel forces led by Abdul-Malik al-Houthi and government troops. Houthi rebels actively interfered with government demining efforts.

The government and local and international human rights organizations claimed that Houthis also committed human rights violations during the year. According to an August 2009 government report, Houthi abuses included unlawful killing, rape and sexual assault, looting and destruction of civilian property, and plunder and destruction of public buildings. Some human rights activists said Houthis used human shields and killed and threatened civilians who did not support them. Independent verification of these allegations was difficult because the government and Houthi rebels blocked nearly all access to Saada during the year.

Although the law barred the use of underage soldiers, local and international human rights organizations reported that both Houthis and government-affiliated tribes deployed child soldiers into armed conflict during the latest round of fighting

1984

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

Commentary

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

Art. 51 - Protection of the civilian population

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

[p.615] General remarks

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

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

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

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

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

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

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

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

1930 In the draft the ICRC had provided that Article 51 (46 of the draft) would be among the

provisions to which no reservations could be made. Finally the Conference deleted all provisions relating to reservations, but in the discussions Article 51 [] had been included in the list of articles to which reservations were prohibited. (5) In the absence of a specific provision it is therefore general international law that applies, in particular the Vienna Convention on the Law of Treaties (Articles 19-23). It may be recalled that that Convention prohibits reservations which are incompatible with the object and purpose of the treaty. (6)

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

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

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

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

Paragraph 1

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

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

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

[p.618] Paragraph 2

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

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

1940 In the second sentence the Conference wished to indicate that the prohibition covers acts intended to spread terror; there is no doubt that acts of violence related to a state of war almost

always give rise to some degree of terror among the population and sometimes also among the armed forces. It also happens that attacks on armed forces are purposely conducted brutally in order to intimidate the enemy soldiers and persuade them to surrender. This is not the sort of terror envisaged here. (12) This provision is intended to prohibit acts of violence the primary purpose of which is to spread terror among the civilian population without offering substantial military advantage. It is interesting to note that threats of such acts are also prohibited. This calls to mind some of the proclamations made in the past threatening the annihilation of civilian populations.

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

Paragraph 3

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

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

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

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

Paragraph 4

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

1947 On this subject the general rule was formulated in Article 48 ' (Basic rule): ' belligerents may direct their operations only against military objectives. The first specification is added in paragraph 2

of the present Article 51 : attacks against the civilian population as such and against individual civilians are prohibited.

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

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

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

' Sub-paragraph (a) '

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

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

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

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

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

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

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

' Sub-paragraph (b) '

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

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

1958 As regards the weapons, those relevant here are primarily long-range missiles which cannot be aimed exactly at the objective. The V2 rockets used at the end of the Second World War are an example of this. It should be noted that most armies endeavour to use accurate weapons as attacks which do not strike the intended objective result in a loss of time and equipment without giving a corresponding advantage. Thereby the margin of error of missiles is gradually reduced. Here, military interests and humanitarian requirements coincide.

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

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

' Sub-paragraph (c) '

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

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

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

1963 However, there are some means of warfare of which the effects cannot be limited in any circumstances. It is different with regard to other means, such as fire (24) or water (25) which, depending on the circumstances of their use, can have either a restricted effect or, on the contrary,

be completely out of the control of those using them, causing significant losses among the civilian population and extensive damage to civilian objects. The nature of the means used is not the only criterion: the power of the weapons used can have the same consequences. For example, if a 10 ton bomb is used to destroy a single building, it is inevitable that the effects will be very extensive and will annihilate or damage neighbouring buildings, while a less powerful missile would suffice to destroy the building. There are also methods which by their very nature have an indiscriminate character, such as poisoning wells.

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

1965 This point was discussed above; it is true that in most cases the indiscriminate character of an attack does not depend on the nature of the weapons concerned, but on the way in which they are used. However, as stated above, there are some weapons which by their very nature have an indiscriminate effect. The example of bacteriological means of warfare is an obvious illustration of this point. There are also other weapons which have similar indiscriminate effects, such as poisoning sources of drinking water. Of course, bacteriological means of warfare have been prohibited since 1925, and the use of poison was prohibited in 1899 by the Hague Regulations.

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

Paragraph 5

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

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

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

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

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

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

1990

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

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

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

1976 The ' second type of attack ' envisaged in paragraph 5 includes those which have excessive effects in relation to the concrete and direct military advantage anticipated. Once again there were long discussions in the Diplomatic Conference and it was difficult to come to an agreement. The formula that was adopted is very similar to that proposed by the ICRC. (31) It is based on the wording of Article 57 ' (Precautions in attack) ' relating to precautionary measures. Committee III had suggested either a straightforward reference to Article 57 ' (Precautions in attack) ' or reproducing the formula used in that article. Finally, the Drafting Committee, which was requested to resolve the question, opted for the second solution. Thus reference may be made to Article 57 ' (Precautions in attack) ' for further details.

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

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

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

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

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

Paragraph 6

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

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

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

1985 This prohibition of attacks by way of reprisals and other prohibitions of the same type contained in the Protocol and in the Conventions have considerably reduced the scope for reprisals in time of war. At most, such measures could now be envisaged in the choice of weapons and in methods of combat used against military objectives.

Paragraph 7

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

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

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

Paragraph 8

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

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

[p.628] 1990 It is fairly clear from the deliberations and the report of Committee III (36) that the prohibitions referred to in paragraph 8 are those contained in paragraph 7. Military objectives are defined as far as objects are concerned in Article 52 ' (General protection of civilian objects), '

paragraph 2. Thus, even if civilians were intentionally brought or kept in the vicinity of military objectives, the attacker should take the measures provided for in Article 57 [] ' (Precautions in attack), ' especially those set out in paragraph 2 (a)(ii) and (iii) and (c). It is clear that in such cases a warning to the population is particularly appropriate as civilians are themselves rarely capable of assessing the danger in which they are placed.

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

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

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

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

' C.P./J.P. '

NOTES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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in the territory in which he seeks asylum, expelled or compulsorily returned to any state where he may be subjected to persecution (except only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons); and that the state granting asylum shall not permit persons who have received asylum to engage in activities contrary to the purposes and principles of the United Nations.

In 1977 a Conference on Territorial Asylum was held with a view to drawing up a Convention on the matter, but it failed to reach agreement.[13] The possibility of a further session of the Conference being convened was left open.

At present the so-called right of asylum is probably nothing but the competence of every state to allow a persecuted alien to enter, and to remain on, its territory under its protection. Such fugitive alien enjoys the hospitality of the state which grants him asylum; but it might be necessary to make his entry subject to conditions, to place him under surveillance, or even to intern him at some place. For it is the duty of every state to prevent individuals living on its territory from endangering the safety of another state by organising hostile expeditions or by preparing common crimes against its head, members of its government or its property.[14]

POSITION OF ALIENS AFTER RECEPTION

Frisch in Strupp, *Wört*, i, pp 330–34 Delessert, *L'Établissement et le séjour des étrangers* (1924) Steinbach, *Unter, suchungen zum internationalen Fremdenrecht* (1931) *The Legal Status of Aliens in Pacific Countries* (ed MacKenzie, 1937) Fraser, *Control of Aliens in the British Commonwealth of Nations* (1940) Gibson, *Aliens and the Law* (1940) (as to the USA) Konvitz, *The Alien and the Asiatic in American Law* (1946) Borchard, §§ 6–8, 14–25, 34–46, 133–6, and *Bibliotheca Visseriana*, 3 (1924), pp 3–52 Churchill, LQR, 31 (1920), pp 402–28 Holdsworth, *Revue d'histoire du droit*, 3 (1921), pp 175–214 Fachiri, BY (1925), pp 159–71 Zaitzeff in Mich Law Rev, 24 (1926), pp 441–60 (as to aliens in Russia) S Basdevant in *Répertoire*, 8, pp 3–61 Cavaglieri, Hag R, 26 (1929), i, pp 452–67 Healy, *ibid*, 27 (1929), ii, pp 405–92 Verdross, Hag R, 37 (1931), iii, pp 348–406 Kelsen, *ibid*, 42 (1932), iv, pp 248–60 Cutler, AJ, 27 (1933), pp 225–46 Bouvé, *AS Proceedings* (1934), pp 92–105 Borchard, *ibid* (1939), pp 51–63 Castrén, ZöV, xi (1943), pp 325–417 Whiteman, *Digest*, 8, Ch XXIII Parry, BDIL, 6, pp 247–440 McNair, *Opinions*, ii, pp 113–37 Baxter and Sohn, AJ, 55 (1961), pp 545–84 (Draft Convention on the International Responsibility of States for Injuries to Aliens) Ryan in *International Law in Australia* (ed O'Connell, 1965), pp 483–91 McDougal, Lasswell and Chen, AJ, 70

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[13] See GA Res 3465 (XXX) (1975); UNYB, 1977, pp 625–6; Weis, BY, 50 (1979), pp 151–71; Leduc, AFDI, 23 (1977), pp 221–67.

[14] See § 122. Provisions protecting states against subversive activities carried on against them by refugees in other states appear in, eg The Montevideo Treaty on Political Asylum and Refuge 1939, Ch II (AJ, 37 (1943), Suppl, p 99), the OAS Convention on Territorial Asylum 1954, Arts 7–9 (BFSP, 161 (1954), p 566); and the OAU Convention Concerning the Specific Aspects of Refugee Problems in Africa 1969, Art III (see § 399, n 25). See also *Re Lechin et al*, AD, 16 (1949), No 1. Article II.2 of the OAU Convention provides that the grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act; see also the penultimate recital in the preamble to the UN Declaration on Territorial Asylum 1967 (GA Res 2312 (XXII)), Art 1 of the OAS Convention, and para 3 of the Council of Europe Declaration on Territorial Asylum 1977 (European YB, 25 (1977), p 351).

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EXPULSION OF ALIENS

Kobarg, *Ausweisung und Abweisung von Ausländern* (1930) Borchard, §§ 27–32 Blondel, *Répertoire*, viii, pp 105–63 Boeck, Hag R, 18 (1927), iii, pp 447–646 (an exhaustive study) Puente, AJ, 36 (1942), pp 252–70 (as to Latin-America) Parry, BDIL, 6, pp 83–241 MacDonald, *Race Relations and Immigration Law* (1969), pp 61–81, and *The New Immigration Law* (1972), Ch 10 Shearer, *Extradition in International Law* (1971), pp 76–91 Goodwin-Gill, *International Law and the Movement of Persons between States* (1973), pp 201–310 (also in BY, 47 (1974–75), pp 55–156).

§ 413 Competence to expel aliens The right of states to expel[1] aliens is generally recognised.[2] It matters not whether the alien is only on a temporary visit, or has settled down for professional business or other purposes on its territory, having established his domicile there.

On the other hand, while a state has a broad discretion in exercising its right to expel aliens, its discretion is not absolute. Thus, by customary international law it must not abuse its right by acting arbitrarily in taking its decision to expel an alien, and it must act reasonably in the manner in which it effects an expulsion.[3]

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1 'Expulsion' is not a technical term, and is often used interchangeably with 'deportation': both involve the removal of a person from a state by its unilateral act, as distinct from extradition (which involves agreement and a degree of cooperation between the two states concerned). See also § 414. The practice of some states may also be distinguished, whereby destitute aliens, foreign vagabonds, suspicious aliens without identity papers, alien criminals who have served their punishment, and the like, are, without any formalities, arrested by the police and reconducted to the frontier. But although such reconduction, often called *droit de renvoi*, is materially not much different from expulsion, it nevertheless differs much from it in form, since expulsion is an order to leave the country, whereas reconduction is forcible conveying away of foreigners. On the practice of deportation and reconduction in the USA, see Clark, *Deportation of Aliens from the United States to Europe* (1931); Oppenheim, *The Enforcement of the Deportation Laws of the United States* (1931); Van Vleck, *The Administrative Control of Aliens* (1932); Hackworth, iii, §§ 293–302; Whiteman, *Digest*, 8, pp 603–20. See also § 414, n 9.

A state is usually unable to expel its own nationals since no other state will be obliged to receive them. It may assimilate certain aliens to its own nationals, so affecting its powers under its own laws to expel them: see *Italian South Tyrol Terrorism Case (1)* (1968), ILR, 71, p 235.

2 See, eg *Attorney-General for Canada v Cain* [1906] AC 542; the decision of the US Supreme Court in *Harisiades v Shaughnessy*, ILR, 19 (1952), No 69; and the decision of the Supreme Court of Burma in *Karam Singh v Controller of Immigration* (1956), ILR, 28, p 311.

See now as to the law of the UK, Immigration Act 1971, ss 3(5) and (6), 5–7, and 15, and the Statement of Changes in Immigration Rules 1990 (HC 251), paras 155–80. The UK Government had, until December 1919, no power to expel even the most dangerous alien without the recommendation of a court, or without an Act of Parliament making provision for such expulsion, except during war or on an occasion of imminent national danger or great emergency.

Expulsion of an alien after being lawfully admitted into a state is to be distinguished from the refusal to allow an alien to enter the state, expulsion or deportation in the two situations often being subject to different legal requirements, usually in the sense of allowing more easily the removal of those refused entry. See eg *Barber v Gonzales*, ILR, 20 (1953), p 276; *Roggenbihl v Lusby*, *ibid*, p 281; *The State v Ibrahim Adam*, ILR, 23 (1956), p 374; *Leng May Ma v Barber*, ILR, 26 (1958–II), p 475; *R v Pringle, ex parte Mills* (1968), ILR, 44, p 135.

Refusal of entry will usually involve the return of the alien to the state from which he came. Aliens who have been refused entry to a state, or who have illegally gained entry, may nevertheless have certain rights under the law of that state to challenge any order for their removal, and may also be able to invoke provisions of certain human rights treaties in support of their challenge: see n 11.

3 See n 16.

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JEAN-MARIE HENCKAERTS
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CHAPTER 34

THE WOUNDED, SICK AND SHIPWRECKED

Rule 109. Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the wounded, sick and shipwrecked without adverse distinction.

Practice

Volume II, Chapter 34, Section A.

Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

International armed conflicts

The duty to collect wounded and sick combatants without distinction in international armed conflicts was first codified in the 1864 Geneva Convention.[1] This subject is dealt with in more detail in the 1949 Geneva Conventions.[2] This duty is now codified in Article 10 of Additional Protocol I,[3] albeit in more general terms of "protecting" the wounded, sick and shipwrecked, which means "coming to their defence, lending help and support".[4]

The numerous military manuals which contain this rule are phrased in general terms covering all wounded, sick and shipwrecked, whether military or civilian.[5] Sweden's IHL Manual, in particular, identifies Article 10 of

[1] 1864 Geneva Convention, Article 6 (cited in Vol. II, Ch. 34, § 1).
[2] First Geneva Convention, Article 15, first paragraph (*ibid.*, § 5); Second Geneva Convention, Article 18, first paragraph (*ibid.*, § 7); Fourth Geneva Convention, Article 16, second paragraph (*ibid.*, § 10).
[3] Additional Protocol I, Article 10 (adopted by consensus) (*ibid.*, § 199).
[4] Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 446.
[5] See, e.g., the military manuals of Argentina (cited in Vol. II, Ch. 34, §§ 21–22 and 127), Australia (*ibid.*, §§ 23 and 128–129), Belgium (*ibid.*, §§ 24–25 and 130), Benin (*ibid.*, §§ 26 and 131), Burkina Faso (*ibid.*, § 27), Cameroon (*ibid.*, §§ 28–29 and 134), Canada (*ibid.*, §§ 30–31 and 132–133), Colombia (*ibid.*, §§ 32–35), Congo (*ibid.*, § 36), Croatia (*ibid.*, §§ 37–40 and 135), Dominican Republic (*ibid.*, § 136), Ecuador (*ibid.*, §§ 41 and 137), France (*ibid.*, §§ 42–43 and 138), Germany

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Additional Protocol I as a codification of customary international law.[6] The legislation of many States provides for the punishment of persons who abandon the wounded, sick and shipwrecked.[7]

Non-international armed conflicts

In the context of non-international armed conflicts, this rule is based on common Article 3 of the Geneva Conventions, which provides that "the wounded and sick shall be collected".[8] It is codified in a more detailed manner in Additional Protocol II.[9] In addition, it is set forth in a number of other instruments pertaining also to non-international armed conflicts.[10]

The duty to search for, collect and evacuate the wounded, sick and shipwrecked is contained in a number of military manuals which are applicable in or have been applied in non-international armed conflicts.[11] It is an offence under the legislation of several States to abandon the wounded and sick.[12]

(*ibid.*, § 44), Hungary (*ibid.*, §§ 45 and 139), India (*ibid.*, § 140), Indonesia (*ibid.*, § 46), Italy (*ibid.*, §§ 47 and 141), Kenya (*ibid.*, §§ 48 and 142), Lebanon (*ibid.*, § 49), Madagascar (*ibid.*, §§ 50 and 143), Mali (*ibid.*, § 51), Morocco (*ibid.*, § 52), Netherlands (*ibid.*, §§ 53–55 and 144), New Zealand (*ibid.*, §§ 56 and 145), Nigeria (*ibid.*, §§ 58–60 and 146), Philippines (*ibid.*, §§ 61 and 147–149), Romania (*ibid.*, §§ 62 and 150), Rwanda (*ibid.*, § 151), Senegal (*ibid.*, § 64), Spain (*ibid.*, §§ 66 and 153), Switzerland (*ibid.*, §§ 68 and 154), Togo (*ibid.*, §§ 69 and 155), United Kingdom (*ibid.*, §§ 70–71 and 156–157), United States (*ibid.*, §§ 72–74 and 158–161) and Yugoslavia (*ibid.*, §§ 75 and 162).

6 Sweden, *IHL Manual* (1991), Section 2.2.3, p. 18.

7 See, e.g., the legislation of China (cited in Vol. II, Ch. 34, § 80), Colombia (*ibid.*, § 81), Democratic Republic of the Congo (*ibid.*, § 82), Iraq (*ibid.*, § 84), Italy (*ibid.*, § 86), Nicaragua (*ibid.*, § 87), Spain (*ibid.*, § 90), Uruguay (*ibid.*, § 93), Venezuela (*ibid.*, § 94) and Vietnam (*ibid.*, § 95); see also the draft legislation of Argentina (*ibid.*, § 76), El Salvador (*ibid.*, § 83) and Nicaragua (*ibid.*, § 88).

8 Geneva Conventions, common Article 3 (*ibid.*, § 3).

9 Additional Protocol II, Article 8 (adopted by consensus) (*ibid.*, § 13).

10 See, e.g., Memorandum of Understanding on the Application of IHL between Croatia and the SFRY, para. 1 (*ibid.*, § 16); Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina, para. 2.1 (*ibid.*, § 18); Hague Statement on Respect for Humanitarian Principles (*ibid.*, § 17); Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law in the Philippines, Part IV, Article 4(2) and (9) (*ibid.*, § 19).

11 See, e.g., the military manuals of Argentina (*ibid.*, § 22), Australia (*ibid.*, §§ 23 and 128), Belgium (*ibid.*, § 24), Benin (*ibid.*, §§ 26 and 131), Cameroon (*ibid.*, § 29), Canada (*ibid.*, §§ 30–31 and 133), Colombia (*ibid.*, §§ 32–35), Croatia (*ibid.*, §§ 37–40 and 135), Ecuador (*ibid.*, §§ 41 and 137), Germany (*ibid.*, § 44), Hungary (*ibid.*, § 45), India (*ibid.*, § 140), Italy (*ibid.*, §§ 47 and 141), Kenya (*ibid.*, §§ 48 and 142), Lebanon (*ibid.*, § 49), Madagascar (*ibid.*, §§ 50 and 143), Netherlands (*ibid.*, §§ 53–54), New Zealand (*ibid.*, § 56), Nicaragua (*ibid.*, § 57), Nigeria (*ibid.*, §§ 58 and 60), Philippines (*ibid.*, §§ 61 and 147–149), Rwanda (*ibid.*, § 151), Senegal (*ibid.*, § 65), Spain (*ibid.*, § 66), Togo (*ibid.*, §§ 69 and 155), United Kingdom (*ibid.*, §§ 70–71), United States (*ibid.*, §§ 72–73) and Yugoslavia (*ibid.*, §§ 75 and 162).

12 See, e.g., the legislation of Colombia (*ibid.*, § 81), Democratic Republic of the Congo (*ibid.*, § 82), Nicaragua (*ibid.*, § 87), Venezuela (*ibid.*, § 94) and Vietnam (*ibid.*, § 95); see also the legislation of Italy (*ibid.*, § 86) and Uruguay (*ibid.*, § 93), the application of which is not excluded in time of non-international armed conflict, and the draft legislation of Argentina (*ibid.*, § 76), El Salvador (*ibid.*, § 83) and Nicaragua (*ibid.*, § 88).

No official contrary practice was found with respect to either international or non-international armed conflicts. The ICRC has called on parties to both international and non-international armed conflicts to respect this rule.[13]

Interpretation

The obligation to search for, collect and evacuate the wounded, sick and shipwrecked is an obligation of means. Each party to the conflict has to take *all possible measures* to search for, collect and evacuate the wounded, sick and shipwrecked. This includes permitting humanitarian organisations to assist in their search and collection. Practice shows that the ICRC in particular has engaged in the evacuation of the wounded and sick.[14] It is clear that in practice humanitarian organisations will need permission from the party in control of a certain area to carry out such activities, but such permission must not be denied arbitrarily (see also commentary to Rule 55). The UN Security Council, UN General Assembly and UN Commission on Human Rights have called upon the parties to the conflicts in El Salvador and Lebanon to permit the ICRC to evacuate the wounded and sick.[15]

In addition, the possibility of calling upon the civilian population to assist in the search, collection and evacuation of the wounded, sick and shipwrecked is recognised in the Geneva Conventions and their Additional Protocols.[16] It is also provided for in several military manuals.[17] Article 18 of the First Geneva Convention provides that "no one may ever be molested or convicted for having nursed the wounded or sick".[18] This principle is also set forth in Article 17(1) of Additional Protocol I, to which no reservations have been made.[19]

The Geneva Conventions and other instruments, such as the UN Secretary-General's Bulletin on observance by United Nations forces of international

[13] See, e.g., ICRC, Conflict between Iraq and Iran: ICRC Appeal (*ibid.*, § 110), Memorandum on the Applicability of International Humanitarian Law (*ibid.*, § 111), Communication to the Press No. 93/17 (*ibid.*, § 112), Memorandum on Respect for International Humanitarian Law in Angola (*ibid.*, § 113), Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Operation Turquoise (*ibid.*, § 114) and Communication to the Press No. 00/42 (*ibid.*, § 115).

[14] See, e.g., the practice of the ICRC (*ibid.*, § 185) and Communication to the Press No. 96/25 (*ibid.*, § 189).

[15] UN Security Council, Res. 436 (*ibid.*, § 173); UN General Assembly, Res. 40/139 (*ibid.*, § 174); UN Commission on Human Rights, Res. 1986/39 (*ibid.*, § 175).

[16] First Geneva Convention, Article 18 (*ibid.*, § 6); Second Geneva Convention, Article 21, first paragraph (*ibid.*, § 8); Additional Protocol I, Article 17(2) (adopted by consensus) (*ibid.*, § 11); Additional Protocol II, Article 18(1) (adopted by consensus) (*ibid.*, § 14).

[17] See, e.g., the military manuals of Argentina (*ibid.*, § 21), Cameroon (*ibid.*, § 29), Canada (*ibid.*, §§ 30–31), Germany (*ibid.*, § 44), Kenya (*ibid.*, § 48), New Zealand (*ibid.*, § 56), Russia (*ibid.*, § 63), Switzerland (*ibid.*, § 68), United Kingdom (*ibid.*, §§ 70–71), United States (*ibid.*, § 72) and Yugoslavia (*ibid.*, § 75).

[18] First Geneva Convention, Article 18 (cited in Vol. II, Ch. 7, § 231).

[19] Additional Protocol I, Article 17(1) (adopted by consensus).

humanitarian law, state that cease-fires and other local arrangements are seen as appropriate ways to create the conditions in which the wounded and sick can be evacuated and require the parties to the conflict to conclude such agreements, whenever circumstances permit, to remove, exchange and transport the wounded from the battlefield.[20] Many military manuals make the same point.[21]

Scope of application

This rule applies to all wounded, sick and shipwrecked, without adverse distinction (see Rule 88). This means that it applies to the wounded, sick and shipwrecked regardless to which party they belong, but also regardless of whether or not they have taken a direct part in hostilities. The application of this rule to civilians was already the case pursuant to Article 16 of the Fourth Geneva Convention, which applies to the whole of the populations of the countries in conflict, and is repeated in Article 10 of Additional Protocol I.[22] With respect to non-international armed conflicts, common Article 3 of the Geneva Conventions applies to all persons taking no active part in the hostilities, which includes civilians.[23] In addition, Article 8 of Additional Protocol II does not indicate any distinction (see also Article 2(1) of Additional Protocol II on non-discrimination).[24] Most military manuals state this rule in general terms.[25]

[20] First Geneva Convention, Article 15, second and third paragraphs (cited in Vol. II, Ch. 34, § 118); Second Geneva Convention, Article 18, second paragraph (*ibid.*, § 119); Fourth Geneva Convention, Article 17 (*ibid.*, § 120); UN Secretary-General's Bulletin, Section 9.2 (*ibid.*, § 126).

[21] See, e.g., the military manuals of Argentina (*ibid.*, § 127), Australia (*ibid.*, §§ 128–129), Cameroon (*ibid.*, § 134), Canada (*ibid.*, §§ 132–133), Ecuador (*ibid.*, § 137), France (*ibid.*, § 138), India (*ibid.*, § 140), Kenya (*ibid.*, § 142), Madagascar (*ibid.*, § 143), Netherlands (*ibid.*, § 144), New Zealand (*ibid.*, § 145), Nigeria (*ibid.*, § 146), Senegal (*ibid.*, § 152), Spain (*ibid.*, § 153), Switzerland (*ibid.*, § 154), United Kingdom (*ibid.*, §§ 156–157), United States (*ibid.*, §§ 158–159 and 161) and Yugoslavia (*ibid.*, § 162).

[22] Fourth Geneva Convention, Article 16 (*ibid.*, §§ 10 and 198); Additional Protocol I, Article 10 (adopted by consensus) (*ibid.*, §§ 199 and 346).

[23] Geneva Conventions, common Article 3 (*ibid.*, § 3).

[24] Additional Protocol II, Article 8 (adopted by consensus) (*ibid.*, § 13) and Article 2(1) (adopted by consensus) (cited in Vol. II, Ch. 32, § 369).

[25] See, e.g., the military manuals of Argentina (cited in Vol. II, Ch. 34, §§ 21–22 and 127), Australia (*ibid.*, §§ 23 and 128–129), Belgium (*ibid.*, §§ 24–25 and 130), Benin (*ibid.*, §§ 26 and 131), Burkina Faso (*ibid.*, § 27), Cameroon (*ibid.*, §§ 28–29 and 134), Canada (*ibid.*, §§ 30–31 and 132–133), Colombia (*ibid.*, §§ 32–35), Congo (*ibid.*, § 36), Croatia (*ibid.*, §§ 37–40 and 135), Dominican Republic (*ibid.*, § 136), Ecuador (*ibid.*, §§ 41 and 137), France (*ibid.*, §§ 42–43 and 138), Germany (*ibid.*, § 44), Hungary (*ibid.*, §§ 45 and 139), India (*ibid.*, § 140), Indonesia (*ibid.*, § 46), Italy (*ibid.*, §§ 47 and 141), Kenya (*ibid.*, §§ 48 and 142), Lebanon (*ibid.*, § 49), Madagascar (*ibid.*, §§ 50 and 143), Mali (*ibid.*, § 51), Morocco (*ibid.*, § 52), Netherlands (*ibid.*, §§ 53–55 and 144), New Zealand (*ibid.*, §§ 56 and 145), Nigeria (*ibid.*, §§ 58–60 and 146), Philippines (*ibid.*, §§ 61 and 147–149), Romania (*ibid.*, §§ 62 and 150), Rwanda (*ibid.*, § 151), Senegal (*ibid.*, § 64), Spain (*ibid.*, §§ 66 and 153), Switzerland (*ibid.*, §§ 68 and 154), Togo (*ibid.*, §§ 69 and 155), United Kingdom (*ibid.*, §§ 70–71 and 156–157), United States (*ibid.*, §§ 72–74 and 158–161) and Yugoslavia (*ibid.*, §§ 75 and 162).

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Rule 110. The wounded, sick and shipwrecked must receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. No distinction may be made among them founded on any grounds other than medical ones.

Practice

Volume II, Chapter 34, Section B.

Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

International armed conflicts

The duty to care for wounded and sick combatants without distinction is a long-standing rule of customary international law already recognised in the Lieber Code and codified in the 1864 Geneva Convention.[26] This subject is dealt with in more detail by the 1949 Geneva Conventions.[27] It is codified in Article 10 of Additional Protocol I.[28]

The numerous military manuals which contain this rule are phrased in general terms covering all wounded, sick and shipwrecked.[29] Sweden's IHL Manual, in particular, identifies Article 10 of Additional Protocol I as a codification of customary international law.[30] To deny medical care to the wounded, sick and shipwrecked is an offence under the legislation of many States.[31]

[26] Lieber Code, Article 79 (*ibid.*, § 205); 1864 Geneva Convention, Article 6 (*ibid.*, § 191).
[27] First Geneva Convention, Article 12, second paragraph, and Article 15, first paragraph (*ibid.*, §§ 193–194); Second Geneva Convention, Article 12, second paragraph, and Article 18, first paragraph (*ibid.*, §§ 193 and 196); Fourth Geneva Convention, Article 16, first paragraph (*ibid.*, § 198).
[28] Additional Protocol I, Article 10 (adopted by consensus) (*ibid.*, §§ 199 and 346).
[29] See, e.g., the military manuals of Argentina (*ibid.*, §§ 215 and 355), Australia (*ibid.*, §§ 216–217 and 357), Belgium (*ibid.*, §§ 218–219), Benin (*ibid.*, §§ 220 and 359), Bosnia and Herzegovina (*ibid.*, § 221), Burkina Faso (*ibid.*, § 222), Cameroon (*ibid.*, §§ 223–224), Canada (*ibid.*, §§ 225–226), Colombia (*ibid.*, §§ 227–229), Congo (*ibid.*, § 230), Croatia (*ibid.*, §§ 231 and 233), Ecuador (*ibid.*, § 234), El Salvador (*ibid.*, § 235), France (*ibid.*, §§ 236–238), Germany (*ibid.*, §§ 239–240), Hungary (*ibid.*, § 241), India (*ibid.*, § 243), Indonesia (*ibid.*, § 244), Israel (*ibid.*, § 245), Italy (*ibid.*, § 246), Kenya (*ibid.*, §§ 247 and 367), Lebanon (*ibid.*, § 248), Madagascar (*ibid.*, §§ 249 and 368), Mali (*ibid.*, § 250), Morocco (*ibid.*, § 251), Netherlands (*ibid.*, §§ 252–254 and 370), New Zealand (*ibid.*, §§ 255 and 371), Nicaragua (*ibid.*, § 256), Nigeria (*ibid.*, §§ 257–260), Philippines (*ibid.*, §§ 261–264 and 374), Romania (*ibid.*, § 375), Rwanda (*ibid.*, § 267), Senegal (*ibid.*, § 268), South Africa (*ibid.*, § 269), Spain (*ibid.*, § 270), Sweden (*ibid.*, §§ 271–272), Switzerland (*ibid.*, §§ 273 and 379), Togo (*ibid.*, §§ 274 and 380), Uganda (*ibid.*, § 275), United Kingdom (*ibid.*, §§ 276–277) and United States (*ibid.*, §§ 278–281).
[30] Sweden, *IHL Manual* (*ibid.*, § 272).
[31] See, e.g., the legislation of Azerbaijan (*ibid.*, § 283), Bangladesh (*ibid.*, § 284), China (*ibid.*, § 285), Colombia (*ibid.*, § 286), Cuba (*ibid.*, § 287), Czech Republic (*ibid.*, § 288), Estonia (*ibid.*, § 289), Ireland (*ibid.*, § 291), Norway (*ibid.*, § 292), Slovakia (*ibid.*, § 293), Spain (*ibid.*, § 294), Ukraine (*ibid.*, § 295), Uruguay (*ibid.*, § 296), Venezuela (*ibid.*, § 297) and Vietnam (*ibid.*, § 298); see also the draft legislation of Argentina (*ibid.*, § 282) and El Salvador (*ibid.*, § 289).

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Non-international armed conflicts

In the context of a non-international armed conflict, this rule is based on common Article 3 of the Geneva Conventions, which provides that "the wounded and sick shall be collected and cared for".[32] It is codified in a more detailed manner in Additional Protocol II.[33] In addition, it is set forth in a number of other instruments pertaining also to non-international armed conflicts.[34]

The duty to care for wounded and sick combatants without distinction is set forth in a number of military manuals which are applicable in or have been applied in non-international armed conflicts.[35] Under the legislation of many States, it is an offence to deny medical care to the wounded, sick and shipwrecked.[36] Respect for this rule was required by Argentina's National Court of Appeals in the *Military Junta case* in 1985.[37] Furthermore, there are official statements and other practice supporting this rule in the context of non-international armed conflicts.[38]

No official contrary practice was found with respect to either international or non-international armed conflicts. States and international organisations have generally condemned violations of this rule.[39] The ICRC has called on

[32] Geneva Conventions, common Article 3 (*ibid.*, § 192).
[33] Additional Protocol II, Articles 7–8 (adopted by consensus) (*ibid.*, §§ 201–202).
[34] Cairo Declaration on Human Rights in Islam, Article 3(a) (*ibid.*, § 208); Hague Statement on Respect for Humanitarian Principles, paras. 1 and 2 (*ibid.*, § 209); Memorandum of Understanding on the Application of International Humanitarian Law between Croatia and the SFRY, para. 1 (*ibid.*, §§ 210 and 351); Agreement on the Application of International Humanitarian Law between the Parties to the Conflict in Bosnia and Herzegovina, para. 2.1 (*ibid.*, §§ 211 and 352); Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law in the Philippines, Part IV, Article 4(2) and (9) (*ibid.*, § 212).
[35] See, e.g., the military manuals of Argentina (*ibid.*, §§ 215 and 355), Australia (*ibid.*, §§ 216–217 and 357), Belgium (*ibid.*, § 218), Benin (*ibid.*, §§ 220 and 359), Bosnia and Herzegovina (*ibid.*, § 221), Cameroon (*ibid.*, § 224), Canada (*ibid.*, §§ 225–226), Colombia (*ibid.*, §§ 227–229), Croatia (*ibid.*, §§ 231 and 233), Ecuador (*ibid.*, § 234), El Salvador (*ibid.*, § 235), Germany (*ibid.*, §§ 239–240), India (*ibid.*, §§ 242–243), Italy (*ibid.*, § 246), Kenya (*ibid.*, §§ 247 and 367), Lebanon (*ibid.*, § 248), Madagascar (*ibid.*, §§ 249 and 368), Netherlands (*ibid.*, §§ 252–253 and 369), New Zealand (*ibid.*, § 255), Nicaragua (*ibid.*, § 256), Nigeria (*ibid.*, §§ 257–258 and 260), Philippines (*ibid.*, §§ 261–264 and 374), Rwanda (*ibid.*, § 267), South Africa (*ibid.*, § 269), Spain (*ibid.*, § 270), Sweden (*ibid.*, § 271), Togo (*ibid.*, §§ 274 and 380), Uganda (*ibid.*, § 275), United Kingdom (*ibid.*, § 277) and United States (*ibid.*, § 278).
[36] See, e.g., the legislation of Azerbaijan (*ibid.*, § 283), Bangladesh (*ibid.*, § 284), Colombia (*ibid.*, § 286), Estonia (*ibid.*, § 290), Ireland (*ibid.*, § 291), Norway (*ibid.*, § 292), Spain (*ibid.*, § 294), Ukraine (*ibid.*, § 295), Venezuela (*ibid.*, § 297) and Vietnam (*ibid.*, § 298); see also the legislation of the Czech Republic (*ibid.*, § 288), Slovakia (*ibid.*, § 293) and Uruguay (*ibid.*, § 296), the application of which is not excluded in time of non-international armed conflict, and the draft legislation of Argentina (*ibid.*, § 282) and El Salvador (*ibid.*, § 289).
[37] Argentina, National Court of Appeals, *Military Junta case* (*ibid.*, § 299).
[38] See, e.g., the statements of Australia (*ibid.*, § 300), Rwanda (*ibid.*, § 311), Uruguay (*ibid.*, § 314) and Yugoslavia (*ibid.*, § 315), the practice of Honduras (*ibid.*, § 304) and the reported practice of Jordan (*ibid.*, § 307), Malaysia (*ibid.*, § 308) and Philippines (*ibid.*, § 309).
[39] See, e.g., the statements of South Africa (*ibid.*, § 312) and Yugoslavia (*ibid.*, § 315); UN Commission on Human Rights, Report of the Special Rapporteur on the Situation of Human Rights in Burundi (*ibid.*, § 320); ONUSAL, Report of the Director of the Human Rights Division (*ibid.*, § 322).

parties to both international and non-international armed conflicts to respect this rule.[40]

Interpretation

The obligation to protect and care for the wounded, sick and shipwrecked is an obligation of means. Each party to the conflict must use its best efforts to provide protection and care for the wounded, sick and shipwrecked, including permitting humanitarian organisations to provide for their protection and care. Practice shows that humanitarian organisations, including the ICRC, have engaged in the protection and care of the wounded, sick and shipwrecked. It is clear that in practice these organisations need permission from the party in control of a certain area to provide protection and care, but such permission must not be denied arbitrarily (see also commentary to Rule 55).

In addition, the possibility of calling on the civilian population to assist in the care of the wounded, sick and shipwrecked is recognised in practice. Aid offered by the civilian population is recognised by the 1864 Geneva Convention, the First Geneva Convention and Additional Protocols I and II.[41] This possibility is also recognised in a number of military manuals.[42]

The rule that no distinction may be made among the wounded, sick and shipwrecked except on medical grounds is often expressed in international humanitarian law as a prohibition of "adverse distinction" (see also Rule 88). This means that a distinction may be made which is beneficial, in particular by treating persons requiring urgent medical attention first, without this being discriminatory treatment between those treated first and those treated afterwards. This principle is set forth in many military manuals.[43] It is also supported by

[40] See, e.g., ICRC, Memorandum on the Applicability of International Humanitarian Law (*ibid.*, §§ 329 and 397), Press Releases Nos. 1658 and 1659 (*ibid.*, § 330), Press Release, Tajikistan: ICRC urges respect for humanitarian rules (*ibid.*, § 331), Press Release No. 1670 (*ibid.*, §§ 332 and 398), Communication to the Press No. 93/17 (*ibid.*, § 333), Press Release No. 1764 (*ibid.*, § 334), Memorandum on Respect for International Humanitarian Law in Angola (*ibid.*, §§ 336 and 399), Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Operation Turquoise (*ibid.*, §§ 337 and 400), Press Release No. 1793 (*ibid.*, § 338), Press Release No. 1797 (*ibid.*, § 339) and Communication to the Press No. 00/42 (*ibid.*, § 340).

[41] 1864 Geneva Convention, Article 5; First Geneva Convention, Article 18 (*ibid.*, § 195); Additional Protocol I, Article 17(2) (adopted by consensus) (*ibid.*, § 200); Additional Protocol II, Article 18(1) (adopted by consensus) (*ibid.*, § 203).

[42] See, e.g., the military manuals of Argentina (*ibid.*, § 214), Cameroon (*ibid.*, § 224), Canada (*ibid.*, §§ 225–226), Croatia (*ibid.*, § 232), Germany (*ibid.*, § 240), Kenya (*ibid.*, § 247), New Zealand (*ibid.*, § 255), Russia (*ibid.*, § 266), Sweden (*ibid.*, § 272), Switzerland (*ibid.*, § 273), United Kingdom (*ibid.*, §§ 276–277) and United States (*ibid.*, §§ 278–279).

[43] See, e.g., the military manuals of Argentina (*ibid.*, §§ 354–355), Australia (*ibid.*, §§ 356–357), Belgium (*ibid.*, § 358), Canada (*ibid.*, §§ 360–361), Colombia (*ibid.*, § 362), Ecuador (*ibid.*, § 363), France (*ibid.*, § 364), Germany (*ibid.*, § 365), Hungary (*ibid.*, § 366), Netherlands (*ibid.*, §§ 369–370), New Zealand (*ibid.*, § 371), Nigeria (*ibid.*, §§ 372–373), Senegal (*ibid.*, § 377), Spain (*ibid.*, § 378), Switzerland (*ibid.*, § 379), United Kingdom (*ibid.*, § 381), United States (*ibid.*, §§ 382–383) and Yugoslavia (*ibid.*, § 385).

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the requirement of respect for medical ethics, as set forth in Additional Protocols I and II (see also Rule 26), to the effect that medical personnel may not be required to give priority to any person, except on medical grounds.[44]

Rule 111. Each party to the conflict must take all possible measures to protect the wounded, sick and shipwrecked against ill-treatment and against pillage of their personal property.

Practice

Volume II, Chapter 34, Section C.

Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts. The acts against which the wounded, sick and shipwrecked have to be protected according to this rule, namely pillage and ill-treatment, are prohibited pursuant to Rules 52 and 87.

International armed conflicts

The obligation to take all possible measures to protect the wounded, sick and shipwrecked from pillage and ill-treatment in the context of international armed conflicts was first codified in the 1906 Geneva Convention and 1907 Hague Convention (X).[45] It is now set forth in the 1949 Geneva Conventions.[46]

Numerous military manuals refer to the duty to take all possible measures to protect the wounded, sick and shipwrecked against ill-treatment and pillage.[47] In particular, many manuals prohibit pillage of the wounded, sick and shipwrecked, sometimes referred to as "marauding", or specify that it constitutes a war crime.[48] For a definition of pillage, see Rule 52.

[44] Additional Protocol I, Article 15(3) (adopted by consensus) (*ibid.*, § 347); Additional Protocol II, Article 9(2) (adopted by consensus) (*ibid.*, § 349).

[45] 1906 Geneva Convention, Article 28 (*ibid.*, § 403); Hague Convention (X), Article 16 (*ibid.*, § 404).

[46] First Geneva Convention, Article 15, first paragraph (*ibid.*, § 405); Second Geneva Convention, Article 18, first paragraph (*ibid.*, § 406); Fourth Geneva Convention, Article 16, second paragraph (*ibid.*, § 407).

[47] See, e.g., the military manuals of Argentina (*ibid.*, § 415), Australia (*ibid.*, § 416), Canada (*ibid.*, §§ 419–420), Colombia (*ibid.*, § 421), Germany (*ibid.*, § 424), Indonesia (*ibid.*, § 427), New Zealand (*ibid.*, § 432), Nigeria (*ibid.*, § 433), United Kingdom (*ibid.*, §§ 438–439) and United States (*ibid.*, §§ 440–441).

[48] See, e.g., the military manuals of Burkina Faso (*ibid.*, § 417), Cameroon (*ibid.*, § 418), Canada (*ibid.*, § 420), Congo (*ibid.*, § 422), France (*ibid.*, § 423), Israel (*ibid.*, § 425), Italy (*ibid.*, § 426), Lebanon (*ibid.*, § 428), Mali (*ibid.*, § 429), Morocco (*ibid.*, § 430), Philippines ("mistreat") (*ibid.*, § 434), Romania (*ibid.*, § 435), Senegal (*ibid.*, § 436), Switzerland (*ibid.*, § 437), United Kingdom (*ibid.*, § 438) and United States ("mistreating") (*ibid.*, § 442).

Non-international armed conflicts

The obligation to take all possible measures to protect the wounded, sick and shipwrecked from pillage and ill-treatment in non-international armed conflicts is set forth in Additional Protocol II.[49] In addition, it is contained in a number of other instruments pertaining also to non-international armed conflicts.[50]

A number of military manuals which are applicable in or have been applied in non-international armed conflicts prohibit pillage and ill-treatment of the wounded, sick and shipwrecked or specify the obligation to take all possible measures to protect them from pillage and ill-treatment.[51] In 1991, the Chief of Staff of the Yugoslav People's Army ordered troops to prevent the pillage and mistreatment of the wounded and sick.[52]

No official contrary practice was found with respect to either international or non-international armed conflicts.

Respect by civilians for the wounded, sick and shipwrecked

Practice further indicates that civilians have a duty to respect the wounded, sick and shipwrecked. With respect to international armed conflicts, this principle is set forth in Article 18 of the First Geneva Convention and in Article 17 of Additional Protocol I.[53] It is also stated in a number of military manuals.[54] Sweden's IHL Manual, in particular, identifies Article 17 of Additional Protocol I as a codification of customary international law.[55] The Commentary on the Additional Protocols notes with respect to Article 17 of Additional Protocol I that:

The duty imposed here upon the civilian population is only to respect the wounded, sick and shipwrecked, and not to protect them. Thus it is above all an obligation to refrain from action, i.e., to commit no act of violence against the wounded or take advantage of their condition. There is no positive obligation to assist a wounded

[49] Additional Protocol II, Article 8 (adopted by consensus) (*ibid.*, § 409).
[50] See, e.g., Memorandum of Understanding on the Application of International Humanitarian Law between Croatia and the SFRY, para. 1 (*ibid.*, § 412); Agreement on the Application of International Humanitarian Law between the Parties to the Conflict in Bosnia and Herzegovina, para. 2.1 (*ibid.*, § 413).
[51] See, e.g., the military manuals of Australia (*ibid.*, § 416), Canada (*ibid.*, §§ 419–420), Colombia (*ibid.*, § 421), Germany (*ibid.*, § 424), Italy (*ibid.*, § 426), Lebanon (*ibid.*, § 428), Netherlands (*ibid.*, § 431), New Zealand (*ibid.*, § 432) and Philippines ("mistreat") (*ibid.*, § 434).
[52] Yugoslavia, *Order No. 579 of the Chief of General Staff of the Yugoslav People's Army* (*ibid.*, § 519).
[53] First Geneva Convention, Article 18, second paragraph (*ibid.*, § 524); Additional Protocol I, Article 17(1) (adopted by consensus) (*ibid.*, § 525).
[54] See, e.g., the military manuals of Argentina (*ibid.*, § 527), Australia (*ibid.*, § 528), Germany (*ibid.*, § 529), Spain (*ibid.*, § 530), Switzerland (*ibid.*, § 532), United Kingdom (*ibid.*, § 533) and United States (*ibid.*, §§ 534–535).
[55] Sweden, *IHL Manual* (*ibid.*, § 531).

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person, though obviously the possibility of imposing such an obligation remains open for national legislation, and in several countries the law has indeed provided for the obligation to assist persons who are in danger, on pain of penal sanctions.[56]

The duty of civilians to respect the wounded, sick and shipwrecked also applies in non-international armed conflicts, because non-respect would be a violation of the fundamental guarantees accorded to all persons *hors de combat* (see Chapter 32). Under the Statute of the International Criminal Court, it is a war crime for anyone to kill or wound a person *hors de combat* whether in international or non-international armed conflicts.[57]

[56] Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 701.

[57] ICC Statute, Article 8(2)(a)(i) and (c)(i) (cited in Vol. II, Ch. 32, §§ 675–676) and Article 8(2)(b)(VI) (cited in Vol. II, Ch. 15, § 217).

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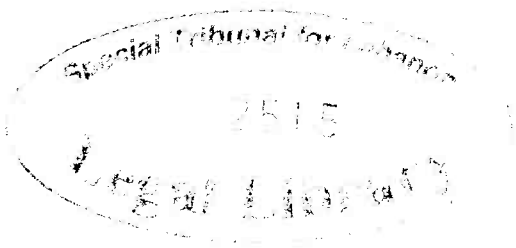
EDITED BY

MALCOLM D. EVANS

Professor of Public International Law, University of Bristol



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THE SOURCES OF INTERNATIONAL LAW

Hugh Thirlway

SUMMARY

A rule of international law must derive from one of the recognized sources, namely: (1) treaties and conventions; (2) international custom; (3) general principles of law; and (4) the 'subsidiary sources' of judicial decisions and legal teachings. Treaties are binding only on the parties to them; custom (which pre-supposes an established practice and a psychological element known as the *opinio juris*) is in principle binding on all States, unless it is a 'special' or 'local' custom, and save for the exceptional case of the 'persistent objector'. The general principles of law (as evidenced by national legal systems) may be appealed to if a point is not settled either by treaty or custom. Other sources, or alternative conceptions of how law comes into being, have from time to time been suggested, but the traditional analysis continues to be used in practice, in particular by the International Court.

I. INTRODUCTION: WHAT ARE SOURCES OF LAW?

The essence of every legal system is a body of principles and rules that lay down the rights and obligations of the subjects of that system.[1] These may for convenience be called the 'primary rules' of the system. However, each system also contains rules which can be applied to determine what are the primary rules, how they come into existence and how they can be changed; these we may term 'secondary rules'.[2] In municipal legal systems, ie,

[1] The question whether international law is *solely* a set of principles and rules is controversial, but no-one denies that such principles and rules are comprised in it, and for present purposes it will be sufficient to limit our attention to those principles and rules. Cf the discussion of 'formalism' and 'anti-formalism' in Ch 2, Section V, above. The concept of 'sources' is in itself essentially formalist.

[2] The terminology is that employed by Hart, 1994 in the context of municipal systems; it is less commonly used in this context in international law, but makes for clarity. The distinction primary/secondary was also used by the International Law Commission in its study of State responsibility: the primary rules are

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the legal systems applicable within individual States, the presence of these secondary rules is easy to overlook in the actual practice of the law. The landowner suing his neighbour for trespass, or the prosecution in a criminal case, normally do not need to stop and ask themselves, 'Why does encroachment on someone else's land invite legal consequences?', or 'Why is it an offence to do what the defendant has done?'—the law so provides, and that is all. The primary legal rules being applied in these cases did not however spring up from nowhere: they exist because the legislature passed particular legislation, or because a long line of judicial decisions has established that the common law is to this or that effect. Thus there exist secondary rules, to the effect that a Parliament, or other legislative body, has the power to make law; and that the common law as expressed in judicial precedents, constitutes the law of the land—the body of primary rules.

In international law, there exist similar secondary rules, but they are less clearly defined, for a number of reasons. There is, for example, at the international level neither a universal legislative body corresponding to a national Parliament, nor a system of universal judicial jurisdiction which has built up a wide-ranging body of precedent. At the municipal level, legal disputes are usually over the precise application or interpretation of rules, the existence of which is generally recognized: do the circumstances of the case fall within the rule enunciated by the judges in a particular line of cases, or within the purview of a particular statute, as correctly interpreted? At the international level, disputes may frequently turn on whether the legal rule relied on by one State exists at all as a legal rule,[3] since there are controversial aspects of the workings of the secondary rules. There may also be recognition of a rule, but dispute whether it is a rule binding on one or the other party to the dispute (since, as we shall see, not all rules of international law are binding on all States).

These secondary rules are referred to in international law as the *sources* of international law. This terminology highlights the idea that a rule must come *from* somewhere, as well as the idea that there is a flow, a process, which may take time: a rule may exist conceptually, as a proposal or a draft, and later come to be accepted as binding. The problem may then be to determine at what moment the rule acquired the status of a rule of existing, binding, law. Prior to that moment, it forms part of what is called *lex ferenda* (law which ought to be made, ie, developing or embryonic law); thereafter it is part of the *lex lata* (law which has been made, positive law).

It is traditional to distinguish between what are called the *material sources* of international law, and the *formal sources*. In relation to a particular rule which is alleged to be a rule of international law, the material source is simply the place—normally a document of some kind—in which the terms of the rule are set out. This may be a treaty, a resolution of the UN General Assembly, a proposal of the UN International Law Commission, a judicial decision, a 'restatement' by a learned body, or even a statement in a textbook. In identifying a material source, no account need be taken of the legal authority of the textual instrument: for example, a treaty which has never come into force at all, and is thus not binding

those imposing specific obligations on States; the secondary rules determine how those obligations are to be implemented, or what consequences flow from their breach.

[3] For example, the dispute between Hungary and Slovakia whether there exists in customary law a rule of automatic succession to a treaty by a successor State in case of dissolution of a State party to the treaty: *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Reports 1997*, p 7, paras 116–121; and in a more narrow context, the *Dispute regarding Navigational and Related Rights between Costa Rica and Nicaragua*, Judgment of 13 July 2009, paras 34–36.

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on anyone as a treaty, may still be the material source for a rule which has acquired the force of binding law by another route.[4]

The question of the authority for the rule as a rule of law, binding on States, is determined by the *formal* source of the rule. The generally recognized formal sources are identified in Article 38 of the Statute of the International Court of Justice (ICJ), to be examined in more detail below, but the two most important sources in practice are treaties and international custom. If a rule is laid down in a treaty, then it is binding on the States parties to that treaty, and the treaty is at once the material source and the formal source of the rule. The rule may however be taken over and applied in the practice of other States, not parties to the treaty, in such a way, and to such an extent, that it takes on the character of a customary rule. For these States, the material source of the rule will still be the original treaty, but the formal source will be international custom.

If the secondary rule defining the recognized sources of international law operates to make it possible to determine what are the primary rules, governing the actual conduct of States, what rule—presumably a tertiary rule—determines the identification of the secondary rules? If the question is asked, 'Why should I comply with this primary rule?', the answer may be, 'Because it is a rule of treaty-law, laid down in a treaty to which you are a party'; but what then is the answer to the question, 'Why must I comply with treaty-law?' The classic answer is that there is a principle *pacta sunt servanda*, that what has been agreed to must be respected; this is an example of a secondary rule, one which defines treaties and agreements as formal sources of international law. Theoretically one may then ask, 'But why should I respect the principle *pacta sunt servanda*? Is there a higher principle still requiring me to respect it?' Article 38 of the ICJ Statute, already referred to, provides that the Court, in deciding disputes in accordance with international law, is to apply international treaties and conventions in force; but that is no more than a recognition of treaties as one of the formal sources of primary rules. The Statute is in fact a material source of the secondary rule that treaties make law, but not a formal source of that rule.

Much legal ingenuity has been deployed to discuss this problem, to avoid an infinite regression of secondary, tertiary, quaternary, etc, rules, by establishing, for example, a 'fundamental norm' on which all international law is based. None of the theories advanced commands universal assent; but nor are any of them actually essential to international legal relations in practice. The issue is fortunately one of purely academic interest. The realistic answer to the conundrum can probably only be that this is the way international society operates, and has operated for centuries, and probably the only way in which anything that can claim to be a society or community could possibly operate. This is particularly evident in the case of the principle *pacta sunt servanda*: if an agreement does not have to be respected, is there any point in making it?[5]

The doctrine of sources has attracted an enormous amount of discussion and criticism among international lawyers, and various proposals have been made for re-thinking the subject, or for getting rid of the idea of 'sources' altogether. While the traditional view presents some anomalies and difficulties, it has so far proved the most workable method

[4] For example, the 1933 Montevideo Convention on the Rights and Duties of States is regularly referred to as containing a convenient legal definition of a 'State', and of the conditions which must be met for that status to be acquired, despite the fact that for want of ratifications it never came into force as a treaty.

[5] There does of course exist a class of agreements not intended to be strictly legally binding: the obligations so created are known as 'soft law'. (See Ch 5 and Ch 6 Section IV, below.)

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of analysing the way in which rules and principles develop that States in practice accept as governing their actions. The reasoning in the decisions of the International Court of Justice has used the traditional terminology and structure of source-based law, consistently with the requirements of Article 38 of the Court's Statute (which is commonly treated as an enumeration of 'sources' although the text does not use the term). At the present time, it seems unlikely that any other system will be able to replace the traditional approach. It is striking that such a comparatively recent development as international environmental law rests on the application of the traditional sources (see Ch 23, Section V, below).

II. ARTICLE 38 OF THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

When the Permanent Court of International Justice was to be established in 1922, a Commission of Jurists was appointed to draw up its Statute, the legal instrument to govern its workings. The Permanent Court was to be the first standing international tribunal to decide disputes between States; if States were to be willing to accept it, one of the matters that had to be defined in advance was the nature of the law that the Court would apply. There was at the time an established tradition of referring inter-State disputes to binding arbitration, on an ad hoc basis, or of submitting groups of related disputes to a temporary standing body, usually called a Claims Commission; but the terms of reference of arbitral bodies or claims commissions were almost always defined in the international agreement (known as the *compromis*) by which they were established.

The text which was adopted as Article 38 of the Permanent Court Statute was re-adopted after the Second World War, when the Permanent Court was wound up and replaced by the International Court of Justice, with one change in the wording. The present text is as follows:

(1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   (b) international custom, as evidence of a general practice accepted as law;
   (c) the general principles of law recognized by civilized nations;
   (d) subject to the provisions of Article 59,[6] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

(2) This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

The clause in the first paragraph 'whose function is to decide in accordance with international law such disputes as are submitted to it' was added in 1946; its effect is to emphasize that, by applying what is mentioned in sub-paragraphs a to d, the Court will be

[6] Article 59 provides that 'The decision of the Court has no binding force except between the parties and in respect of that particular case'.

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applying international law, ie, that the sources mentioned in those sub-paragraphs constitute recognized sources of international law, and (presumably) the sole sources of that law. That this was already the intention of the text is clear from the records of its drafting; but it also follows from the inclusion of paragraph 2. To decide a case *ex aequo et bono* is by definition to decide otherwise than in accordance with the applicable law: to decide simply what seems to the judge or arbitrator the fairest solution in the circumstances.[7] Since the Court only possesses the power to decide in this way when the parties agree to it, all other decisions must be in accordance with law—and law as derived from the sources mentioned in paragraph 1.

Article 38 has been much criticized as a definition of the sources of international law, and it has often been suggested that it is inadequate, out of date, or ill-adapted to the conditions of modern international intercourse. As already noted, there have been suggestions that the whole concept of 'sources' should be thrown overboard, to be replaced by, for example, the 'recognized manifestations of international law'; it has also been suggested that the existence of additional sources should be accepted. Some of these latter suggestions will be addressed in Section IV below; but the fact is that no new approach has acquired any endorsement in the practice of States, or in the language of their claims against each other; and the International Court has in its decisions consistently analysed international law in the terms of Article 38. It may of course be objected that this is not necessarily significant, because whether or not Article 38 is obsolete as a general statement, the Court remains bound by it; but if there had really been a substantive change in international legal thinking on the question of sources, the Court might have been expected at the least to have taken note of it, while drawing attention to its inability to go beyond the terms of its own Statute.

A. TREATIES AND CONVENTIONS IN FORCE

The principle *pacta sunt servanda* has already been mentioned as the basis for the binding nature of treaties. The whole point of making a binding agreement is that each of the parties should be able to rely on performance of the treaty by the other party or parties, even when such performance may have become onerous or unwelcome to such other party or parties. Thus a treaty is one of the most evident ways in which rules binding on two or more States may come into existence, and thus an evident formal source of law. The 1969 Vienna Convention on the Law of Treaties,[8] which is to a very large extent the codification of pre-existing general law on the subject, states the principle in Article 26, under the heading '*Pacta sunt servanda*': 'Every treaty is binding upon the parties to it and must be performed by them in good faith'.

It has been argued that a treaty is better understood as a source of *obligation*, and that the only rule of *law* in the matter is the basic principle that treaties must be observed

[7] The Court has never been asked by the parties to a dispute to decide it in this way; but it has been suggested (by Judge Oda) that maritime delimitation cases, in view of the difficulty of basing any specified delimitation line on a framework of logically compelling legal argument, have in fact been decided on an unavowed *ex aequo et bono* basis, with the tacit consent of the parties.

[8] A multilateral convention adopted in 1969, on the basis of a draft prepared by the UN International Law Commission, and accepted by a large number of States. It codifies practically the whole of the law of treaties (see further Ch 7 below).

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(Fitzmaurice, 1958). Certainly the content of, let us say, a bilateral customs treaty, setting rates of duties and tariffs on various goods, does not look much like 'law'. At the other extreme, there are more and more examples in modern law of so-called 'law-making' treaties: multilateral conventions that lay down for the parties to them a whole regime, as for example the Geneva Conventions in the field of humanitarian law, the Genocide Convention, or the Vienna Convention on the Law of Treaties itself. The principle in each case is however the same: that the States parties accept a commitment to certain behaviour that would not be legally required of them in the absence of the treaty. They may indeed by treaty vary or set aside the rules that general international law imposes on all States, though such variation or exclusion is only effective between the parties; and this power is subject to the limits imposed by *jus cogens*.[9] The traditional doctrine that treaties are sources of law is therefore recommended by logic and convenience.

If it is axiomatic that a party to a treaty is committed to what has been agreed in the treaty, it is equally axiomatic that a State which is not a party to a treaty is under no such obligation. The principle *res inter alios acta nec nocet nec prodest* (a transaction between others effects neither disadvantage nor benefit) is as valid as *pacta sunt servanda* and can in fact be regarded as a corollary of that principle. As the Vienna Convention on the Law of Treaties (Article 34) expresses the point: 'A treaty does not create either obligations or rights for a third State without its consent'. The Vienna Convention being itself a treaty, its codifying provisions are thus themselves only applicable *as treaty-law* to the States which have ratified it.

There are two apparent exceptions to this principle—but they are only apparent. First, the situation in which an obligation stated in a treaty is or becomes an obligation of general customary law (a process to be examined below), in which case the non-party State may be bound by the same substantive obligation, but as a matter of customary law, and not by the effect of the treaty. This is in fact the case of the Vienna Convention on the Law of Treaties itself; its provisions have frequently been applied by the International Court, on the basis that such provisions state rules which apply to all States as customary law, to a State not party to the Convention. Secondly, it is possible for a State not a party to a treaty to accept an obligation stated in the treaty, or to derive a benefit from the treaty, if all States concerned—the parties to the treaty and the outsider State—are so agreed. In effect a new treaty is concluded extending the scope of the original treaty to the third State.[10]

The normal way in which a State becomes bound by the obligations provided for in a treaty is by becoming a party to it, through the processes to be described in Chapter 7, Section III. Where the treaty is a multilateral convention of the 'law-making' type, it is possible that a State could, simply by conduct, indicate its acceptance of the regime of the convention as applicable to itself. In the *North Sea Continental Shelf* case before the International Court, it was argued by Denmark and the Netherlands that the Federal

[9] This concept is examined in Section IV B below, and will be dealt with more fully in Ch 6: briefly, international law is regarded as divided into *jus dispositivum*, the rules of law from which States may freely contract out, by treaty; and *jus cogens*, a category composed of a limited number of norms which, because of their importance in and to the international community, remain binding notwithstanding any agreement to the contrary (see Articles 53 and 64 of the Vienna Convention on the Law of Treaties). The concept is generally accepted, but there remains considerable controversy as to its application, as to how rules of *jus cogens* acquire that status, and which rules have in fact acquired it.

[10] See Articles 35 and 36 of the Vienna Convention on the Law of Treaties.

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Republic of Germany, which had signed but not ratified the 1958 Geneva Convention on the Continental Shelf, had 'by conduct, by public statements and proclamations, and in other ways,... unilaterally assumed the obligations of the Convention; or... manifested its acceptance of the conventional régime.'[11] The Court rejected this contention on the facts of the case, but did not absolutely rule out any possibility of such a process; it did however make it clear, first that 'only a very definite, very consistent course of conduct on the part of [the] State' could have the effect suggested, and secondly that there could be no question of a State being permitted to claim rights or benefits under a treaty 'on the basis of a declared willingness to be bound by it, or of conduct evincing acceptance of the conventional regime'.[12]

Article 38 of the ICJ Statute refers to 'treaties and conventions in force', thus excluding treaties which have not, or not yet, come into force, or which have ceased to be binding on the parties.[13] The question whether a particular treaty is 'in force' between a particular pair of States is however not an absolute one, to be answered simply by checking that each of them has ratified it. A new State may be bound by certain treaties concluded by its predecessor, without a formal Act of Accession thereto. A further complication is due to the possibility of reservations made by parties when signing or ratifying the treaty: in the case of a complex multilateral treaty, there may in effect be a number of parallel regimes operating between different pairs of States, depending on the extent to which a State may have excluded certain provisions of the treaty by reservation, and the extent to which the reservation has been accepted (or more precisely, not objected to) by other States parties. The operation of the rules as to reservations will be explained more fully in Chapter 7, Section VI.

B. CUSTOM

1. Introduction

It is probably a universal characteristic of human societies that many practices which have grown up to regulate day-to-day relationships imperceptibly acquire a status of inexorability: the way things have always been done becomes the way things *must* be done. In treating custom as a source of legal rules, international law does not deviate from the pattern discernible in municipal legal systems. Historically, at the international level, once the authority of natural law, in the sense of what was given by God or imposed by the nature of an international society made up of independent princes, had weakened, it was natural to derive legal obligations from the legitimate expectations created in others by conduct. The precise nature and operation of the process have, however, always presented obscurities.

[11] *North Sea Continental Shelf, Judgment, ICJ Reports 1969*, p 3, para 27.

[12] Ibid, para 28. Underlying the distinction is of course the question of the consent of the original parties: they may be presumed to have no objection to other States accepting the *obligations* of the Convention, but if other States are to enjoy *benefits* under it there must be positive consent of the original parties, as indeed the Vienna Convention requires. This point was made by the ICJ in the *North Sea Continental Shelf* case, ibid, para 28.

[13] The question whether neglected treaties cease to be binding through 'desuetude' was raised, but not answered, before the ICJ in the *Nuclear Tests* and *Aegean Sea Continental Shelf* cases; it remains controversial.

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One approach is to regard all custom as a form of tacit agreement: States behave towards each other in given circumstances in certain ways, which are found acceptable, and thus tacitly assented to, first as a guide to future conduct and then, little by little, as legally determining future conduct. The difficulty of this analysis is that if agreement makes customary law, absence of agreement justifies exemption from customary law. On that basis, a given rule would only be binding on those States that had participated in its development, and so shown their assent to the rule. Yet it is generally recognized that, subject to two exceptions, to be indicated below, a rule of general customary international law is binding on all States, whether or not they have participated in the practice from which it sprang. The problem is particularly acute in the case of new States: during the period of decolonization after the Second World War, some attempt was made by the newly independent States to argue that they began life with a clean slate, so far as rules of customary law were concerned. They claimed to be able to pick and choose which established rules of law they would accept, and which they would reject. This view was not accepted by other States, and later quietly abandoned by its adherents. It was probably realized that it could have been a two-edged sword; that most rules of general custom are such that a State which rejects one of them today in one dispute, may find it needs to invoke the same rule in its favour tomorrow in a different dispute.[14]

2. The two-element theory

The traditional doctrine is that the mere fact of consistent international practice in a particular sense is not enough, in itself, to create a rule of law in the sense of the practice; an additional element is required. Classical international law sees customary rules as resulting from the combination of two elements: an established, widespread, and consistent practice on the part of States; and a psychological element known as the *opinio juris sive necessitatis* (opinion as to law or necessity), usually abbreviated to *opinio juris*. The judicial *locus classicus* on the point is the ICJ judgment in the *North Sea Continental Shelf* case; the Court was discussing the process by which a treaty provision might generate a rule of customary law, but its analysis is applicable to custom-creation generally:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, ie, the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.[15]

The idea that State practice, to be significant, must be accompanied by a conviction of adhering to an *existing* rule of law, is here merely re-stated; it had long been recognized in international law. It has however been frequently pointed out that it is paradoxical in its implications: for how can a practice ever develop into a customary rule if States have to believe the rule already exists before their acts of practice can be significant for the

[14] The question of the application to a new State of treaties concluded by its predecessor, where each treaty could be considered independently, continued to cause controversy.

[15] *North Sea Continental Shelf, Judgment, ICJ Reports 1969*, p 3, para 77. See also *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, ICJ Reports 1985*, p 13, para 27; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment, ICJ Reports 1986*, p 14, paras 183 and 207.

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creation of the rule? Or is it sufficient if initially States act in the *mistaken* belief that a rule already exists, a case of *communis error facit jus* (a shared mistake produces law)?

The problem has been argued over endlessly by legal writers,[16] some of whom have sought to escape the dilemma by denying the two-element theory itself. It is clear that the elements of practice and *opinio* are closely intertwined: the Court spoke of the practice as 'evidence' of the existence of the *opinio juris*, and for some authors only the psychological element is essential, the role of State practice being merely to prove the existence of that element. This makes it possible to see a rule of international customary law where there is insufficient practice, or none, but there is other evidence that States believe in the existence of a rule of law; this is particularly relied on by those who see General Assembly resolutions as law-creating. An alternative approach is to see custom as essentially practice, the only relevance of the beliefs or intention of the States involved in the practice being to exclude practices rendered legally binding by a treaty obligation, or regarded by all concerned as dictated merely by courtesy or comity, without any legal commitment to continued observance.

Since the *opinio juris* is a state of mind, there is an evident difficulty in attributing it to an entity like a State; and in any event it has to be deduced from the State's pronouncements and actions, particularly the actions alleged to constitute the 'practice' element of the custom. It should not be overlooked that State practice is two-sided; one State asserts a right, either explicitly or by acting in a way that impliedly constitutes such an assertion, and the State or States affected by the claim then react either by objecting or by refraining from objection. The practice on the two sides adds up to imply a customary rule, supporting the claim if no protest is made, or excluding the claim if there is a protest. The accumulation of instances of the one kind or the other constitutes the overall practice required for establishment of a customary rule.

It also follows from the psychological requirement of *opinio juris*, the consciousness of conforming to a rule, that if the acts of practice are to be attributed to a motive other than such consciousness, they cannot show *opinio juris*. This point also arose in the *North Sea Continental Shelf* case: the Court, when considering whether a rule of maritime delimitation laid down in the 1958 Geneva Convention on the Continental Shelf had become a customary rule, noted that a number of instances of delimitation complying with the rule were delimitations effected by States parties to the Convention. Those States 'were therefore presumably... acting... in the application of the Convention', and thus 'From their action no inference could legitimately be drawn as to the existence of a rule of customary law...'[17]

Similar reasoning may be applied to the situation of States which, for one reason or another, cannot participate in a practice giving rise to a customary rule: an obvious example is that of land-locked States in relation to a rule concerning the delimitation of maritime areas off the coasts of coastal States. Such States may have a view as to the existence of such a rule, but one which cannot be demonstrated by acts of practice, and thus not a true *opinio juris*. It was probably this consideration that led the International Court, in the *North Sea Continental Shelf* case, to refer to the importance, in assessing the law-creative effect of State practice, of the participation in it of 'States whose interests are

[16] For an idiosyncratic modern re-statement of the difficulties, see Kammerhofer, 2004.

[17] *North Sea Continental Shelf, Judgment, ICJ Reports 1969*, p 3, para 76.

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specially affected'.[18] More controversial was the question that arose in the case concerning the *Legality of the Threat or Use of Nuclear Weapons*:[19] was the practice of the States that actually possessed such weapons more significant than that of the States which did not? The Court did not, in its advisory opinion, comment directly on the point.

A further problem of a similar nature is the determination of customary law in a field in which there is no practice at all, because the subject matter is new. This was the case when the first satellites were launched into space, and the idea of a landing on the moon or other celestial bodies began to look like something more than an impractical dream. Did a satellite, in orbiting the earth, infringe the sovereignty of the States whose territory it overflew? Were celestial bodies open to appropriation and sovereignty in the same way as unoccupied territories on earth? On the first point, the only practice at the time of the Russian *Sputnik* was the launching of that object itself, and the reaction, or lack of reaction, of other States: on the second point, there was no practice, and unlikely to be any for a number of years. The problem was solved by international treaty;[20] but it was in this context that the suggestion was made that there had come into existence a new form of customary law, usually known as 'instant custom'. According to this view, first advanced in 1965 (Cheng, 1965), custom could be deduced from declarations in General Assembly resolutions, such resolutions constituting at once elements of State practice and evidence of the necessary *opinio juris*. This theory, though influential for a time, never gained full acceptance, and eventually it was implicitly rejected by the International Court in the cases of *Military and Paramilitary Activities in and against Nicaragua*[21] and *Legality of the Threat or Use of Nuclear Weapons*,[22] in which General Assembly resolutions were treated as evidence of *opinio juris*, but not as acts of State practice. The position appears to be that in a field of activity in which there has not yet been any opportunity for State practice, there is no customary law in existence.

3. Practice

Since international law, including custom, regulates the relationships between States, the practice that is relevant for establishing a rule of customary law is essentially the practice (action or inaction) of States in relation to each other, or in relation to other recognized international actors, such as international organizations. This follows from the nature of the process whereby custom grows from action by one subject of law which is either accepted, rejected, or tolerated by the other subjects of law. Consequently, the practice of a State in relation to its own citizens, a matter of 'domestic jurisdiction' within the meaning of Article 2 (7) of the United Nations Charter, is in principle without significance for the establishment of a customary rule.[23] This may appear to be in contradiction with the

[18] Ibid, para 74.

[19] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996*, p 226.

[20] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (1967), 610 UNTS, p 205.

[21] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment, ICJ Reports 1986*, p 14, paras 184 and 188.

[22] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996*, p 226, para 73.

[23] The treatment of foreign nationals, in particular those resident or present in the State's territory, may give rise to a claim of diplomatic protection by the national State, and is thus very relevant to the development of customary law in this field.

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corpus of the modern law of human rights, which prescribes numerous limitations on the freedom of states in this domain. Human rights law has however grown very largely through the adoption of wide-ranging international conventions, precisely because of the difficulty in establishing a practice-based customary law.[24] Since many of these conventions have been ratified by almost all States, and in the view of the moral authority of the principles which they embody, it is widely argued that the conventional provisions, or some of those principles, are binding also on non-parties, and one of the grounds for this contention is that there is, despite the theoretical problem just noted, a customary law of human rights. The question remains controversial, though there are signs that many States recognize a compromise approach which is workable, even if it may be difficult to define legally.[25]

The controversy over customary human rights law also involves the problem whether non-binding resolutions of international bodies, particularly the United Nations General Assembly, rank as State practice: on this see Section IV B 3 below.

The settled practice required to establish a rule of customary law does not need to be the practice of every single State of the world, as long as it is widespread and consistent. A special problem is that of the divergence between States' assertion of the existence of a particular rule of customary law, and their practice inconsistent with it. In the field of human rights law, for example, it is probably the case that the municipal law of practically every State of the world prohibits torture, and States are generally agreed, in theory, that there is a rule of international law forbidding it; yet there is no doubt that torture continues to be widely practised. Can a rule which flies in the face of consistent practice still be said to have existence as one of customary law? An observation of the International Court in the case of *Military and Paramilitary Activities in and against Nicaragua*, in connection with the question of the existence of customary rules forbidding the use of force or intervention, is in point here:

> 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 recognition of a new rule. If a State acts in a way prima facie inconsistent 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.[26]

[24] The problem is not merely whether other States *may* legally object to actions by a State regarded as contrary to human rights, but also whether they will have any interest in doing so, and thus in carrying out acts creative of State practice; the situation is very different in the field of, for example, international trade.

[25] See Byers, 1999, pp 43–35.

[26] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v *United States of America), Merits, Judgment, ICJ Reports 1986*, p 14, para 186.

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The Court here rules that conduct inconsistent with an existing rule is not necessarily an indication of the recognition, or even the emergence, of a new rule; but it does at the same time recognize that this is a way in which a new rule may be discerned. Later in the same decision, discussing the principle of non-intervention, it observed that 'Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend toward a modification of customary international law'.[27] The paradox of *opinio juris* is of course here emphasized: if a State decides to act in a way inconsistent with a recognized rule of custom, it will no doubt have good and sufficient reason for doing so, and perhaps even for thinking that its approach should be generalized—that the rule needs to be modified consistently with its action. It will however, almost by definition, not be acting because it is convinced that there is already a new rule. The process by which customary rules change and develop thus presents theoretical difficulties; but it is a process which does occur. Customary law, in the traditional conception of it, is not a rigid and unchangeable system, though it is sometimes criticized as being such.

An important difference between customary law and law derived from treaties is that, as already observed, in principle customary law is applicable to all States without exception, while treaty-law is applicable as such only to the parties to the particular treaty. A State which relies in a dispute on a rule of treaty-law has to establish that the other party to the dispute is bound by the treaty; whereas if a claim is based on general customary law, it is sufficient to establish that the rule exists in customary law, and there is no need to show that the other party has accepted it, or participated in the practice from which the rule derives.[28] There are two exceptions to this principle: alongside general customary law there exist rules of *special* or *local* customary law, which are applicable only within a defined group of States; and it is in principle possible for a State which does not accept a rule which is in the process of becoming standard international practice to make clear its opposition to it, in which case it will be exempted from the rule when it does become a rule of law, having the status of what is generally called a *persistent objector.*

As regards *local customary law*, perhaps the only clear and well-known example is that relating to the practice of diplomatic asylum in Latin America, whereby the States of the region recognize the right of the embassies of other States of the region to give asylum to political fugitives.[29] The rule is purely local in that it is not asserted in favour of, or against, States outside the region: for example, neither the British Embassy in Buenos Aires, nor the Argentine Embassy in London, would be regarded as entitled to offer asylum. The International Court had to consider the detailed application of the rule in the *Asylum* and *Haya de la Torre* cases, in which Colombia relied, against Peru, on 'an alleged regional or local custom peculiar to Latin-American States'. In the *Asylum* case the Court observed that:

[27] Ibid, para 207.

[28] If the dispute is subjected to arbitration or judicial settlement, there is theoretically no need even to establish the existence of the rule; according to the principle *jura novit curia* (the court knows the law), no proof of general rules of law is required. However, in practice litigant States do endeavour to prove the existence of the rules of law on which they base their claims.

[29] Another alleged rule of regional customary law was pleaded in the *Dispute regarding Navigational and Related Rights between Costa Rica and Nicaragua*, but the ICJ found it unnecessary to decide whether such a rule existed: Judgment of 13 July 2009, paras 34–36.

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The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State.[30]

Further on in its judgment, the Court held that 'even if such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has on the contrary repudiated it...'.[31] This has been held by some commentators to constitute a finding that Peru had the status of 'persistent objector', to be discussed in a moment; but it can also be understood as a finding that the regional custom, at least on the specific point in dispute, applied to a group of States which did not include Peru.

It has even been held that a special custom may exist between two States only: in the *Right of Passage over Indian Territory* case, Portugal relied on such a custom as regulating the relationship between itself and India concerning access to certain Portuguese enclaves in Indian territory. The Court held that:

It is difficult to see why the number of States between which a local custom may be established on the basis of long practice must necessarily be larger than two. The Court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States.[32]

It would seem evident that two must be the minimum number of States to be subject to a special custom: if a single State claimed (otherwise than as a 'persistent objector'—see below) to be entitled in certain respects to rely on rules different from those generally in force, such a claim could only be maintained as the result of a general acceptance making it a matter of general customary law. Thus the suggestion that has from time to time been made that the USA, by reason of its position as sole remaining superpower, and self-appointed global policeman,[33] is not necessarily bound by such rules as that of non-intervention, cannot rest on the assertion of a special custom.

The notion of the '*persistent objector*' has been identified in the reasoning in the *Asylum* case; but the idea is usually traced back to the earlier *Fisheries* case between the UK and Norway, which concerned the legality of the baselines drawn by Norway around its coasts in order to calculate the breadth of its territorial sea. The UK argued that the Norwegian baselines were inconsistent with a rule of customary law referred to as the 'ten-mile rule', but the Court was not satisfied that any such general rule of customary law existed. However it then added, 'In any event the ten-mile rule would appear to be inapplicable

[30] *Asylum, Judgment, ICJ Reports 1950*, p 266 at p 276. [31] Ibid, pp 277–278.

[32] *Right of Passage over Indian Territory, Merits, Judgment, ICJ Reports 1960*, p 6 at p 39. Cases of this kind are likely to be rare, since it would normally be more appropriate to analyse such a situation as one of tacit agreement, ie, in effect governed by treaty-law. In the *Right of Passage* case this interpretation would have raised problems of succession, the arrangement dating back to the Mughal period, and left undisturbed by the successive British and independent Indian governments.

[33] Cf the views of McDougal on hydrogen bomb testing, and (more recently) Murswiek, 2002, pp 195ff, rejecting the US approach as contrary to the principle of the sovereign equality of States.

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as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast'.[34]

As a result of, in particular, a very influential article by Sir Gerald Fitzmaurice (Fitzmaurice, 1953), it became accepted by most scholars that a State which objected consistently to the application of a rule of law while it was still in the process of becoming such a rule—in other words, while practice consistent with the possible rule was still accumulating, but before the rule could be regarded as established—could continue to 'opt out' of the application of the rule even after it had acquired the status of a rule of general customary law.

This is an attractive theory, since if there were no possibility of dissent from a nascent rule, customary law would be created by the majority of States and imposed willy-nilly on the minority; but there is little State practice to support it (and if it exists, it is itself a rule of customary law established by practice), and its very existence has been questioned by commentators (Charney, 1993). What is certain is that customary law is not made simply by majority: in the case of *Legality of the Threat or Use of Nuclear Weapons*, the Court accepted that the opposition of the handful of nuclear States to any customary rule prohibiting such weapons blocked the creation of such a rule, even though it was favoured by a substantial majority of the States of the world.[35]

C. THE GENERAL PRINCIPLES OF LAW

When Article 38 of the Statute of the Permanent Court was being drafted, the Commission of Jurists was concerned that in some cases the future Court might find that the issues in dispute before it were not governed by any treaty, and that no established rule of customary law either could be found to determine them. It was thought undesirable, and possibly inappropriate in principle, that the Court should be obliged to declare what is known as a *non liquet*—a finding that a particular claim could neither be upheld nor rejected, for lack of any existing applicable rule of law. This is to be distinguished from a finding that a particular claim is not supported by a positive rule of law, which is tantamount to a finding that there exists a negative rule of law. For example, in the *Barcelona Traction, Light and Power Co* case,[36] Belgium claimed that it could demand reparation from Spain for the economic loss suffered by Belgian shareholders in a Canadian company as a result of the bankruptcy of the company in Spain—allegedly brought about by unlawful action attributable to Spain. The Belgian claim was dismissed, on the ground that in customary law, only the national State of the company (Canada) could seek reparation; this was not a *non liquet*, a finding that there was no law on the point, but a finding as to the content of customary law.

The extent to which international legal relations were governed in the 1920s, at the time of the Commission's work, by anything beyond treaties and custom, was obscure, but the Commission was able to agree that, failing one of those sources, the Court should apply 'the general principles of law recognized by civilized nations'. Up to the present, neither the Permanent Court nor the ICJ has based a decision on such principles, though there are

[34] *Fisheries, Judgment, ICJ Reports 1951*, p 116 at p 131.
[35] *Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996*, p 226, para 73.
[36] *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, ICJ Reports 1970*, p 3.

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decisions by arbitral bodies (to whom, of course, Article 38 of the ICJ Statute has no direct application) which have relied on the concept. There is however no unanimity among scholars as to the nature of the principles which may be invoked under this head. There are broadly two possible interpretations.

According to one interpretation, the principles in question are those which can be derived from a comparison of the various systems of municipal law, and the extraction of such principles as appear to be shared by all, or a majority, of them.[37] This interpretation gives force to the reference to the principles being those 'recognized by civilized nations'; the term 'civilized' is now out of place, but at the time it was apparently included inasmuch as some legal systems were then regarded as insufficiently developed to serve as a standard of comparison.[38] In line with this interpretation, parties to cases before the ICJ have at times invoked comparative studies of municipal law.[39] An alternative interpretation is to the effect that, while the Commission of Jurists may have had primarily in view the legal principles shared by municipal legal orders, the principles to be applied by the Court also include general principles applicable directly to international legal relations, and general principles applicable to legal relations generally. Many of these find expression in customary law, and therefore exist as rules derived from that source; others are in effect assertions of secondary rules (of the kind defined in the Introduction to this chapter), eg, the principle *pacta sunt servanda*. Some are applied unquestioningly as self-evident: for example the principles already mentioned for determining the relationship between successive treaties (and possibly successive legal rules generally)—the principles that the special prevails over the general, and that the later prevails over the earlier.

There is however a striking lack of evidence in international practice and jurisprudence of claims to a specific right of a concrete nature being asserted or upheld on the basis simply of the general principles of law.[40] It may be that such a phenomenon is inconsistent with the nature of such principles; in any event, this particular source of law is of less practical importance in determining the rights and obligations of States in their regular relations.

[37] A pioneering and influential work on this subject was Lauterpacht, 1927. A clearer statement of the derivation of general principles from national systems is to be found in the Rome Statute of the International Criminal Court: 'general principles of law derived by the Court from national laws of legal systems of the world' (Article 21(1)(c)). On the dangers of analogy from municipal systems, see Thirlway, 2002.

[38] In the *Abu Dhabi* arbitration in 1951, 18 ILR 144, the arbitrator found that the law of Abu Dhabi contained no legal principles that could be applied to modern commercial instruments, and could not therefore be applied to an oil concession.

[39] In the case of *Right of Passage over Indian Territory*, Portugal argued that general principles of law supported its right to passage from the coast to its enclaves of territory, and adduced a comparative study of the provisions in various legal systems for what may be called 'rights of way of necessity'. When for the first time an application was made by a State (Malta) to intervene in a case between two other States (Tunisia and Libya) on the basis of having an interest which might be affected by the decision in the case (a possibility referred to in Article 62 of the Court's Statute), Malta similarly relied on a comparative law study showing the conditions and modalities of intervention in judicial proceedings in various national courts.

[40] One field in which the existence of a general principle of law has been asserted is on the controversial question of the binding effect of provisional measures (see below, Ch 20, Section VI A). When the question was examined by the ICJ in the *LaGrand* case, the Court dealt with it purely as a question of interpretation of the Statute, without recourse to 'general principles', *LaGrand (Germany v United States of America), Merits, Judgment, ICJ Reports 2001*, p 466, para 99.

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D. SUBSIDIARY SOURCES: JUDICIAL DECISIONS AND TEACHINGS

Paragraph 1(d) of Article 38 makes a clear distinction between, on the one hand, the sources mentioned in the preceding paragraphs, and on the other, judicial decisions and teachings, inasmuch as it refers to the latter as being merely 'subsidiary means for the determination of rules of law'. The reason for this is evident: if a rule of international law is stated in a judicial decision, or in a textbook, it will be stated as a rule deriving either from treaty, custom, or the general principles of law. The judge, or the author of the textbook, will not assert that the rule stated is law *because* he has stated it; he will state it because he considers that it derives from one of the three principal sources indicated in paragraphs (a) to (c) of Article 38. The first three sources of Article 38 are formal sources; those of paragraph (d) are material rather than formal sources, but material sources having a special degree of authority.

This was so even in the early days of the development of international law, when the opinions of eminent legal writers such as Vattel, Grotius, Bynkershoek, or Vitoria carried much more weight than do the authors of even the most respected textbooks of today. Those eminent classical authors based their views much more on natural law than on State practice or judicial decisions.[41] Natural law, by definition, as it were, is only visible in the form stated by legal authors; and the greater the authority of the author, the more trust is to be placed in his definition of what natural law prescribes. Nevertheless, the authority of the law stated as natural law rested on what would now be called the general principles of law, and not on the say-so of the writer, whatever his eminence.

Now that there exists a much greater body of judicial and arbitral decisions enunciating rules of law, the emphasis in practice has shifted to the contribution made by such decisions, and away from the views of 'the most highly qualified publicists of the various nations'. Furthermore, the judges and arbitrators are more often than not themselves eminent scholars and practitioners, so that the distinction between judicial precedent and teachings is not a sharp one. It remains the case, however, that States involved in a dispute, or their counsel, will cite the leading textbooks and monographs in support of their claims, as will arbitrators and individual judges of the ICJ in separate or dissenting opinions. The Court itself does not quote teachings, and only rarely refers to arbitral decisions; it does however habitually cite its own previous decisions when deciding a point of customary law, to such an extent that it has been accused of paying these more attention than the actual State practice creative of the rules it is called upon to state.

The judicial decisions referred to in Article 38 of course include the decisions of the ICJ, as being of the highest authority. The Court has however made clear that, even for the Court itself, they are not in the nature of binding precedents. In a recent case in which one of the points in issue was directly covered by an earlier decision, the Court said in relation to that decision: 'It is not a question of holding [the parties to the current case] to decisions reached by the Court in previous cases. The real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases'.[42]

[41] See above, Ch I, Section III.

[42] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, ICJ Reports 1998*, p 275, para 28.

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The scope of Article 38(1)(d) is however not limited to the decisions of international courts and tribunals; they include the decisions of municipal courts also. Such decisions may play a dual role: on the one hand they may contain a useful statement of international law on a particular point (thus constituting a material source); on the other, the courts of a State are organs of the State and their decisions may also rank as State practice on a question of customary law. In the ICJ case concerning the *Arrest Warrant*, the question was whether Heads of State and Foreign Ministers enjoy absolute immunity from prosecution for crimes allegedly committed during their period of office, and whether there is an exception to this rule in the case of war crimes or crimes against humanity. The parties (Belgium and the Democratic Republic of the Congo) both relied on decisions on the point by the UK House of Lords in the *Pinochet* case[45] and the French *Cour de cassation* in the *Qaddafi* case.[46] The statements of international law in those decisions could have been regarded as 'subsidiary means' for the determination of the customary law on the subject; they were however presented as evidence of State practice, and the Court dealt with them as such.[47] The Court referred to the 'few' decisions of national courts on the question; the paucity of practice was obviously relevant to the question whether a customary rule had become established (as explained in Section II B above). But if the decisions had been classified as 'subsidiary means' under Article 38(1)(d), the only question would have been whether they correctly stated the law, not whether they represented a widespread practice of national judicial bodies.[48]

III. THE RELATIONSHIPS BETWEEN THE SOURCES OF INTERNATIONAL LAW

A. RELATIONSHIP BETWEEN TREATY AND CUSTOM

The State practice which is required for the establishment of a rule of customary law has to take the form of action by a State on the international level, that is to say, in relation to one or more other States. An act of a State that has no impact outside its territory, or in relation to any but its own subjects, is irrelevant as State practice.[49] One of the most normal and essential acts of a State in relation to another State or States is however the conclusion of a treaty or agreement; and consequently treaties may well serve as acts of practice significant for the development of custom. The treaty in itself creates certain rights and obligations which are not of a customary nature; but if a number of States make a habit of concluding treaties containing certain standard provisions, then this may, in suitable circumstances,

[45] *R v Bow Street Metropolitan Stipendiary, ex parte Pinochet Ugarte (Amnesty International Intervening) (No 3)* [1999] UKHL 17; [2000] AC 147; [1999] 2 All ER 97.

[46] *SOS Attentat and Gastemaa d'Esmail v Qaddafi, Head of State of the State of Libya*, France, Court of Cassation, criminal chamber, 13 March 2001, No 1414.

[47] *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium), Preliminary Objections and Merits, Judgment, ICJ Reports 2002*, p 3, paras 57, 58.

[48] However, since they would only be subsidiary means of proving the law, it would have been necessary to show that there was *other* State practice supporting a customary rule.

[49] This statement should perhaps be qualified as regards human rights law: see Ch 26, Section III A, below.

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be taken to show that they recognize the existence of a custom requiring them to do so. The difficulty is of course that it can also be argued that the very fact that States have recourse to treaties to establish certain rules shows that they consider that those rules would not be applicable if no treaty were concluded, ie, that there is *no* customary rule of that nature. This is a difficulty that has caused controversy, for example, over the question whether there is a customary rule to the effect that a State is not bound to extradite persons accused of political offences. A provision to that effect is almost always included in extradition treaties; does that signify the existence of a custom, or of a need which has to be met on each and every occasion by a special clause?

As observed above, as a result of the parallel existence of treaties and custom as sources of international law, the same question may be governed simultaneously by a treaty, as regards the relationships between the parties to the treaty, and by customary rules, as regards the relationship between non-parties, or between a party to the treaty and a non-party. It has even been held, by the International Court in the case of *Military and Paramilitary Activities in and against Nicaragua*, that where a customary rule has been replaced by a multilateral treaty, the customary rule continues to exist, not only for non-parties to the treaty, but also for the parties to it, 'behind' the treaty, as it were. Such continued existence will normally be of purely theoretical importance, so long as the treaty continues to bind, but in the case referred to, the customary rule rather than the treaty rule fell to be applied by the Court (for special reasons connected with the nature of the Court's jurisdiction in the case).

The relationship between treaty and customary rules is not necessarily static, however. In the *North Sea Continental Shelf* case, the International Court identified three situations in which the existence or creation of a customary rule might be related to treaty provisions. In the first place, as already observed, a treaty may embody already established rules of customary law, so that it is, to that extent, simply declaratory of existing rules. There are probably very few multilateral treaties of which every provision does no more than state existing customary law (since such a treaty would have little raison d'être).[48] Most such treaties contain a mixture of re-statement and new conventional rules, the problem being to determine to which category a given clause belongs. This is certainly the case of, for example, the Vienna Convention on Diplomatic Relations, or the Vienna Convention on the Law of Treaties, and the 1982 Montego Bay Convention on the Law of the Sea; as regards the convention in issue in the *North Sea* cases, the 1958 Geneva Convention on the Continental Shelf, the Court recognized that some provisions represented existing customary law, though not the delimitation Article (Article 6).

Secondly, it is possible that a multilateral treaty states rules and principles which can be found reflected in the practice of States prior to the adoption of the treaty, so that they can be regarded as *lex ferenda* which is ripe for transition to *lex lata*;[49] in such case, the processes of negotiation and adoption of the treaty may be regarded as having what the Court referred to as a 'crystallizing' effect on the nascent customary rules. This is probably particularly likely if the treaty results from the labours of the International Law Commission,

[48] In the *Asylum* case, it was argued that the 1933 Montevideo Convention 'has merely codified principles which were already recognised by Latin-American custom' but the Court rejected this view: *ICJ Reports 1950*, p 266 at p 277.

[49] For these concepts, see Section I (Introduction) above.

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whose methods of work allow for considerable input from governments, which is taken into account in the drafting of texts presented for incorporation in a convention.

Finally, it may be that, after the convention has come into force, States other than the parties to it find it convenient to apply the convention rules in their mutual relations, and this may constitute State practice leading to the development of a customary rule. The contention that this had occurred in relation to Article 6 of the 1958 Geneva Convention signified, in the view of the Court:

> treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur; it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained.[50]

The Court pointed out that the rule in question would have to be 'of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law';[51] not every rule which finds a place in a multilateral convention is appropriate for general adoption. For a suitable rule to pass into customary law, 'it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself', and it was in this respect that the Court emphasized, as already mentioned, the role of 'States whose interests were specially affected'.[52] What the Court regarded as 'indispensable' was that:

> within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been extensive and virtually uniform in the sense of the provision invoked;—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.[53]

B. THE HIERARCHY OF SOURCES

In general, when there exists more than one rule that is prima facie applicable to a given situation, the choice between them can be made by the application of one or other of two principles: *lex specialis derogat generali* and *lex posterior derogat priori*: that is to say, the special rule overrides the general rule and the later rule overrides the earlier rule. However, when these principles are applied to the acts of a legislator, they may be regarded as ways of interpreting legislative intention: normally a new law is intended to replace or modify an older law, and legislation providing for a special case or regime is intended to constitute an exception to any general regime. There is normally no difficulty in applying these principles to treaties, which represent the shared intentions of the parties,[54] but it is less clear that they can operate in relation to custom.

[50] *North Sea Continental Shelf, Judgment, ICJ Reports 1969*, p 3, para 71.
[51] Ibid, para 72. [52] Ibid, para 73. [53] Ibid, para 74.
[54] Article 30 of the Vienna Convention on the Law of Treaties, dealing with 'Application of successive treaties relating to the same subject-matter', in effect applies first the criterion of the actual intention of the parties, and then a combination of the two principles here discussed.

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Since, as explained above, it was the intention of the draftsmen of the PCIJ Statute that the 'general principles of law' should provide a fall-back source of law in the event that no treaty and no customary rule could be found to apply to a given situation, it is clear that to this extent there exists a hierarchy of sources. If a treaty rule or a customary rule exists, then there is no possibility of appealing to the general principles of law to exclude or modify it. The text of Article 38 does not however indicate whether there was a hierarchy of application between custom and treaty; a proposed provision, indicating specifically that the Court should apply the sources named in the order in which they were mentioned in that Article, was rejected during the drafting.

It will normally be the case that a treaty is *lex specialis*, and as such prevails over any inconsistent rules of customary law, or at least such as existed at the time of the conclusion of the treaty. It is to be presumed that the parties to the treaty were aware of the existing customary rule, and decided to provide otherwise in their treaty precisely in order to exclude the customary rule.[55] More difficult is the question whether a custom which arises subsequently to the conclusion of a treaty, and which might be regarded as *lex specialis* in relation to the regime established by the treaty, has the effect of overriding the treaty, or such part of it as is inconsistent with the customary rule, as between the parties. If the new customary norm is one accepted as *jus cogens*, then according to the Vienna Convention on the Law of Treaties, not merely is any inconsistent provision in the treaty overridden, but 'any existing treaty which is in conflict with that norm becomes void and terminates' (Article 64).

Assuming however that the new norm is not of that nature, what is the position? If the parties to the treaty have themselves contributed to the development of the new customary rule by acting inconsistently with the treaty, or have adopted the customary practice in their relations after the rule has become established, then the situation may be analysed as in effect a modification (or even perhaps an interpretation) of the treaty. There is a well-settled practice of the Security Council, treating as valid a resolution adopted over the abstention of one of the permanent members, despite the requirement in Article 27(3) of the Charter for the 'concurring votes' of the permanent members. This practice was upheld by the Court in the *Namibia* case,[56] in terms which left it obscure whether this was an agreed 'interpretation' of the Article, or an agreed amendment; no reference was made to any subsequently developed rule of custom.

The real problem arises when none of the parties, or only some of them, have participated in the new customary rule. Article 41 of the Vienna Convention on the Law of Treaties lays down a defined procedure for amendment of a multilateral treaty between certain of the parties only, thereby excluding a tacit amendment of this kind; but it is not certain that customary law is so exigent. At all events, the real question is whether the new customary rule can be asserted against those of the parties to the treaty that have not participated in it, or assented to it. One view of the matter is that the very existence of the distinction between *jus cogens* and *jus dispositivum* implies that a newly developed customary rule

[55] In the *Dispute regarding Navigational and Related Rights between Costa Rica and Nicaragua*, the Court found it unnecessary to examine rules of customary law in the presence of a treaty that 'completely define[d] the rules applicable' to the matter: Judgment of 13 July 2009, para 36.

[56] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971*, p 16, paras 21–22.

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which is not *jus cogens* does not affect the operation of a pre-existing treaty; but the point must probably be regarded as unsettled.

IV. IS THE ENUMERATION OF ARTICLE 38 EXHAUSTIVE? POSSIBLE NEW OR ADDITIONAL SOURCES

A. HOW CAN NEW SOURCES COME INTO EXISTENCE?

On the basis that the enumeration of sources of international law indicated in Article 38 of the PCIJ Statute was complete and exhaustive at the time of its drafting, there is a certain difficulty in postulating that a new source has come into existence subsequently. The enumeration of sources is, as we have seen, a secondary rule of law, one of those that lays down how the primary rules, those that directly govern conduct, may be created or modified. As was explained in the Introduction to this chapter, the quest for what might be called a 'tertiary' rule, one that lays down how the secondary rules might be created or modified, for a 'fundamental norm' underlying all international law has proved to be vain. We must, it seems, be content to say that international society has established certain secondary rules that correspond to the nature of that society and are universally accepted.

Does it then follow that if the nature of international society changes, there may be a modification of the secondary rules, that is to say of the list of recognized sources of law? It is certain that the nature of international society has changed radically since, for example, the date of the preparation of the PCIJ Statute, in particular in view of the great increase in number of sovereign States, and in the complexity of their relations with each other. One cannot exclude *a priori* the possibility of a modification of the secondary rules.

But by what process is such modification to occur? In the absence of what we have called tertiary rules, it is difficult to imagine any process that does not in effect involve invoking a secondary rule to effect a modification of a secondary rule. For example, let us suppose that it is contended that the resolutions of the UN General Assembly have become a new independent source of international law. How would one set about proving that this was so? Presumably, by showing that in their relations with each other States asserted rules stated in such resolutions, and accepted such rules as binding when asserted against them. This would however amount to saying that an international custom had arisen whereby such resolutions created binding international law. It would follow, either that a new source (resolutions) had arisen through the operation of an existing source (custom); or, perhaps more accurately, that the scope of custom as a source had become widened to include resolutions. On the latter view, a resolution would be (as it is now) a material source of law, but the formal source would be custom.

B. SOME ADDITIONAL SOURCES OR QUASI-SOURCES THAT HAVE BEEN SUGGESTED

1. Unilateral acts

Unilateral acts relevant in international law may be of two kinds. There are acts, unilateral in the sense that the State performing such an act chooses of its own will to do so, but the

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consequences of which are governed by general international law. In this category fall, for example, the ratification of a treaty, or protest at the action of another State. The question here to be considered is whether there exists a category of unilateral acts not directed to a specified addressee, and the effects of which are defined, not by pre-existing legal rules, but by the simple intention of the State performing them.

The place of unilateral acts of States of this kind in the structure of international law had been regarded as doubtful or somewhat marginal until the decision of the International Court in 1974 in the *Nuclear Tests* cases. In those cases, the Court held that France had assumed legally binding obligations through unilateral declarations, made to the world at large, to the effect that it would not hold any further atmospheric nuclear tests in the Pacific. The Court laid down a general rule in the following terms:

> It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations... When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking.[57]

The Court recognized that 'Of course, not all unilateral acts imply obligation...'[58] but found on the facts that France had intended to enter into a binding commitment. As a result, the Court was able to hold that the purpose of the proceedings brought by Australia and New Zealand against France, namely a cessation of the atmospheric tests in the Pacific, had been achieved, and the case had therefore become 'without object' or moot.

The application of the traditional doctrine of sources to this decision posed problems. What was the formal source of France's obligation? It was not a treaty; neither of the other two States had indicated any acceptance of France's olive branch, so as to give rise to a contractual or conventional obligation. The Court had also made it clear that it was not ruling on the vexed question whether France had any obligation under customary law to stop its tests; if France was bound to do so, it was only because it had declared that it would do so. Was a unilateral act then to be treated as a new source of law?

This conclusion has been drawn by some scholars; but it does not seem to be an ineluctable one. Notwithstanding the Court's sweeping general statement, quoted above, the normal consequence of a unilateral declaration is either that it is accepted by the State or States to which it is addressed, and it will then become in effect part of a treaty settlement; or it will be ignored and rejected, and the other State or States will not seek to enforce it, so that it will become a dead letter. Even without any explicit acceptance, the moment that one of the addressees of the unilateral declaration seeks to rely on the legal obligation indicated in it, this will itself constitute the acceptance needed to convert it into a bilateral, conventional, relationship. The *Nuclear Tests* cases were exceptional in that, for reasons not relevant to the present discussion, the Court was seeking to impose on Australia and New Zealand a settlement of their claims on terms which they had not themselves accepted. Whatever view one may take of the specific *Nuclear Tests* decisions, to base a theory of sources on a decision in a case the special facts of which are very unlikely to be repeated, does not appear a sound approach.

[57] *Nuclear Tests (Australia* v *France), Judgment, ICJ Reports 1974*, p 253, para 43.
[58] Ibid, para 44.

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2. Equity

Invocations of equity have played an increasing part in international legal discourse of recent years, but the exact nature of the concept is elusive. It has been said that 'Whatever the legal reasoning of a court of justice, its decision must by definition be just, and therefore in that sense equitable',[79] which however does not carry matters much further. The idea of 'equitable principles' or an 'equitable result' plays an important part in the specialized field of maritime delimitation, both in judicial and arbitral decisions and in Articles 74 and 83 of the 1982 United Nations Convention on the Law of the Sea.[80] Equity in many legal systems may play a moderating role in the sense that when the rigorous application of accepted rules of law leads to a result which appears unjust, equity may step in to adjust the outcome. This is in fact the way in which the concept has developed historically, from Aristotle to the distinction between common law and equity which still survives in the English legal system. Whether this is its role in international law, and if so whether it is its only role, is a controversial issue.

We are here concerned only with the question whether something bearing the label 'equity' can be considered to be a formal source of law: that is to say, whether a legal right or obligation can be asserted, which does not derive from any treaty or any rule of customary law, simply on the basis of being 'equitable'. There is little support for such a view either in State practice or in judicial decisions. In the *Barcelona Traction, Light and Power Co* case, the Court, having dismissed the Belgian legal claim against Spain (for injury to Belgian shareholders in the Canadian company), considered the possibility that 'considerations of equity might call for the possibility of protection of the shareholders in question by their own national State'; it took the view however that that hypothesis did not correspond to the circumstances of the case.[81] This might be read as implying that in different circumstances a claim based on equity alone might have succeeded; but in fact it seems that the real point was that customary law on the point is equitable in its effects, so that the point does not arise.

Equity is probably best regarded, in words applied by the International Court to the comparable principle of good faith, as one of the basic principles governing the creation and performance of legal obligations, but 'not in itself a source of obligation where none would otherwise exist'.[82]

3. Resolutions of the UN General Assembly

The decisions of the UN Security Council are binding upon the member States, but this does not mean that they constitute an independent source of law: under Article 25 of the Charter the members agree to accept and carry out such decisions, so that their legal force derives from the Charter as a treaty. Resolutions of the UN General Assembly are not attributed such force by the Charter. Many Assembly resolutions are however convenient material sources of law, inasmuch as they state, with apparent

[79] *North Sea Continental Shelf, Judgment, ICJ Reports 1969*, p 3, para 88.

[80] See below, Ch 22, Section VI A.

[81] *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, ICJ Reports 1970*, p 3, para 95.

[82] *Border and Transborder Armed Actions (Nicaragua v Honduras), Jurisdiction and Admissibility, Judgment, ICJ Reports 1988*, p 12, para 94.

authority, propositions of general law, and are often assented to by a very large majority of the Members, and thus of the States of the world.[63] It is therefore tempting to confer on them also the authority of a formal source of law, to look no further than the resolution itself in order to assert the binding quality of the rules enunciated. This is particularly so when the resolution in question is of a declaratory or 'law-making' type, and when it is difficult to discern a consistent practice of States in application of those rules, adequate to permit the conclusion that a customary rule exists, one may seek to equate the votes in favour of the resolution with *opinio juris*. This is however a too simplistic approach.[64] States vote as they do in the General Assembly (in particular) for a variety of reasons, only some of which may be declared or otherwise visible to the observer. Custom is also traditionally regarded as composed of two elements, practice and *opinio juris*; even if the voting may exhibit *opinio juris*, can it simultaneously be treated as an act of practice?[65]

The theoretical difficulties involved in seeing resolutions as an independent source of law have already been adverted to. When rules declared in resolutions have been relied on in international litigation, the resolutions have been judicially assessed as no more than declaratory of customary law, or at most as evidence of the existence of the *opinio juris*. In the case of *Military and Paramilitary Activities in and against Nicaragua*, the International Court declared that:

> The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as part of customary international law, and as applicable as such to those States.[66]

Had it considered that, independently of customary law, declarations in General Assembly resolutions were creative of law as a formal source, it would surely have so found. In the case concerning *Legality of the Threat or Use of Nuclear Weapons*, the Court interpreted the numerous General Assembly resolutions on the question of nuclear weapons as doing no more than revealing 'the desire of a very large section of the international community' to take steps toward nuclear disarmament.[67]

[63] For example, the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, GA Res 2625 (XXV); Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, GA Res 2749 (XXV); Declaration on the Establishment of a new International Economic Order, GA Res 3202 (S-VI).

[64] As was pointed out by an informed observer many years ago: see Higgins, 1970.

[65] For an interesting analysis whereby the legal significance of States' attitudes to resolutions of international bodies may be assessed in terms of each State's ability to manifest its practical interest in the question, defined as the 'cost' of such manifestation, see Byers, 1999, 151–153, 156–167.

[66] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v *United States of America), Merits, Judgment, ICJ Reports 1986*, p 14, para 184. Similarly in the case concerning *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004*, p 136, para 87, the Court referred to the principle excluding the acquisition of territory by the use of force, laid down in the 'Friendly Relations Declaration' (GA Res 2625 (XXV)) as a reflection of customary law.

[67] *Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996*, p 226, para 73. See also the dissenting opinion of Judge Schwebel, ibid, p 319: 'The General Assembly has no authority to enact international law'.

4. The problem of 'superior norms'

In the classical theory of international law, any priority of conflicting rules or norms was resolved simply according to the de facto hierarchy of the sources from which they derived, coupled with the principles of the overriding effect of *lex posterior* and *lex specialis* (see Section III B above). For this purpose, the content of the rules in issue was irrelevant, except insofar as it was taken into account to judge whether there was in fact a conflict at all (the scope of each rule), and whether one rule was *specialis* in relation to the other, and if so, which was which.

In more recent years, however, more and more attention has been paid to the concept of *jus cogens*—the category of 'peremptory' legal norms, norms from which no derogation by agreement is permitted. Exactly which norms can be so designated in modern international law is still subject to some controversy[68] but it is accepted that the status of peremptory norm derives from the importance of the *content* of the norm to the international community: an example is the prohibition of genocide. A further development is the attempt to assimilate such norms to those creating 'obligations *erga omnes*'[69]—obligations which are regarded as being owed to the whole international community, with the practical consequence that the right to react to any violation of the norm is not confined to the State or States directly injured or affected by the violation, but appertains to every State.[70] Another linked concept was that of the 'international crime' introduced by the International Law Commission into its draft Articles on State Responsibility, but deleted again at a later stage of the Commission's work.

All these concepts will be examined more fully in Chapter 6; they are mentioned here simply to draw attention to the theoretical and practical difficulties of analysing their development in terms of the classical theory of sources. A rule of *jus cogens* is normally (perhaps necessarily) a rule of customary law,[71] as is implied by the reference in Article 63 of the Vienna Convention of the Law of Treaties to the development of a new rule of this type after the conclusion of a treaty. To be such a rule at all, it has to be based upon the consistent practice of States, backed by the *opinio juris*. One would therefore expect that, for a rule to be one of *jus cogens*, or to give rise to obligations *erga omnes*, there would have been practice of such a kind as to show a conviction that the developing rule was of that specific nature, ie, a sort of superior *opinio juris*. If a State endeavoured to rely on a treaty as justifying conduct otherwise flagrantly in conflict with a rule of international law, and

[68] For a light-hearted, but well-reasoned, debunking of the whole concept, see d'Amato, 1991.

[69] The Latin phrase '*erga omnes*' means 'towards all' or 'in relation to all'. Consequently, a right *erga omnes* is not necessarily the counterpart of an obligation *erga omnes*: the one is a right which has to be respected by all States; the other an obligation which can be enforced by every State, whether or not it has suffered from the breach of the obligation. A number of writers have made this confusion, which seems also to have touched the ICJ: see the advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory, Advisory Opinion, ICJ Reports 2004*, p 136, paras 154–159, and the critical comments of Judges Higgins, ibid, pp 216–217, paras 37–39, and Kooijmans, ibid, pp 231–234, paras 40–50. The counterpart of an obligation *erga omnes* is a right *omnium* (of all), as is recognized (for example) by Villalpando, 2005, pp 265ff.

[70] See the judgment in the *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, ICJ Reports 1970*, p 3, paras 33–35 and para 91. This assimilation is by no means self-evident; the Commentary to the ICL Articles on State Responsibility suggests that there is at least 'a difference in emphasis' (Commentary to Article 40, Part I, para (7)).

[71] For an alternative view, that *jus cogens* is a matter of consensus, see the combative article by Kolb, 1998.

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the universal reaction of States was to assert that that rule was such that no derogation by treaty was permitted, this could be read as practice showing an *opinio* that the rule was one of *jus cogens*. Similarly, if a State not directly affected by a breach of international law took counter-measures against the offending State, and that State conceded its right to do so, this would show an *opinio* that an obligation *erga omnes* was involved. In fact however, that has not been at all the way in which norms of *jus cogens* and obligations *erga omnes* have come to be identified; and the first hypothesis, of assertion of a treaty as justifying conduct universally condemned, is *a priori* somewhat unlikely to be realized.

V. CONCLUSION

Ubi societas, ibi jus: wherever there is a social structure, you will find law. This is ultimately the only explanation for the development of international law, for the respect generally shown for it by States as international actors, and for the general recognition of the 'secondary rules' whereby law acquires binding effect. Historically, the more individual States found it necessary to relate to each other, the greater the need for generally respected rules and guidelines. Even the concept of 'natural law' related to what was fitting and necessary for the good ordering of society; and the positivist approach, which sees all law as established by the express or tacit agreement of those subject to it, is in effect a prolongation of the 'social contract'.

The establishment of the Permanent Court of International Justice brought to a focus the ideas as to the sources of law that had, over the years, made their appearance in State practice, arbitral decisions, and the views of scholars. The definition given in Article 38 of the Statute of the Court has proved to embody a workable structure of recognized law-making processes, and despite the criticisms made of it, and the multiplicity of new approaches to international law,[72] that definition seems likely to continue to guide the international community and the international judge.

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de libera piscaria (dee **lib**-ər-ə pi-**skair**-ee-ə), *n.* [Law Latin "of free fishery"] *Hist.* A writ allowing an exclusive right to fish on public navigable water. • This was a form of *quod permittat.*

deliberate (di-**lib**-[ə]-rit), *adj.* (15c) **1.** Intentional; premeditated; fully considered. **2.** Unimpulsive; slow in deciding.

deliberate (di-**lib**-ə-rate), *vb.* (Of a court, jury, etc.) to weigh and analyze all the evidence after closing arguments <the jury deliberated for 12 hours before reaching a verdict>.

deliberate elicitation. (1966) *Criminal procedure.* The purposeful yet covert drawing forth of an incriminating response (usu. not during a formal interrogation) from a suspect whose Sixth Amendment right to counsel has attached but who has not waived that right. • Deliberate elicitation may occur, for example, when a police officer engages an arrested suspect in conversation on the way to the police station. Deliberate elicitation violates the Sixth Amendment. *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199 (1964). See MASSIAH RULE.

deliberate indifference. See INDIFFERENCE.

deliberate-indifference instruction. See JEWELL INSTRUCTION.

deliberate speed, with all. (1817) As quickly as the maintenance of law and order and the welfare of the people will allow, esp. with respect to the desegregation of public schools. *Brown v. Board of Educ.*, 347 U.S. 483, 74 S.Ct. 686 (1954). [Cases: Schools ⇨13(9).]

deliberation, *n.* (14c) The act of carefully considering issues and options before making a decision or taking some action; esp., the process by which a jury reaches a verdict, as by analyzing, discussing, and weighing the evidence. See CONSIDERATION (3). [Cases: Criminal Law ⇨857(1); Federal Civil Procedure ⇨1974; Trial ⇨306.] — **deliberate** (di-**lib**-ə-rayt), *vb.*

deliberative assembly. See ASSEMBLY.

deliberative-process privilege. (1977) The principle that a decision-maker's thoughts and how they led to a decision are not subject to revelation or scrutiny. *See U.S. v. Morgan*, 313 U.S. 409, 61 S.Ct. 999 (1941). • An exception to the rule may be allowed if a party can clearly show that the decision resulted from bias, bad faith, misconduct, or illegal or unlawful action. The privilege is meant to encourage open and independent discussion among those who develop government policy. [Cases: Privileged Communications and Confidentiality ⇨361.] — Also termed *mental-process privilege.*

de libero homine exhibendo (dee **lib**-ər-oh **hom**-ə-nee ek-si-**ben**-doh). [Latin "for the production of a free man"] *Roman law.* An interdict requiring a free person to be produced before a magistrate.

de libero passagio (dee **lib**-ər-oh pə-**say**-jee-oh), *n.* [Law Latin "of free passage"] *Hist.* A writ allowing free passage over water. • This was a form of *quod permittat.*

de libertate probanda (dee lib-ər-**tay**-tee proh-**ban**-də), *n.* [Law Latin "for proving liberty"] *Hist.* A writ directing a sheriff to take security from a person accused of being a villein and to protect that person from harassment until the person's status was determined by the justices of assize.

de libertatibus allocandis (dee lib-ər-**tay**-tə-bəs al-ə-**kan**-dis), *n.* [Law Latin "for allowing liberties"] *Hist.* A writ allowing a person entitled to certain liberties to obtain them.

de licentia transfretandi (dee lī-**sen**-shee-ə trans-frə-**tan**-dī), *n.* [Law Latin "of permission to cross the sea"] *Hist.* A writ ordering wardens of seaports, on certain conditions, to permit any person named in the writ to cross the sea.

delict (di-**likt**), *n.* [Latin *delictum* "an offense"] (16c) *Roman & civil law.* A violation of the law; esp., a wrongful act or omission giving rise to a claim for compensation; TORT. — Also termed (in Roman law) *delictum*; (in French law) *délit.* [Cases: Torts ⇨107.]

> "A delict is a civil wrong. It is an infringement of another's interests that is wrongful irrespective of any prior contractual undertaking to refrain from it — though there may also be one. It entitles the injured party to claim compensation in civil proceedings — though criminal proceedings aimed at punishing the wrongdoer may also ensue." 1 P.Q.R Boberg, *The Law of Delict* 1 (1984).

private delict. A wrong regarded primarily as a matter of compensation between individuals.

public delict. A wrong for which the community as a whole takes steps to punish the offender. Cf. *public tort* under TORT.

quasi-delict. **1.** *Roman law.* A residuary category of private wrongs, characterized by either vicarious or strict liability.

> "QUASI-DELICT . . . . Justinian enumerates four cases of obligations said to arise quasi ex delicto. The implication seems to be that in all of them the law creates a liability though the defendant may not in fact be to blame. The cases are the following: — (1) The judge who 'makes the case his own' . . . incurs a penalty fixed by the magistrate at discretion . . . . (2) If anything was thrown, or poured, from an upper room . . . the occupier was liable for double the damage . . . . (3) If a thing was kept placed or suspended over a way used by the public . . . there was a penalty . . . which might be recovered from the occupier . . . . (4) Shipowners, innkeepers and stable-keepers were liable for damage or theft committed by slaves or free persons in their employ . . . ." R.W. Lee, *The Elements of Roman Law* 401–02 (4th ed. 1956).

2. See *quasi-offense* under OFFENSE (2). **3.** *Scots law.* Tortious conduct that is negligent, as opposed to intentional.

delictal. See DELICTUAL.

deliction (di-**lik**-shən). (1966) The loss of land by gradual, natural changes, such as erosion resulting from a change in the course of a river or stream. Cf. ACCRETION (1); ALLUVION; AVULSION (2); EROSION. [Cases

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United Nations S/RES/1757 (2007)

Security Council

Distr.: General
30 May 2007

Resolution 1757 (2007)

Adopted by the Security Council at its 5685th meeting, on 30 May 2007

The Security Council,

Recalling all its previous relevant resolutions, in particular resolutions 1595 (2005) of 7 April 2005, 1636 (2005) of 31 October 2005, 1644 (2005) of 15 December 2005, 1664 (2006) of 29 March 2006 and 1748 (2007) of 27 March 2007,

Reaffirming its strongest condemnation of the 14 February 2005 terrorist bombings as well as other attacks in Lebanon since October 2004,

Reiterating its call for the strict respect of the sovereignty, territorial integrity, unity and political independence of Lebanon under the sole and exclusive authority of the Government of Lebanon,

Recalling the letter of the Prime Minister of Lebanon to the Secretary-General of 13 December 2005 (S/2005/783) requesting inter alia the establishment of a tribunal of an international character to try all those who are found responsible for this terrorist crime, and the request by this Council for the Secretary-General to negotiate an agreement with the Government of Lebanon aimed at establishing such a Tribunal based on the highest international standards of criminal justice,

Recalling further the report of the Secretary-General on the establishment of a special tribunal for Lebanon on 15 November 2006 (S/2006/893) reporting on the conclusion of negotiations and consultations that took place between January 2006 and September 2006 at United Nations Headquarters in New York, the Hague, and Beirut between the Legal Counsel of the United Nations and authorized representatives of the Government of Lebanon, and the letter of its President to the Secretary-General of 21 November 2006 (S/2006/911) reporting that the Members of the Security Council welcomed the conclusion of the negotiations and that they were satisfied with the Agreement annexed to the Report,

Recalling that, as set out in its letter of 21 November 2006, should voluntary contributions be insufficient for the Tribunal to implement its mandate, the Secretary-General and the Security Council shall explore alternate means of financing the Tribunal,

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Recalling also that the Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon was signed by the Government of Lebanon and the United Nations respectively on 23 January and 6 February 2007,

Referring to the letter of the Prime Minister of Lebanon to the Secretary-General of the United Nations (S/2007/281), which recalled that the parliamentary majority has expressed its support for the Tribunal, and asked that his request that the Special Tribunal be put into effect be presented to the Council as a matter of urgency,

Mindful of the demand of the Lebanese people that all those responsible for the terrorist bombing that killed former Lebanese Prime Minister Rafiq Hariri and others be identified and brought to justice,

Commending the Secretary-General for his continuing efforts to proceed, together with the Government of Lebanon, with the final steps for the conclusion of the Agreement as requested in the letter of its President dated 21 November 2006 and referring in this regard to the briefing by the Legal Counsel on 2 May 2007, in which he noted that the establishment of the Tribunal through the Constitutional process is facing serious obstacles, but noting also that all parties concerned reaffirmed their agreement in principle to the establishment of the Tribunal,

Commending also the recent efforts of parties in the region to overcome these obstacles,

Willing to continue to assist Lebanon in the search for the truth and in holding all those involved in the terrorist attack accountable and reaffirming its determination to support Lebanon in its efforts to bring to justice perpetrators, organizers and sponsors of this and other assassinations,

Reaffirming its determination that this terrorist act and its implications constitute a threat to international peace and security,

1. *Decides*, acting under Chapter VII of the Charter of the United Nations, that:

(a) The provisions of the annexed document, including its attachment, on the establishment of a Special Tribunal for Lebanon shall enter into force on 10 June 2007, unless the Government of Lebanon has provided notification under Article 19 (1) of the annexed document before that date;

(b) If the Secretary-General reports that the Headquarters Agreement has not been concluded as envisioned under Article 8 of the annexed document, the location of the seat of the Tribunal shall be determined in consultation with the Government of Lebanon and be subject to the conclusion of a Headquarters Agreement between the United Nations and the State that hosts the Tribunal;

(c) If the Secretary-General reports that contributions from the Government of Lebanon are not sufficient to bear the expenses described in Article 5 (b) of the annexed document, he may accept or use voluntary contributions from States to cover any shortfall;

2. *Notes* that, pursuant to Article 19 (2) of the annexed document, the Special Tribunal shall commence functioning on a date to be determined by the Secretary-General in consultation with the Government of Lebanon, taking into account the progress of the work of the International Independent Investigation Commission;

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3. *Requests* the Secretary-General, in coordination, when appropriate, with the Government of Lebanon, to undertake the steps and measures necessary to establish the Special Tribunal in a timely manner and to report to the Council within 90 days and thereafter periodically on the implementation of this resolution;

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

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Annex

Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon

Whereas the Security Council, in its resolution 1664 (2006) of 29 March 2006, which responded to the request of the Government of Lebanon to establish a tribunal of an international character to try all those who are found responsible for the terrorist crime which killed the former Lebanese Prime Minister Rafiq Hariri and others, recalled all its previous resolutions, in particular resolutions 1595 (2005) of 7 April 2005, 1636 (2005) of 31 October 2005 and 1644 (2005) of 15 December 2005,

Whereas the Security Council has requested the Secretary-General of the United Nations (hereinafter "the Secretary-General") "to negotiate an agreement with the Government of Lebanon aimed at establishing a tribunal of an international character based on the highest international standards of criminal justice", taking into account the recommendations of the Secretary-General's report of 21 March 2006 (S/2006/176) and the views that have been expressed by Council members,

Whereas the Secretary-General and the Government of the Lebanese Republic (hereinafter "the Government") have conducted negotiations for the establishment of a Special Tribunal for Lebanon (hereinafter "the Special Tribunal" or "the Tribunal"),

Now therefore the United Nations and the Lebanese Republic (hereinafter referred to jointly as the "Parties") have agreed as follows:

Article 1
Establishment of the Special Tribunal

1. There is hereby established a Special Tribunal for Lebanon to prosecute persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons. If the tribunal finds that other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks. This connection includes but is not limited to a combination of the following elements: criminal intent (motive), the purpose behind the attacks, the nature of the victims targeted, the pattern of the attacks (modus operandi) and the perpetrators.

2. The Special Tribunal shall function in accordance with the Statute of the Special Tribunal for Lebanon. The Statute is attached to this Agreement and forms an integral part thereof.

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Article 2
Composition of the Special Tribunal and appointment of judges

1. The Special Tribunal shall consist of the following organs: the Chambers, the Prosecutor, the Registry and the Defence Office.

2. The Chambers shall be composed of a Pre-Trial Judge, a Trial Chamber and an Appeals Chamber, with a second Trial Chamber to be created if, after the passage of at least six months from the commencement of the functioning of the Special Tribunal, the Secretary-General or the President of the Special Tribunal so requests.

3. The Chambers shall be composed of no fewer than eleven independent judges and no more than fourteen such judges, who shall serve as follows:

(a) A single international judge shall serve as a Pre-Trial Judge;

(b) Three judges shall serve in the Trial Chamber, of whom one shall be a Lebanese judge and two shall be international judges;

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

(d) Five judges shall serve in the Appeals Chamber, of whom two shall be Lebanese judges and three shall be international judges; and

(e) Two alternate judges, of whom one shall be a Lebanese judge and one shall be an international judge.

4. The judges of the Tribunal shall be persons of high moral character, impartiality and integrity, with extensive judicial experience. They shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.

5. (a) Lebanese judges shall be appointed by the Secretary-General to serve in the Trial Chamber or the Appeals Chamber or as an alternate judge from a list of twelve persons presented by the Government upon the proposal of the Lebanese Supreme Council of the Judiciary;

(b) International judges shall be appointed by the Secretary-General to serve as Pre-Trial Judge, a Trial Chamber Judge, an Appeals Chamber Judge or an alternate judge, upon nominations forwarded by States at the invitation of the Secretary-General, as well as by competent persons;

(c) The Government and the Secretary-General shall consult on the appointment of judges;

(d) The Secretary-General shall appoint judges, upon the recommendation of a selection panel he has established after indicating his intentions to the Security Council. The selection panel shall be composed of two judges, currently sitting on or retired from an international tribunal, and the representative of the Secretary-General.

6. At the request of the presiding judge of a Trial Chamber, the President of the Special Tribunal may, in the interest of justice, assign alternate judges to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting.

7. Judges shall be appointed for a three-year period and may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government.

8. Lebanese judges appointed to serve in the Special Tribunal shall be given full credit for their period of service with the Tribunal on their return to the Lebanese national judiciaries from which they were released and shall be reintegrated at a level at least comparable to that of their former position.

Article 3
Appointment of a Prosecutor and a Deputy Prosecutor

1. The Secretary-General, after consultation with the Government, shall appoint a Prosecutor for a three-year term. The Prosecutor may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government.

2. The Secretary-General shall appoint the Prosecutor, upon the recommendation of a selection panel he has established after indicating his intentions to the Security Council. The selection panel shall be composed of two judges, currently sitting on or retired from an international tribunal, and the representative of the Secretary-General.

3. The Government, in consultation with the Secretary-General and the Prosecutor, shall appoint a Lebanese Deputy Prosecutor to assist the Prosecutor in the conduct of the investigations and prosecutions.

4. The Prosecutor and the Deputy Prosecutor shall be of high moral character and possess the highest level of professional competence and extensive experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor and the Deputy Prosecutor shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.

5. The Prosecutor shall be assisted by such Lebanese and international staff as may be required to perform the functions assigned to him or her effectively and efficiently.

Article 4
Appointment of a Registrar

1. The Secretary-General shall appoint a Registrar who shall be responsible for the servicing of the Chambers and the Office of the Prosecutor, and for the recruitment and administration of all support staff. He or she shall also administer the financial and staff resources of the Special Tribunal.

2. The Registrar shall be a staff member of the United Nations. He or she shall serve a three-year term and may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government.

Article 5
Financing of the Special Tribunal

1. The expenses of the Special Tribunal shall be borne in the following manner:

(a) Fifty-one per cent of the expenses of the Tribunal shall be borne by voluntary contributions from States;

(b) Forty-nine per cent of the expenses of the Tribunal shall be borne by the Government of Lebanon.

2. It is understood that the Secretary-General will commence the process of establishing the Tribunal when he has sufficient contributions in hand to finance the establishment of the Tribunal and twelve months of its operations plus pledges equal to the anticipated expenses of the following 24 months of the Tribunal's operation. Should voluntary contributions be insufficient for the Tribunal to implement its mandate, the Secretary-General and the Security Council shall explore alternate means of financing the Tribunal.

Article 6
Management Committee

The parties shall consult concerning the establishment of a Management Committee.

Article 7
Juridical capacity

The Special Tribunal shall possess the juridical capacity necessary:

(a) To contract;

(b) To acquire and dispose of movable and immovable property;

(c) To institute legal proceedings;

(d) To enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Tribunal.

Article 8
Seat of the Special Tribunal

1. The Special Tribunal shall have its seat outside Lebanon. The location of the seat shall be determined having due regard to considerations of justice and fairness as well as security and administrative efficiency, including the rights of victims and access to witnesses, and subject to the conclusion of a headquarters agreement between the United Nations, the Government and the State that hosts the Tribunal.

2. The Special Tribunal may meet away from its seat when it considers it necessary for the efficient exercise of its functions.

3. An Office of the Special Tribunal for the conduct of investigations shall be established in Lebanon subject to the conclusion of appropriate arrangements with the Government.

Article 9
Inviolability of premises, archives and all other documents

1. The Office of the Special Tribunal in Lebanon shall be inviolable. The competent authorities shall take appropriate action that may be necessary to ensure

that the Tribunal shall not be dispossessed of all or any part of the premises of the Tribunal without its express consent.

2. The property, funds and assets of the Office of the Special Tribunal in Lebanon, wherever located and by whomsoever held, shall be immune from search, seizure, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

3. The archives of the Office of the Special Tribunal in Lebanon, and in general all documents and materials made available, belonging to or used by it, wherever located and by whomsoever held, shall be inviolable.

Article 10
Funds, assets and other property

The Office of the Special Tribunal, its funds, assets and other property in Lebanon, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process, except insofar as in any particular case the Tribunal has expressly waived its immunity. It is understood, however, that no waiver of immunity shall extend to any measure of execution.

Article 11
Privileges and immunities of the judges, the Prosecutor, the Deputy Prosecutor, the Registrar and the Head of the Defence Office

1. The judges, the Prosecutor, the Deputy Prosecutor, the Registrar and the Head of the Defence Office, while in Lebanon, shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the Vienna Convention on Diplomatic Relations of 1961.

2. Privileges and immunities are accorded to the judges, the Prosecutor, the Deputy Prosecutor, the Registrar and the Head of the Defence Office in the interest of the Special Tribunal and not for the personal benefit of the individuals themselves. The right and the duty to waive the immunity in any case where it can be waived without prejudice to the purposes for which it is accorded shall lie with the Secretary-General, in consultation with the President of the Tribunal.

Article 12
Privileges and immunities of international and Lebanese personnel

1. Lebanese and international personnel of the Office of the Special Tribunal, while in Lebanon, shall be accorded:

(a) Immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue to be accorded after termination of employment with the Office of the Special Tribunal;

(b) Exemption from taxation on salaries, allowances and emoluments paid to them.

2. International personnel shall, in addition thereto, be accorded:

(a) Immunity from immigration restriction;

(b) The right to import free of duties and taxes, except for payment for services, their furniture and effects at the time of first taking up their official duties in Lebanon.

3. The privileges and immunities are granted to the officials of the Office of the Special Tribunal in the interest of the Tribunal and not for their personal benefit. The right and the duty to waive the immunity in any case where it can be waived without prejudice to the purpose for which it is accorded shall lie with the Registrar of the Tribunal.

Article 13
Defence counsel

1. The Government shall ensure that the counsel of a suspect or an accused who has been admitted as such by the Special Tribunal shall not be subjected, while in Lebanon, to any measure that may affect the free and independent exercise of his or her functions.

2. In particular, the counsel shall be accorded:

(a) Immunity from personal arrest or detention and from seizure of personal baggage;

(b) Inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused;

(c) Immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed in his or her capacity as counsel. Such immunity shall continue to be accorded after termination of his or her functions as a counsel of a suspect or accused;

(d) Immunity from any immigration restrictions during his or her stay as well as during his or her journey to the Tribunal and back.

Article 14
Security, safety and protection of persons referred to in this Agreement

The Government shall take effective and adequate measures to ensure the appropriate security, safety and protection of personnel of the Office of the Special Tribunal and other persons referred to in this Agreement, while in Lebanon. It shall take all appropriate steps, within its capabilities, to protect the equipment and premises of the Office of the Special Tribunal from attack or any action that prevents the Tribunal from discharging its mandate.

Article 15
Cooperation with the Special Tribunal

1. The Government shall cooperate with all organs of the Special Tribunal, in particular with the Prosecutor and defence counsel, at all stages of the proceedings. It shall facilitate access of the Prosecutor and defence counsel to sites, persons and relevant documents required for the investigation.

2. The Government shall comply without undue delay with any request for assistance by the Special Tribunal or an order issued by the Chambers, including, but not limited to:

(a) Identification and location of persons;

(b) Service of documents;

(c) Arrest or detention of persons;

(d) Transfer of an indictee to the Tribunal.

Article 16
Amnesty

The Government undertakes not to grant amnesty to any person for any crime falling within the jurisdiction of the Special Tribunal. An amnesty already granted in respect of any such persons and crimes shall not be a bar to prosecution.

Article 17
Practical arrangements

With a view to achieving efficiency and cost-effectiveness in the operation of the Special Tribunal:

(a) Appropriate arrangements shall be made to ensure that there is a coordinated transition from the activities of the International Independent Investigation Commission, established by the Security Council in its resolution 1595 (2005), to the activities of the Office of the Prosecutor;

(b) Judges of the Trial Chamber and the Appeals Chamber shall take office on a date to be determined by the Secretary-General in consultation with the President of the Special Tribunal. Pending such a determination, judges of both Chambers shall be convened on an ad hoc basis to deal with organizational matters and serving, when required, to perform their duties.

Article 18
Settlement of disputes

Any dispute between the Parties concerning the interpretation or application of this Agreement shall be settled by negotiation or by any other mutually agreed upon mode of settlement.

Article 19
Entry into force and commencement of the functioning of the Special Tribunal

1. This Agreement shall enter into force on the day after the Government has notified the United Nations in writing that the legal requirements for entry into force have been complied with.

2. The Special Tribunal shall commence functioning on a date to be determined by the Secretary-General in consultation with the Government, taking into account the progress of the work of the International Independent Investigation Commission.

Article 20
Amendment

This Agreement may be amended by written agreement between the Parties.

Article 21
Duration of the Agreement

1. This Agreement shall remain in force for a period of three years from the date of the commencement of the functioning of the Special Tribunal.

2. Three years after the commencement of the functioning of the Special Tribunal the Parties shall, in consultation with the Security Council, review the progress of the work of the Special Tribunal. If at the end of this period of three years the activities of the Tribunal have not been completed, the Agreement shall be extended to allow the Tribunal to complete its work, for a further period(s) to be determined by the Secretary-General in consultation with the Government and the Security Council.

3. The provisions relating to the inviolability of the funds, assets, archives and documents of the Office of the Special Tribunal in Lebanon, the privileges and immunities of those referred to in this Agreement, as well as provisions relating to defence counsel and the protection of victims and witnesses, shall survive termination of this Agreement.

In witness whereof, the following duly authorized representatives of the United Nations and of the Lebanese Republic have signed this Agreement.

Done at _____ on _____ 2006, in three originals in the Arabic, French and English languages, all texts being equally authentic.

For the United Nations:

_____

For the Lebanese Republic:

_____

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Attachment
Statute of the Special Tribunal for Lebanon

Having been established by an Agreement between the United Nations and the Lebanese Republic (hereinafter "the Agreement") pursuant to Security Council resolution 1664 (2006) of 29 March 2006, which responded to the request of the Government of Lebanon to establish a tribunal of an international character to try all those who are found responsible for the terrorist crime which killed the former Lebanese Prime Minister Rafiq Hariri and others, the Special Tribunal for Lebanon (hereinafter "the Special Tribunal") shall function in accordance with the provisions of this Statute.

Section I
Jurisdiction and applicable law

Article 1
Jurisdiction of the Special Tribunal

The Special Tribunal shall have jurisdiction over persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons. If the Tribunal finds that other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks. This connection includes but is not limited to a combination of the following elements: criminal intent (motive), the purpose behind the attacks, the nature of the victims targeted, the pattern of the attacks (modus operandi) and the perpetrators.

Article 2
Applicable criminal law

The following shall be applicable to the prosecution and punishment of the crimes referred to in article 1, subject to the provisions of this Statute:

(a) The provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy; and

(b) Articles 6 and 7 of the Lebanese law of 11 January 1958 on "Increasing the penalties for sedition, civil war and interfaith struggle".

Article 3
Individual criminal responsibility

1. A person shall be individually responsible for crimes within the jurisdiction of the Special Tribunal if that person:

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(a) Committed, participated as accomplice, organized or directed others to commit the crime set forth in article 2 of this Statute; or

(b) Contributed in any other way to the commission of the crime set forth in article 2 of this Statute by a group of persons acting with a common purpose, where such contribution is intentional and is either made with the aim of furthering the general criminal activity or purpose of the group or in the knowledge of the intention of the group to commit the crime.

2. With respect to superior and subordinate relationships, a superior shall be criminally responsible for any of the crimes set forth in article 2 of this Statute committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(a) The superior either knew, or consciously disregarded information that clearly indicated that the subordinates were committing or about to commit such crimes;

(b) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

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

Article 4
Concurrent jurisdiction

1. The Special Tribunal and the national courts of Lebanon shall have concurrent jurisdiction. Within its jurisdiction, the Tribunal shall have primacy over the national courts of Lebanon.

2. Upon the assumption of office of the Prosecutor, as determined by the Secretary-General, and no later than two months thereafter, the Special Tribunal shall request the national judicial authority seized with the case of the attack against Prime Minister Rafiq Hariri and others to defer to its competence. The Lebanese judicial authority shall refer to the Tribunal the results of the investigation and a copy of the court's records, if any. Persons detained in connection with the investigation shall be transferred to the custody of the Tribunal.

3. (a) At the request of the Special Tribunal, the national judicial authority seized with any of the other crimes committed between 1 October 2004 and 12 December 2005, or a later date decided pursuant to article 1, shall refer to the Tribunal the results of the investigation and a copy of the court's records, if any, for review by the Prosecutor;

(b) At the further request of the Tribunal, the national authority in question shall defer to the competence of the Tribunal. It shall refer to the Tribunal the results of the investigation and a copy of the court's records, if any, and persons detained in connection with any such case shall be transferred to the custody of the Tribunal;

(c) The national judicial authorities shall regularly inform the Tribunal of the progress of their investigation. At any stage of the proceedings, the Tribunal may formally request a national judicial authority to defer to its competence.

Article 5
Non bis in idem

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

2. A person who has been tried by a national court may be subsequently tried by the Special Tribunal if the national court proceedings were not impartial or independent, were designed to shield the accused from criminal responsibility for crimes within the jurisdiction of the Tribunal or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under this Statute, the Special Tribunal 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 6
Amnesty

An amnesty granted to any person for any crime falling within the jurisdiction of the Special Tribunal shall not be a bar to prosecution.

Section II
Organization of the Special Tribunal

Article 7
Organs of the Special Tribunal

The Special Tribunal shall consist of the following organs:

(a) The Chambers, comprising a Pre-Trial Judge, a Trial Chamber and an Appeals Chamber;

(b) The Prosecutor;

(c) The Registry; and

(d) The Defence Office.

Article 8
Composition of the Chambers

1. The Chambers shall be composed as follows:

(a) One international Pre-Trial Judge;

(b) Three judges who shall serve in the Trial Chamber, of whom one shall be a Lebanese judge and two shall be international judges;

(c) Five judges who shall serve in the Appeals Chamber, of whom two shall be Lebanese judges and three shall be international judges;

(d) Two alternate judges, one of whom shall be a Lebanese judge and one shall be an international judge.

2. 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 Tribunal.

3. At the request of the presiding judge of the Trial Chamber, the President of the Special Tribunal may, in the interest of justice, assign the alternate judges to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting.

Article 9
Qualification and appointment of judges

1. The judges shall be persons of high moral character, impartiality and integrity, with extensive judicial experience. 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 established competence of the judges in criminal law and procedure and international law.

3. The judges shall be appointed by the Secretary-General, as set forth in article 2 of the Agreement, for a three-year period and may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government.

Article 10
Powers of the President of the Special Tribunal

1. The President of the Special Tribunal, in addition to his or her judicial functions, shall represent the Tribunal and be responsible for its effective functioning and the good administration of justice.

2. The President of the Special Tribunal shall submit an annual report on the operation and activities of the Tribunal to the Secretary-General and to the Government of Lebanon.

Article 11
The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for the crimes falling within the jurisdiction of the Special Tribunal. In the interest of proper administration of justice, he or she may decide to charge jointly persons accused of the same or different crimes committed in the course of the same transaction.

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

3. The Prosecutor shall be appointed, as set forth in article 3 of the Agreement, by the Secretary-General for a three-year term and may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government. 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 Lebanese Deputy Prosecutor and by such other Lebanese and international staff as may be required to perform the functions assigned to him or her effectively and efficiently.

5. 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 Lebanese authorities concerned.

Article 12
The Registry

1. Under the authority of the President of the Special Tribunal, the Registry shall be responsible for the administration and servicing of the Tribunal.

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 and shall be a staff member of the United Nations. He or she shall serve for a three-year term and may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government.

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, measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, and such other appropriate assistance for witnesses who appear before the Special Tribunal and others who are at risk on account of testimony given by such witnesses.

Article 13
The Defence Office

1. The Secretary-General, in consultation with the President of the Special Tribunal, shall appoint an independent Head of the Defence Office, who shall be responsible for the appointment of the Office staff and the drawing up of a list of defence counsel.

2. The Defence Office, which may also include one or more public defenders, shall protect the rights of the defence, provide support and assistance to defence counsel and to the persons entitled to legal assistance, including, where appropriate, legal research, collection of evidence and advice, and appearing before the Pre-Trial Judge or a Chamber in respect of specific issues.

Article 14
Official and working languages

The official languages of the Special Tribunal shall be Arabic, French and English. In any given case proceedings, the Pre-Trial Judge or a Chamber may decide that one or two of the languages may be used as working languages as appropriate.

Section III
Rights of defendants and victims

Article 15
Rights of suspects during investigation

A suspect who is to be questioned by the Prosecutor shall not be compelled to incriminate himself or herself or to confess guilt. He or she shall have the following rights of which he or she shall be informed by the Prosecutor prior to questioning, in a language he or she speaks and understands:

(a) The right to be informed that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Special Tribunal;

(b) The right to remain silent, without such silence being considered in the determination of guilt or innocence, and to be cautioned that any statement he or she makes shall be recorded and may be used in evidence;

(c) The right to have legal assistance of his or her own choosing, including the right to have legal assistance provided by the Defence Office where the interests of justice so require and where the suspect does not have sufficient means to pay for it;

(d) The right to have the free assistance of an interpreter if he or she cannot understand or speak the language used for questioning;

(e) The right to be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

Article 16
Rights of the accused

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

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

3. (a) The accused shall be presumed innocent until proved guilty according to the provisions of this Statute;

(b) The onus is on the Prosecutor to prove the guilt of the accused;

(c) In order to convict the accused, the relevant Chamber must be convinced of the guilt of the accused beyond reasonable doubt.

4. In the determination of any charge against the accused pursuant to this 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 without hindrance with counsel of his or her own choosing;

(c) To be tried without undue delay;

(d) Subject to the provisions of article 22, 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 examine all evidence to be used against him or her during the trial in accordance with the Rules of Procedure and Evidence of the Special Tribunal;

(g) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Tribunal;

(h) Not to be compelled to testify against himself or herself or to confess guilt.

5. The accused may make statements in court at any stage of the proceedings, provided such statements are relevant to the case at issue. The Chambers shall decide on the probative value, if any, of such statements.

Article 17
Rights of victims

Where the personal interests of the victims are affected, the Special Tribunal shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Pre-Trial Judge or the Chamber and in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Pre-Trial Judge or the Chamber considers it appropriate.

Section IV
Conduct of proceedings

Article 18
Pre-Trial proceedings

1. The Pre-Trial Judge shall review the indictment. If satisfied that a prima facie case has been established by the Prosecutor, he or she shall confirm the indictment. If he or she is not so satisfied, the indictment shall be dismissed.

2. The Pre-Trial Judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest or transfer of persons, and any other orders as may be required for the conduct of the investigation and for the preparation of a fair and expeditious trial.

Article 19
Evidence collected prior to the establishment of the Special Tribunal

Evidence collected with regard to cases subject to the consideration of the Special Tribunal, prior to the establishment of the Tribunal, by the national authorities of Lebanon or by the International Independent Investigation Commission in accordance with its mandate as set out in Security Council resolution 1595 (2005) and subsequent resolutions, shall be received by the Tribunal. Its admissibility shall be decided by the Chambers pursuant to international standards on collection of evidence. The weight to be given to any such evidence shall be determined by the Chambers.

Article 20
Commencement and conduct of trial proceedings

1. The Trial Chamber shall read the indictment to the accused, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment and instruct the accused to enter a plea.

2. Unless otherwise decided by the Trial Chamber in the interests of justice, examination of witnesses shall commence with questions posed by the presiding judge, followed by questions posed by other members of the Trial Chamber, the Prosecutor and the Defence.

3. Upon request or *proprio motu*, the Trial Chamber may at any stage of the trial decide to call additional witnesses and/or order the production of additional evidence.

4. The hearings shall be public unless the Trial Chamber decides to hold the proceedings in camera in accordance with the Rules of Procedure and Evidence.

Article 21
Powers of the Chambers

1. The Special Tribunal shall confine the trial, appellate and review proceedings strictly to an expeditious hearing of the issues raised by the charges, or the grounds for appeal or review, respectively. It shall take strict measures to prevent any action that may cause unreasonable delay.

2. A Chamber may admit any relevant evidence that it deems to have probative value and exclude such evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

3. A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.

4. In cases not otherwise provided for in the Rules of Procedure and Evidence, a Chamber shall apply rules of evidence that 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.

Article 22
Trials in absentia

1. The Special Tribunal shall conduct trial proceedings in the absence of the accused, if he or she:

(a) Has expressly and in writing waived his or her right to be present;

(b) Has not been handed over to the Tribunal by the State authorities concerned;

(c) Has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges confirmed by the Pre-Trial Judge.

2. When hearings are conducted in the absence of the accused, the Special Tribunal shall ensure that:

(a) The accused has been notified, or served with the indictment, or notice has otherwise been given of the indictment through publication in the media or communication to the State of residence or nationality;

(b) The accused has designated a defence counsel of his or her own choosing, to be remunerated either by the accused or, if the accused is proved to be indigent, by the Tribunal;

(c) Whenever the accused refuses or fails to appoint a defence counsel, such counsel has been assigned by the Defence Office of the Tribunal with a view to ensuring full representation of the interests and rights of the accused.

3. In case of conviction in absentia, the accused, if he or she had not designated a defence counsel of his or her choosing, shall have the right to be retried in his or her presence before the Special Tribunal, unless he or she accepts the judgement.

Article 23
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 any separate or dissenting opinions shall be appended.

Article 24
Penalties

1. The Trial Chamber shall impose upon a convicted person imprisonment for life or for a specified number of years. In determining the terms of imprisonment for the crimes provided for in this Statute, the Trial Chamber shall, as appropriate, have recourse to international practice regarding prison sentences and to the practice of the national courts of Lebanon.

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

Article 25
Compensation to victims

1. The Special Tribunal may identify victims who have suffered harm as a result of the commission of crimes by an accused convicted by the Tribunal.

2. The Registrar shall transmit to the competent authorities of the State concerned the judgement finding the accused guilty of a crime that has caused harm to a victim.

3. Based on the decision of the Special Tribunal and pursuant to the relevant national legislation, a victim or persons claiming through the victim, whether or not such victim had been identified as such by the Tribunal under paragraph 1 of this article, may bring an action in a national court or other competent body to obtain compensation.

4. For the purposes of a claim made under paragraph 3 of this article, the judgement of the Special Tribunal shall be final and binding as to the criminal responsibility of the convicted person.

Article 26
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) An error on a question of law invalidating the decision;

(b) An error of fact that has occasioned a miscarriage of justice.

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

Article 27
Review proceedings

1. Where a new fact has been discovered that was not known at the time of the proceedings before the Trial Chamber or the Appeals Chamber and that 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 28
Rules of Procedure and Evidence

1. The judges of the Special Tribunal shall, as soon as practicable after taking office, adopt Rules of Procedure and Evidence for the conduct of the pre-trial, trial and appellate proceedings, the admission of evidence, the participation of victims, the protection of victims and witnesses and other appropriate matters and may amend them, as appropriate.

2. In so doing, the judges shall be guided, as appropriate, by the Lebanese Code of Criminal Procedure, as well as by other reference materials reflecting the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious trial.

Article 29
Enforcement of sentences

1. Imprisonment shall be served in a State designated by the President of the Special Tribunal from a list of States that have indicated their willingness to accept persons convicted by the Tribunal.

2. Conditions of imprisonment shall be governed by the law of the State of enforcement subject to the supervision of the Special Tribunal. The State of enforcement shall be bound by the duration of the sentence, subject to article 30 of this Statute.

Article 30
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 Tribunal accordingly. There shall only be pardon or commutation of sentence if the President of the Tribunal, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

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DUE PROCESS AND HUMAN RIGHTS

8.1 INTRODUCTION

international criminal tribunals are considered important tools for improving the protection of human rights. And rightly so. However, the important mandate of these international tribunals to establish and enforce rights of the [illegible]

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Unlike the law of the tribunals and the ICC, we make no distinction between the rights of the accused and the rights of suspects. Nor does such distinction exist in human rights law. What matters is an individual's right to liberty and a fair trial, which triggers the applicability of certain rights at different stages of the procedure.

8.5.1 Right to a fair trial in general

The relationship between the specific fair trial rights and the right to a fair trial in a broader sense has yielded two important results. First, the violation of specific rights by definition violates the right to a fair trial in a broader sense, which follows from the reference to them as minimum guarantees.[80] However, the absence of violation of any of the specific minimum guarantees does not automatically warrant the conclusion that the trial as a whole is fair. This brings us to the second point, namely that all the procedural measures bordering on violations of minimum guarantees and elements of a fair trial that have not been translated literally into specific rights may justify the conclusion that there has been no fair hearing. This residual function of the general right to a fair trial serves the useful purpose of making the concept of a fair hearing a dynamic and living reality, capable of adjusting to changing views on fairness and of rectifying omissions that may occur in the law and practice of international criminal courts.[81]

Legal doctrine and practice have given rise to a number of fair trial elements which are not covered by the specific minimum guarantees. In this respect one may mention the right to an adversarial hearing (the principle of *audi alteram partem*), the principle of equality of arms, and the right to a reasoned judgment. In the context of international criminal proceedings the principle of equality of arms deserves our attention.

The very fact that equality of arms does not enjoy the status of a full right, but of a principle is telling of its nature. Full equality between parties to criminal proceedings is an idle aspiration from a practical perspective and not the required standard in the human rights arena. Rather, the principle has a procedural nature and is closely connected to the right to an adequately prepared defence. Thus, the European Court of Human Rights ruled in this respect that 'each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage *vis-à-vis* his opponent'.[82] It also observed that there can be no violation of this principle when both sides are denied something that might have been useful.[83] In this light, the defence's claim in *Tadić* that the principle of equality of arms was

[80] Cf. Article 21(4) (*Jhapeau*) of the ICTY Statute and Article 67(1) (*Jhapeau*) of the ICC Statute. See also Trechsel, *Human Rights in Criminal Proceedings*, at 86.

[81] An example of the latter is the privilege against self-incrimination, which is part of Article 14 of the ICCPR, Article 21 of the ICTY Statute, and Article 67 of the ICC Statute, but not of Article 6 of the anterior ECHR. The European Court of Human Rights has nevertheless developed progressive case law in respect of this right by considering it a vital element of the right to a fair trial.

[82] *Bulut* v. *Austria*, 17358/90 [1996] ECtHR 10 (22 February 1996), para. 47.

[83] *Jasper* v. *UK*, 27052/95 [2000] ECtHR 90 (16 February 2000), para. 57; *Ekbatani* v. *Sweden*, 10563/83 [1988] ECtHR 6 (26 May 1988), para. 30.

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Otto Triffterer

Commentary on the Rome Statute of the International Criminal Court

Observers' Notes, Article by Article

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Article 67
Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

(c) To be tried without undue delay;

(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks 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. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks;

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(h) To make an unsworn oral or written statement in his or her defence; and

(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Literature:

…mbos, *The Right of Non-Self-Incrimination of Witnesses Before the ICC*, 15 LEIDEN J. INT'L L. 155 (2002); … Baum, *Pursuing Justice in a Climate of Moral Outrage: An Evaluation of the Rights of the Accused in the … Statute of the International Criminal Court*, 19 WISCONSIN INT'L L. J. 197 (2001); Stuart Beresford/Hafida …, *The Right to be Defended in Person or Through Legal Assistance and the International Criminal Court*, …DEN J. INT'L L. 949 (2000); Enrique Carnero Rojo, *The Role of Fair Trial Considerations in the Rome … of the International Criminal Court: From "No Peace Without Justice" to "No Peace with Victor's …"*, 18 LEIDEN J. INT'L L. 829 (2005); Antonio Converti, *The Rights of the Accused*, in: Flavia Lattanzi (ed.) …TERNATIONAL CRIMINAL COURT: COMMENTS ON THE DRAFT STATUTE 219 (1998); Louise Doswald-…/Robert Kolb, JUDICIAL PROCESS AND HUMAN RIGHTS: UNITED NATIONS, EUROPEAN, AMERICAN AND …N SYSTEMS (2004); Hakan Friman, *Rights of Persons Suspected or Accused of a Crime*, in: Roy S. Lee … THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, AND …S 247 (1999); Richard May/Marieke Wierda, INTERNATIONAL CRIMINAL EVIDENCE 259-298 (2002); Sara …on, *Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the …ssibility of Derogation*, 31 N. Y. U. J. INT'L L. & POLICY 535 (1999); Vladimir Tochilovsky, CHARGES, … AND LEGAL ASSISTANCE IN INTERNATIONAL JURISDICTIONS (2005); Stefan Trechsel, HUMAN RIGHTS

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Contents

A. Introduction/General Remarks

1 During the Second World War, Churchill and other Allied leaders flirted with some form of summary justice for major war criminals[1]. The concept now is Indeed, only a few years later, one of the Nuremberg Tribunals held that presumptions involved in a trial lacking the fundamental guarantees of fairness could be held re crimes against humanity. Such guarantees include the right of the accused to introduce to confront witnesses, to present evidence, to be tried in public, to have counsel of c be informed of the nature of the charges[2]. Certainly, the credibility of internation depends on rigorous respect for the rights of the accused to a fair trial, an id frequently expressed during the development of the ICC *Statute*. Nor can the credibi international courts be gainsaid; their treatment of the accused provides a model justice systems throughout the world in the respect of fundamental human rights.

2 The *Statute* might well have omitted a general provision dealing with the accused. Many specific guarantees are incorporated in other articles of the *Statute* be little doubt that even in the absence of a more general text, the judges would internationally recognized norms. Principle 5 of the *United Nations Basic Princip Independence of the Judiciary* provides: "The principle of the independence of th entitles and requires the judiciary to ensure that judicial proceedings are conduct that the rights of the parties are respected"[3]. The *Statute* imposes a duty upon the Tri to see that "a trial is fair and expeditious and is conducted with full respect for the accused"[4]. Furthermore, there is the constant danger that any codification, left in conservative judges, may tend to constrict the development of the law rather than The original contribution of article 67 may well be that rather than merely restate have already been codified, it elaborates on the relatively laconic provisions of

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1 A.J. Kochavi, PRELUDE TO NUREMBERG: ALLIED WAR CRIMES POLICY AND THE QUESTION OF 63-91 (1998).

2 *United States of America v. Weizsäcker et al.* ("Justice trial"), (1948) 3 TWC 1, 5 L.R.T.W.C. 1, p. 97 (L.R.T.W.C.)

3 U.N. Doc. A/CONF.121/22/Rev.1, G.A. Res. 40/146 (1985). The *Basic Principles* are cited in th of the International Criminal Court's Code of Judicial Ethics, Document ICC-ASD/2-01-05

4 Rome Statute, article 64 para. 1.

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and, moreover, develops new rights which do not yet appear in human rights treaties and declarations.

The right to a fair trial is recognized in the *Universal Declaration of Human Rights*[5], and in 3
the universal and regional human rights conventions that it inspired[6], as well as in humanitarian law instruments[7]. The model for article 67 of the *Statute* is article 14 of the *ICCPR*[8], although with some major distinctions. Article 14 of the *ICCPR* applies to civil and administrative proceedings, as well as criminal trials. Article 14 contains provisions dealing with trial of juvenile offenders[9] which are irrelevant to the work of the ICC because of the Rome Conference's decision to exclude jurisdiction in the case of suspects who were under eighteen years of age at the time of the offence[10]. The *ICCPR* fair trial provision also recognizes some specific rights that are enshrined elsewhere in the *Statute*, notably the presumption of innocence[11], a right of appeal[12], to compensation in cases of erroneous conviction[13], and to protection against double jeopardy[14].

The ILC Draft Statute of 1994 contained a provision entitled "Rights of the Accused" that 4
was essentially a copy of article 14 para. 3 of the *ICCPR*[15]. The only significant departure was inclusion of a second paragraph requiring the prosecutor to disclose exculpatory evidence to the defence. In addition, the ILC made the text gender neutral, replacing masculine pronouns with reference to "the accused". In 1995, the *Ad Hoc* Committee of the General Assembly examined the ILC Draft Statute, observing that "in view of the considerable powers [the Court] would enjoy in relation to individuals, [it] should be bound to apply the highest standards of justice, integrity and due process"[16]. Its discussion focussed on the issue of mandatory legal assistance, and on the need to establish rules on the qualifications, powers and remuneration of defence attorneys, and on the procedure for their appointment by the Court[17].

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[5] G.A. Res. 217A(III), U.N. Doc. A/810 (1948), "Article 10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. Article 11 para. 3. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence".

[6] ICCPR, 999 U.N.T.S. 171, *entered into force* 23 Mar. 1976, article 14; American Convention on Human Rights, 1144 U.N.T.S. 123, *entered into force* 18 July 1978, article 8; European Convention on Human Rights, 213 U.N.T.S. 221, *entered into force* 3 Sep. 1953, article 6; African Charter on Human and People's Rights, O.A.U. Doc. CAB/LEG/67/3 rev. 5, *entered into force* 21 Oct. 1986, article 7; Convention on the Rights of the Child, G.A. Res. 44/25, Annex, *entered into force* 2 Sep. 1990, article 40 § 2.

[7] Geneva Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, *entered into force* 21 Oct. 1950, articles 84-87, 99-108; Geneva Convention Relative to the Protection of Civilians, *entered into force* 21 Oct. 1950, article 5, 64-76; Add. Prot. I to the 1949 Geneva Conventions and Relating to The Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3, *entered into force* 7 Dec. 1978, article 75; Add. Prot. II to the 1949 Geneva Conventions and Relating to The Protection of Victims of Non-International Armed Conflicts, 1125 U.N.T.S. 3, *entered into force* 7 Dec. 1978, article 6.

[8] It was also the model for the provisions dealing with the rights of the accused in the Statute of the International Criminal Tribunal for the former Yugoslavia [ICTY], U.N. Doc. S/RES/827, Annex, article 21, and the Statute of the International Criminal Tribunal for Rwanda [ICTR], U.N. Doc. S/RES/955, Annex, article 20. The Secretary-General's Report, U.N. Doc. S/25704, para. 106, stated: "It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights".

[9] *Supra* note 6, ICCPR, article 14 paras. 1, 4.

[10] *Supra* note 4, Rome Statute, article 26.

[11] *Supra* note 6, ICCPR, article 14 para. 2. See: *supra* note 4, Rome Statute, article 66.

[12] *Supra* note 6, ICCPR, article 14 para. 5. See: *supra* note 4, Rome Statute, articles 81-84.

[13] *Supra* note 6, ICCPR article 14 para. 6. See: *supra* note 4, Rome Statute, article 85.

[14] *Supra* note 6, ICCPR, article 14 para. 7. See: *supra* note 4, Rome Statute, article 20.

[15] 1994 ILC Draft Statute, article 41, pp. 114-115.

[16] *Ad Hoc* Committee Report, para. 129, p. 29.

[17] *Ibid.*, para. 175, p. 35.

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5 Rights of an accused were considered by the informal working group at the August session of the Preparatory Committee, and a number of detailed comments and suggestions specific points appear in the report of these discussions[18]. The subject was again addressed the Preparatory Committee in August 1997. By this point, the innovative spirit of the Preparatory Committee was becoming apparent, and there were many departures from the of article 14 para. 3 of the *ICCPR*, several of them without square brackets, indicating that had been agreed to by consensus[19]. There were also many cross-references to other provisions the *Statute*, showing the Committee's concern that the rights of the accused not only recognized generally, but that they be reflected in specific procedural provisions. In addition "improved" versions of the rights set out in article 14 of the *ICCPR*, the Committee's 1997 dr also contained several new rights: to make an unsworn statement, to have the Court seek operation in gathering evidence, to be protected against any reverse onus or duty of rebuttal be free from unjust search and seizure, and a general entitlement to due process. The Aug 1997 Preparatory Committee's text was reproduced in the Zutphen compilation and the Fin Draft of the Preparatory Committee with little modification[20].

6 The Rome Conference quickly agreed on most of the provisions in article 67. It was mad quite clear to the delegates that the minimum guarantees enshrined in article 14 of the *ICCP* were being enlarged, and they were invited to accept or reject such an approach. The Conferenc adopted the latter route without hesitation. Negotiating difficulties with the provisions concerning appearance at trial, funded counsel and disclosure of evidence by the prosecut took slightly more time to be resolved. The proposals concerning search and seizure and du process were dropped as being redundant.

B. Analysis and interpretation of elements

1. Paragraph 1

1. Chapeau

7 The *chapeau* provision of article 67 is an amalgam of norms contained in paras. 1 and 3 article 14 of the *ICCPR*. In effect, it takes the *chapeau* of article 14 para. 3 of the *ICCPR*, wit minor modifications, and adds the notions of a public, fair and impartial hearing that appear article 14 para. 1. The text differs significantly from the original ILC Draft[21] and reflects proposal made at the Rome Conference, on 2 July, by the Chair of the Working Group[22].

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18 1996 Preparatory Committee I, paras. 270-279, pp. 57-59.

19 Preparatory Committee Decisions Aug. 1997, pp. 34-36.

20 Zutphen Draft, pp. 114-115; Draft Statute for the ICC, U.N. Doc. A/CONF.183/2/Rev.1, pp. 126-128.

21 *Supra* note 15, 1994 ILC Draft Statute, article 41: "In the determination of any charge under this Statute, the accused is entitled to a fair and public hearing, subject to article 43, and to the following minimum guarantees: ...".

22 Draft proposal for article 67 submitted by the chairman, U.N. Doc. A/CONF.183/C.1/WGPM/L.42 (2 July): "In the determination of any charge, the accused is entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees in full equality"." It was adopted by the Committee with the addition of the word "and" before the words "to a fair hearing": Report of the Working Group on Procedural Matters, U.N. Doc. A/CONF.183/C.1/WGPM/L.2 (4 July), pp. 4-5. The Drafting Committee removed the word "and", and made other minor changes. Compendium of draft articles referred to the Drafting Committee by the Committee of the Whole as of 9 July 1998, U.N. Doc. A/CONF.183/C.1/L.58, pp. 41-42: "In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality".

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a) "any charge"

The reference to "any charge" must apply to trials on accusations based on the four core crimes enumerated in article 5 of the *Statute*. The Court is also competent to judge "[o]ffences against the administration of justice", pursuant to article 70, and the rights of an accused would also apply in such proceedings. Some adaptation would appear to be required in proceedings for removal of a Registrar or Deputy Registrar, pursuant to article 46 para. 3 of the *Statute*, as these are not criminal in nature. Where the rights set out in article 67 do not apply necessarily is in other proceedings before the Court, for example those relating to a hearing subsequent to a decision by the Prosecutor not to proceed with charges[23] or to conduct an investigation[24]. Indeed, rights during an investigation are set out in a distinct provision of the *Statute*[25]. Nevertheless, the phrase "in the determination of any charge" is essentially identical to the wording of the international models, such as article 6 para. 1 of the *European Convention on Human Rights*[26]. The European Court of Human Rights considers this to be "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence" or an act that has "the implication of such an allegation and which likewise substantially affects the situation of the suspect"[27]. An individual might become "substantially affected", to borrow the Strasbourg terminology, once a State party has asked that a case be examined[28], or upon the application by the Prosecutor to initiate an investigation[29]. If notions of complementarity are factored in, the right may even be extended to encompass proceedings under domestic law prior to exercise of jurisdiction of the Court. 8

b) "public hearing"

The principle of a public hearing, stated in the *chapeau* of article 67 para. 1, is developed in the Regulations of the Court. Regulation 20 states: 9

> "1. All hearings shall be held in public, unless otherwise provided in the Statute, Rules, these Regulations or ordered by the Chamber.
> 2. When a Chamber orders that certain hearings be held in closed session, the Chamber shall make public the reasons for such an order.
> 3. A Chamber may order the disclosure of all or part of the record of closed proceedings when the reasons for ordering its non-disclosure no longer exist".

The Regulations provide for broadcasting and recording of hearings. Subregulation 21 para. 1 says that "publicity of hearings may extend beyond the courtroom and may be through broadcasting by the Registry or release of transcripts or recordings, unless otherwise ordered by the Chamber". According to subregulation 21 para. 2, "[i[n order to protect sensitive information, broadcasts of audio- and videorecordings of all hearings shall, unless otherwise ordered by the Chamber, be delayed by at least 30 minutes"[30].

The text of article 67 of the *Statute* differs from that of article 14 of the *ICCPR* in that it does not enumerate the exceptions to the right to a public hearing. Article 14 para. 1 of the *ICCPR* allows the exclusion of the press and the public "for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice". Moreover, according to the *ICCPR*, the judgment must always be made public "except where the interest of juvenile

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[23] *Supra* note 4, Rome Statute, article 53 para. 3.
[24] *Ibid.*, articles 56-58.
[25] *Ibid.*, article 55.
[26] *Supra* note 6.
[27] *Corigliano* v. *Italy*, Ser. A, No. 57, 10 Dec. 1982, para. 34.
[28] *Supra* note 4, Rome Statute, article 14 para. 1.
[29] *Ibid.*, article 15 para. 3.
[30] See also Regulations of the Registry, Document ICC-BD/03-01-06, regulation 42.

persons otherwise requires"[31]. A detailed enumeration of exceptions to the public hearing principle had been proposed but was rejected by the Preparatory Committee. These derogations included: the deliberations of the Court; protection of public order or of human dignity; safety and protection of the accused, of the victims or of witnesses. Victims of sexual violence were to be entitled as of right to an *in camera* hearing[32].

10 To the extent there is a residual power to derogate from the norm of a public hearing, as found in article 64 para. 7: "The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence". That the public hearing requirement of the *chapeau* of article 67 is subordinate to article 64 para. 7 is implied by the words "having regard to the provisions of this Statute" in the *chapeau*. In any case, the exceptions listed in article 64 para. 7 are presented in a more elaborate fashion in articles 68, 69 and 72. According to the Regulations of the Court, "[a]t the request of a participant or the Registry, or *proprio motu* ... the Chamber may, in the interests of justice, order that any information likely to present a risk to the security or safety of victims, witnesses or other persons, or likely to be prejudicial to national security interests, shall not be published in any broadcast, audio- or video-recording or transcript of a public hearing"[33].

11 Article 68 concerns the protection of victims and witnesses. Specifically, article 68 para. 2 provides: "As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness". The already elaborate case law of the *ad hoc* Tribunals in this matter should guide the Court in this difficult area[34]. A mere glance at the jurisprudence of the Court indicates just how dramatic an impact issues concerning victim and witness protection can have on the general principle of public hearing and access to the record. Many hearings are held totally or partially in camera, and decisions are often published in severely redacted versions.

12 The second exception allowed by article 64 para. 7 is the protection of confidential or sensitive information[35]. Confidential or sensitive information may have several sources. There may be claims to confidentiality based on privilege, and the Court is to respect this pursuant to article 69 para. 5, as provided for in the *Rules of Procedure and Evidence*. But the major source of problems with this exception will be information derived from sovereign States. The *Statute* allows a State to apply "for necessary measures" to respect "confidential or sensitive information"[36]. Other exceptions to the rule dictating a public hearing are the possibility of *in camera* and even *ex parte* hearings with respect to the protection of national security information[37] and the power of the court to exclude disruptive individuals, including the accused[38].

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31 Note that article 76 para. 4 of the *Statute* requires that the judgment be rendered in public.

32 1996 Preparatory Committee II, pp. 195-196.

33 Regulations of the Court, Document ICC-BD/01-01-04, subregulation 21 para. 8.

34 For example: *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on the Prosecutor's Motion requesting protective measures for victims and witnesses, 10 Aug. 1995; *Prosecutor v. Rutaganda*, Case No. ICTR 96-3-T, Decision on the Preliminary Motion submitted by the Prosecutor for Protective Measures for Witnesses, 26 Sep. 1996. See: A.-M. La Rosa, *Réflexions sur l'apport du Tribunal pénal international pour l'ex-Yougoslavie au droit à un procès équitable*, REV. GÉN. DROIT INT'L PUBLIC 945, 962-970 (1997).

35 Also: *supra* note 4, Rome Statute, article 64 para. 6 (c).

36 *Ibid.*, article 68 para. 6.

37 *Ibid.*, article 72 para. 7.

38 *Ibid.*, articles 63 para. 2, 71 para. 1.

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Article 61 para. 1 specifies the right of the accused to be present at the hearing on the confirmation of charges. But this would clearly seem to be a hearing "[i]n the determination of the charge" of "an accused", and therefore the public hearing rule ought to apply. In other words, not only the accused but also the public should have access to such proceedings. The first confirmation hearing, that of Thomas Lubanga, was accordingly held in public with considerable publicity. Pre-Trial Chamber even made an order authorizing photography by representatives of the media[39]. 13

c) "having regard to the provisions of this Statute"

The words "having regard to the provisions of this Statute" suggest that article 67 can be limited by express provisions to the contrary. An example would be article 64 para. 7, which limits the right to a public hearing. The wording in the *chapeau* of article 67 is decidedly unenthusiastic. The Preparatory Committee Draft did not include any such general provision, preferring to enumerate any exceptions to the judicial guarantees recognized to the accused in a specific fashion[40]. A proposal from the United Kingdom submitted at Rome eschewed any equivocation on this point, beginning the text of article 67 with the words "[s]ubject to the provisions of this Statute ..."[41]. There is a suggestion in the *travaux préparatoires* that the words "subject to ..." put article 67 in a subordinate position, whereas the words "having regard to ..." do not[42]. 14

d) "fair hearing"

The general right to a "fair hearing" provides defendants with a powerful tool to go beyond the text of the *Statute*, and to require that the Court's respect for the rights of an accused keep pace with the progressive development of human rights law. The notion of a fair hearing goes back, in international human rights law, to article 10 of the *Universal Declaration of Human Rights*. Of course, it is repeated in article 14 of the *ICCPR* and in the regional instruments. The case law of the Strasbourg organs, established to implement the *European Convention on Human Rights*, has used this residual right to a fair hearing to fill in some of the gaps in the more specific provisions[43]. That the term "fair hearing" invites the Court to go beyond the precise terms of article 67 in appropriate circumstances is confirmed by the reference within the *chapeau* to "minimum guarantees"[44]. The term "fair hearing" also suggests that where individual problems with specific rights set out in article 67 do not, on their own, amount to a violation, the requirement of a fair hearing may allow a cumulative view and lead to the conclusion that there is a breach where there have been a number of apparently minor or less significant encroachments on article 67[45]. 15

The international case law has developed the notion of "equality of arms" within the concept of the right to a fair trial[46]. The ICTY Appeals Chamber has described the principle of equality

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39 *Prosecutor* v. *Lubanga*, ICC-01/04-01/0, Ordonnance autorisant la prise de photographies à l'audience du 9 novembre 2006, 6 Nov. 2006.

40 *Supra* note 20, Zutphen Draft, p. 114, article 60; *supra* note 20, Draft Statute, article 67, pp. 106-108.

41 Proposal submitted by the United Kingdom of Great Britain and Northern Ireland, U.N. Doc. A/CONF.183/C.1/WGPM/L.33 (29 June), p. 1.

42 *Supra* note 18, 1996 Preparatory Committee I, p. 59, para. 279.

43 D.J. Harris/M. O'Boyle/C. Warbrick, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 202-203 (1995).

44 *Prosecutor* v. *Lubanga*, ICC-01/04-01/06, Décision relative au système définitif de divulgation et à l'établissment d'un échéancier, Annexe I, Analyse de la décisions relative au système définitif de divulgation, 15 May 2006, para. 97.

45 *Stanford v. United Kingdom*, Ser. A, No. 182-A, 30 Aug. 1990, para. 24.

46 *Neumeister v. Austria*, Ser. A, No. 8, 11 Y.B. 822, 27 June 1968; M. Novak, CCPR COMMENTARY 247 (1993). For recognition of the principle of "equality of arms" by the ICTY, see: *Prosecutor v. Tadić*, Case

of arms 'as being only one feature of the wider concept of a fair trial'[47]. In *Tadić*, the ICTY Appeals Chamber explained that 'the principle of equality of arms falls within the fair trial guarantee under the Statute'. It continued:

> [U]nder the Statute of the International Tribunal the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts. This principle means that the Prosecution and the Defence must be equal before the Trial Chamber. It follows that the Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case. The Trial Chambers are mindful of the difficulties encountered by the parties in tracing and gaining access to evidence in the territory of the former Yugoslavia where some States have not been forthcoming in complying with their legal obligation to cooperate with the Tribunal. Provisions under the Statute and the Rules exist to alleviate the difficulties faced by the parties so that each side may have equal access to witnesses[48].

But 'equality of arms [...] does not necessarily amount to the material equality of possessing the same financial and/or personal resources'[49].

The concept of "equality of arms" has been invoked in early decisions of the International Criminal Court. For example, according to Pre-Trial Chamber II, "[f]airness is closely linked to the concept of 'equality of arms', or of balance between the parties during the proceedings. As commonly understood, it concerns the ability of a party to a proceeding to adequately make its case, with a view to influencing the outcome of the proceedings in its favour"[50].

e) "conducted impartially"

16 The *Statute* states that the hearing must be "conducted impartially", whereas article 14 of the *ICCPR* requires that it be conducted "by a competent, independent and impartial tribunal". The Zutphen Draft referred to "an independent and impartial tribunal"[51]. Curiously, the statutes of the *ad hoc* Tribunals impose no requirements in this respect[52], perhaps because the Security Council considered the matter to be beyond debate, although this did not prevent defendants from raising the issue[53]. At the International Criminal Court, not only judges, but also the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar are required to make a solemn undertaking in open court to exercise their functions "impartially"[54].

17 Of course, the issue of impartiality of the judiciary is also addressed elsewhere in the *Statute*[55]. Impartiality is also protected by specific provisions in the Court's Code of Judicial Ethics.

No. IT-94-1-T, Separate Opinion of Judge Vohrah on Prosecution Motion for Production of Defence Witness Statements, 27 Nov. 1996, pp. 4, 7.

47 *Prosecutor* v. *Kordić et al.*, Case No. IT-95-14/2-A, Decision on the Application by Mario Čerkez for Extension of Time to File his Respondent's Brief, 11 Sep. 2001, para. 5.

48 *Prosecutor* v. *Tadić*, Case No. IT-94-1-A, Judgment, 15 July 1999, para. 52. The United States of America invoked the Appeals Chamber's comments before the Inter-American Commission on Human Rights, in a case dealing with capital punishment, as authority for the proposition that 'equality of arms' concerns procedural but not substantive equality: *Garza* v. *United States of America*, Report No. 52/01, Case 12.243, 4 Apr. 2001, para. 56.

49 *Prosecutor* v. *Kayishema et al.*, Case No. ICTR-95-1-A, Judgment (Reasons), 1 June 2001, paras. 63-71; *Prosecutor* v. Milutinovic *et al.*, Case No. IT-99-37-AR73. 2, Decision on Interlocutory Appeal on Motion for Additional Funds, 13 Nov. 2003.

50 *Situation in Uganda*, ICC-02/04-01/05, Decision on Prosecutor's Application for leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, 19 Aug. 2005, para. 30. Also: *Prosecutor* v. *Lubanga*, ICC-01/04-01/06, Décision sur la demande d'autorisation d'appel de la Défense relative à la transmission des Demandes de participation des victimes, 6 Nov. 2006, p. 7.

51 *Supra* note 20, Zutphen Draft, p. 114, article 60.

52 *Supra* note 8, Statute of the ICTY, article 21; *supra* note 8, Statute of the ICTR, article 20.

53 *Prosecutor* v. *Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995.

54 *Supra* note 4, *Rome Statute*, article 45; Rules of Procedure and Evidence, Document ICC-ASP/1/3, pp. 10–107, Rule 5.

55 *Supra* note 4, Rome Statute, articles 35, 40, 41.

"**Article 4**

Impartiality

1. Judges shall be impartial and ensure the appearance of impartiality in the discharge of their judicial functions.

2. Judges shall avoid any conflict of interest, or being placed in a situation which might reasonably be perceived as giving rise to a conflict of interest"[56].

According to the European Court of Human Rights, "impartiality" means lack of "prejudice or bias"[57]. It comprises both a subjective and an objective dimension: "[t]he existence of impartiality ... must be determined according to a subjective test, that is, on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, namely, ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect"[58].

The ICTY Appeals Chamber has described judicial impartiality as follows:

> [A] Judge should not only be subjectively free from bias, but also [...] there should be nothing in the surrounding circumstances that objectively gives rise to an appearance of bias. On this basis, the Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute:
>
> A. A Judge is not impartial if it is shown that actual bias exists.
>
> B. There is an unacceptable appearance of bias if:
>
> (i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or
>
> (ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias[59].

The *Rome Statute* provides the most advanced and thorough regime in order to ensure both independence and impartiality of its judiciary. It constitutes a dramatic improvement on the norms applicable to the *ad hoc* tribunals. In this respect, the limitation of judges to one term of office, and a clarification of both the grounds for dismissal and the body responsible for doing so constitute major improvements upon earlier models.

f) "in full equality"

The terms "in full equality" are imported from article 14 para. 3 of the *ICCPR*. They complement the initial phrase of article 14, "[a]ll persons shall be equal before the courts and tribunals" for which there is no equivalent in article 67 of the *Statute*. Nevertheless, article 21 para. 1 of the *Statute* comprises a non-discrimination clause applicable to the instrument as a whole. The guarantee of full equality before the ICC protects the accused against discriminatory practices and even vexatious prosecution where it appears to be motivated by discriminatory criteria. **18**

In the *Čelebići* case, the ICTY Appeals Chamber considered the principle of equality before the law within the context of prosecutorial discretion. It said:

> "This provision reflects the corresponding guarantee of equality before the law found in many international instruments, including the 1948 Universal Declaration of Human Rights, the 1966 *International Covenant on Civil and Political Rights*, the *Additional Protocol I* to the *Geneva Conventions*, and the Rome Statute of the International Criminal Court. All these instruments provide for a right to equality before the law, which is central to the principle of the due process of law. The provisions reflect a firmly established principle of international law of equality before the law, which encompasses the requirement that there should be no discrimination in the enforcement or application of the law. Thus Article 21 and the principle it embodies prohibits discrimination in the application of the law based on impermissible motives such as, inter alia, race, colour, religion, opinion, national or ethnic

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56 Code of Judicial Ethics, *supra* note 3.

57 *Piersack* v. *Belgium*, Ser. A, No. 53, 1 Oct. 1982.

58 *Hauschildt* v. *Denmark*, Ser. A, No. 154, 24 Dec. 1989, para. 46.

59 *Prosecutor* v. *Furundžija* (Case No. IT-95-17/1-A), Judgment, 21 July 2000, para. 189.

origin. The Prosecutor, in exercising her discretion under the Statute in the investigation and indictment of accused before the Tribunal, is subject to the principle of equality before the law and to the requirement of non-discrimination"[60].

The Appeals Chamber suggested that there would be a violation of equality before the law 'the decision to prosecute him or to continue his prosecution was based on impermissible motives, such as race or religion, and that the Prosecution failed to prosecute similarly situated defendants'[61]. To show the Prosecutor is proceeding on a selective basis, 'the evidence of discriminatory intent must be coupled with the evidence that the Prosecutor's policy has a discriminatory effect, so that other similarly situated individuals of other ethnic or religious backgrounds were not prosecuted'[62].

An ICTY Trial Chamber has suggested that the right to equality before the law might be violated in cases of plea-bargaining. For example, it mentioned the possibility that the Prosecutor might seek to make a plea agreement with some accused because of their knowledge of particular events which may be useful in prosecutions of other, more high ranking accused. The Prosecutor could make the terms of such a plea agreement quite generous in order to secure the co-operation of that accused. "Other accused, who may not have been involved in the most egregious crimes or who may not have been part of a joint criminal enterprise with more high ranking accused, may not be offered such a generous plea agreement, or indeed any plea agreement", said the decision[63].

2. Minimum guarantees

(a) Information about the charge

19 Article 67 para. 1 (a) of the *Statute* complements similar provisions protecting suspects during an investigation[64] and at the time charges are confirmed[65]. The purpose of the norm is to provide an accused person with the information necessary for the preparation of a defence. The appropriate information required will depend on any questioning the accused has already undergone and on other circumstances of the case[66]. But the accused may be expected to show some diligence in seeking information about the charge, for example by insisting upon attendance at the confirmation hearing[67].

20 Article 14 of the *ICCPR* refers only to the "nature and cause" of the charge. The *Statute* goes further than the *ICCPR* and the other human rights models by requiring that this information also include the "content" of the charge[68]. According to the European Commission on Human Rights, the "nature" of the charge refers to the specific offence, while the "cause" of the charge

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60 *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgment, 20 Feb. 2001, para. 605 (reference omitted)

61 *Ibid.*, para. 607. Also: *Prosecutor v. Ntakirutimana et al.*, Case No. ICTR-96-10 & ICTR-96-17-T, Judgment, 21 Feb. 2003, paras. 870-871.

62 *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Judgment, 1 June 2001, paras. 94-96.

63 *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-S, Sentencing Judgment, 2 Dec. 2003, para. 66.

64 *Supra* note 4, Rome Statute, article 55 para. 2 (a)

65 *Ibid.*, article 61 para. 3. Also: *supra* note 33, Regulations of the Court, Regulation 52, which indicates the information that must be included in the document containing the charges: "The document containing the charges referred to in article 61 shall include: (a) The full name of the person and any other relevant identifying information; Regulations of the Court; (b) A statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court; (c) A legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28".

66 *Kamasinski v. Austria*, Ser. A, No. 168, 19 Dec. 1989, paras. 79-81.

67 *Campbell and Fell v. United Kingdom*, Ser. A, No. 80, 28 June 1984. See: *supra* note 4, Rome Statute, article 61 para. 2 (a).

68 At the August 1996 session of the Preparatory Committee it was said that the ICCPR provision "needed further elaboration in the Statute": *supra* note 18, 1996 Preparatory Committee I, para. 271, p. 58.

means the relevant material facts[69]. There may be no meaningful distinction between "cause" and "content", except perhaps a message of exhaustivity[70]. In practice, the European case law has not been very demanding, with the Commission holding that the accused is entitled to material to enable preparation of a defence, "without however necessarily mentioning the evidence on which the charge is based"[71]. However, in the ICC *Statute* this provision must be taken in combination with the very thorough disclosure requirements that are imposed upon the Prosecutor[72]. Taken as a whole, these provisions indicate the desire of the Rome Conference that the Prosecutor ensure that the accused is not taken by surprise during the proceedings, and that he or she benefits from a level of information going well beyond the thresholds set by domestic justice systems and endorsed by international human rights tribunals as being acceptable.

21 The requirement that the information be "in a language which the accused fully understands and speaks" develops article 14 para. 3 (a) of the *ICCPR*, which requires only that it be "in a language which [the accused] understands". A proposal to refer to "his own language" had been left in square brackets by the Preparatory Committee[73], and was added at Rome. An amendment at the Rome Conference contained the phrase "in his or her own language or in a language of his or her choice"[74]. This prompted the Chair to propose: "in a language the accused understands or in his or her language"[75]. The matter sparked considerable controversy. The provision that was finally adopted included a footnote: "It is understood that this expression means the language for which the accused, in good faith, has clearly expressed his or her preference"[76]. To some degree, these are questionable improvements. The purpose served by requiring not only that the accused understand the language but also speak it seems unclear. Note that the *ICCPR*, in its general provision dealing with the right to an interpreter, presents this in the alternative: "if he cannot understand *or* speak the language used in court". It was surely not the intention of the drafters of the *Statute* to provided disabled persons who are unable to speak with a pretext to avoid the jurisdiction of the Court. On the other hand, insisting on this detail helps to exclude some Strasbourg case law by which the norm is respected if the language is understood by the accused's lawyer, and not necessarily by the accused personally[77]. It goes without saying that the information must be provided at no cost to the defendant[78].

(b) Time to prepare defence

22 This provision is modeled on article 14 para. 3 (b) of the *ICCPR* with the addition of the words "freely" and "in confidence". It was introduced by the Preparatory Committee at its

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69 *Ofner v. Austria* (No. 524/59), (1960) 3 Y.B. 322, 344. See also: *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision on defence application for forwarding the documents in the language of the accused (Delalić), 25 Sep. 1996, for determination on the types of materials to be made available to the accused in his or her language.

70 See: Amnesty International, MAKING THE RIGHT CHOICES, PART V (1997).

71 *X v. Belgium* (No. 7628/76), (1977) 9 D.R. 169.

72 *Supra* note 4, Rome Statute, articles 61 para. 3 (b), 64 para. 3 (c), 67 para. 2. Also: *Prosecutor v. Delalić et al.*, *supra* note 77.

73 *Supra* note 19, Preparatory Committee Decisions Aug. 1997, p. 34; *supra* note 20, Zutphen Draft, p. 114, article 60; *supra* note 20, Draft Statute, article 67, pp. 106-108.

74 Proposal submitted by the Delegations of Egypt, Oman and the Syrian Arab Republic, U.N. Doc. A/CONF.183/C.1/WGPM/L.36 (29 June), p. 1.

75 *Supra* note 22, Draft proposal for article 67.

76 Report of the Working Group on Procedural Matters, U.N. Doc. A/CONF.183/C.1/WGPM/L.2/ Add.6 (11 July), pp. 3-4, fn. 5.

77 *X. v. Austria* (No. 6185/73), (1975) 2 D.R. 68.

78 *Luedicke, Belkacem and Koc v. Germany*, Ser. A, No. 29, 28 Nov. 1978. That these services were free of charge was spelled out in one of the proposals submitted to the Preparatory Committee: 1996 Preparatory Committee II, p. 196.

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August 1997 session[79], and the text remained unchanged through to the final version adopted in Rome[80].

23 Adequate time will depend on the circumstances of the case. Here the international case law is not particularly helpful, because it is a given that the types of cases to come before the ICC will be extraordinarily complex and therefore difficult to compare with the more mundane matters of domestic tribunals. The only relevant normative provision, again not particularly helpful, is article 105 of the third *Geneva Convention* which specifies that counsel have "a period of two weeks at least before the opening of trial"[81]. According to the ICTY, adequate time is a flexible concept that "begs of a definition outside the particular situation of each case. It is impossible to set a standard of what constitutes adequate time to prepare a defence because this is something which can be affected by a number of factors including the complexity of the case, and the competing forces and claims at play, such as consideration of the interests of other accused persons"[82].

24 The word "facilities" refers to "documents, records, etc. necessary for preparation of the defence"[83], a right that is complemented by the *Statute*'s extensive disclosure obligations. According to the European Commission of Human Rights, this means the accused must have "the opportunity to organize his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court"[84].

25 With respect to communication with counsel, the addition of the words "freely" and "in confidence" underscore the privileged nature of the communication and the fact that it must be undertaken in secure premises not subject to eavesdropping by the authorities. However, there is nothing explicit in the *Statute* recognizing the privileged nature of solicitor-client communication[85]. The Preparatory Committee considered that the question of privileged communication should not be dealt with in the provision on rights of the accused[86]. Access to communication by the accused must be both in person and in writing.

(c) Trial without undue delay

26 The provision is identical to that of its model in the *ICCPR*. During the Preparatory Committee sessions, "[t]he point was also made that an expeditious trial process would prevent a guilty person from delaying the proceedings and would secure the early release of an innocent person. What was needed in this regard was a proactive court which would properly manage the case so as to achieve an early resolution of the case"[87]. Here, too, there were attempts to "improve" the *ICCPR* text, with suggestions that "undue" be replaced with "unreasonable" and

79 *Supra* note 19, Preparatory Committee Decisions Aug. 1997, p. 34.

80 *Supra* note 20, Zutphen Draft, p. 114; *supra* note 20, Draft Statute, p. 127; *supra* note 22Draft proposal for article 67,; *supra* note 22, Report of the Working Group on Procedural Matters (4 July), pp. 4-5; *supra* note 22, Compendium of draft articles, pp. 41-42.

81 Geneva Convention of 12 Aug. 1949 relative to the treatment of prisoners of war, 75 U.N.T.S. 135, *entered into force* 21 Oct. 1950.

82 *Prosecutor* v. *Delalić et al.*, Case No. IT-96-21-T, Decision on the applications for adjournment of the trial date, 3 Feb. 1997.

83 *Supra* note 46, M. Novak, p. 256.

84 *Can* v. *Austria*, Ser. A, No. 96, 30 Sep. 1985, Commission Report, para. 53.

85 See: article 69 para. 5, which indicates that this is a question for the Rules. In the *travaux*, see: 1996 Preparatory Committee II, pp. 196-197; *supra* note 20, Zutphen, p. 114, fn. 203; *supra* note 20, Draft Statute, p. 127, fn. 11. The Rules of the *ad hoc* Tribunals expressly recognize lawyer-client privilege: Rules of Procedure and Evidence, as amended 10 Dec. 1998, U.N. Doc. IT/32, article 97. The United States of America proposed a draft set of rules of evidence for the Court containing a provision ensuring lawyer-client privilege: Reference Paper Submitted by the United States of America, U.N. Doc. A/CONF.183/C.1/WGPM/L.21, p. 7, rule 10.

86 *Supra* note 19, Preparatory Committee Decisions Aug. 1997, p. 34, fn. 48.

87 *Supra* note 18, 1996 Preparatory Committee I, p. 58, para. 271.

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that the right "to enjoy a speedy trial" be added[88]. But at Rome, on a proposal from the Chair of the Working Group, the *ICCPR* text was retained[89].

Case law and academic comment on the *ICCPR* provision have considered that the time limit begins to run at the moment the suspect or the accused is informed that the authorities are taking steps towards prosecution. The period ends with a definitive decision[90]. What this means specifically will depend on each individual case. In one case, the Human Rights Committee considered the provision had been violated by Canada when the preparation of trial transcripts took twenty-nine months resulting in a three-year delay for an appeal hearing[91]. In *Pratt and Morgan* v. *Jamaica*, a delay of forty-five months between dismissal of an appeal and delivery of a written judgment was held to violate the norm[92]. The Nuremberg trial of the major war criminals set an awesome precedent that the *ad hoc* Tribunals have been unable even to approach. By domestic standards, today's international justice is an incredibly protracted affair. The Appeals Chamber of the International Criminal Tribunal for Rwanda has considered that inexcusable delay attributable to the Prosecutor, in extreme circumstances, entitles the accused to have the charges dropped 'with prejudice' to the Prosecutor, that is, without the possibility of retrial[93]. **27**

In its Court Capacity Model, the International Criminal Court sets out optimistic assessments of the length of proceedings, projecting an average trial to last slightly less than three years from arrest until final judgment, apportioning three months for the confirmation of charges, six months for disclosure and preparation for trial, fifteen months for the trial itself and finally nine months for the appeal[94]. If it succeeds, it will be dramatically faster than the *ad hoc* tribunals. But in its first case, the confirmation of charges was issued ten months, not three, after the suspect had been taken into custody.

(d) Rights of the defence

Article 67 para. 1 (d) of the *Statute* substantially reflects the content of article 14 para. 3 (d) of the *ICCPR*, subject to a number of minor drafting changes. The text is little changed from the ILC Draft[95]. It was approved by the Working Group at the August 1997 Preparatory Committee[96] and was adopted at Rome without change[97]. **28**

α) Presence at trial

The right to be present at trial is made subject to article 63 para. 2, which permits the trial to proceed in the absence of an accused who is disruptive. Exceptions exist within the Statute and **29**

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88 *Supra* note 78, 1996 Preparatory Committee II, p. 197; *supra* note 19, Preparatory Committee Decisions Aug. 1997, p. 34; *supra* note 20, Zutphen Draft, p. 114; *supra* note 20,Draft Statute, p. 127. Also, at the Rome Conference, *supra* note 74, Proposal submitted by the Delegations of Egypt, Oman and the Syrian Arab Republic, p. 1.

89 *Supra* note 22, Draft proposal for article 67; *supra* note 22, Report of the Working Group on Procedural Matters (4 July), pp. 4-5; *supra* note 22, Compendium of draft articles, pp. 41-42.

90 *Supra* note 46, M. Novak, p. 257.

91 *Pinkney v. Canada* (No. 27/1978), U.N. Doc. CCPR/3/Add.1, Vol. II, p. 385, U.N. Doc. CCPR/C/OP/1, p. 95, 2 HUM. RTS. L.J. 344.

92 *Pratt and Morgan v. Jamaica*, Nos. 210/1986, 225/1987, U.N. Doc. A/44/40, p. 222, 11 HUM. RTS. L.J. 150.

93 *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, Decisions of 3 November 1999 and 31 March 2000.

94 Report on the Court Capacity Model, Document ICC-ASP/5/10, para. 23.

95 *Supra* note 15, 1994 ILC Draft Statute, article 41.

96 *Supra* note 19, 1996 Preparatory Committee Decisions Aug. 1997, pp. 34-35.

97 *Supra* note 20, Zutphen Draft, p. 114; *supra* note 20, Draft Statute, p. 117; *supra* note 22, Draft proposal for article 67; *supra* note 22, Report of the Working Group on Procedural Matters (4 July), pp. 4-5; Report of the Working Group on Procedural Matters, U.N. Doc. A/CONF.183/C.1/WGPM/L.2/Add.8 (15 July), p. 6; *supra* note 22, Compendium of draft articles, pp. 41-42.

the Rules of Procedure and Evidence for *ex parte* hearings under very specific circumstances. Article 72 para. 7 of the *Statute* allows for a hearing concerning the protection of national security information to take place *ex parte*, that is, in the absence of one or both of the parties[98]. *Ex parte* proceedings during the trial phase are also authorised under the Rules of Procedure and Evidence. The Trial Chamber may hear the Prosecutor *ex parte* in order to determine whether an assurance may be given to a witness who may make testify in such a way as to incriminate himself or herself[99]. A Trial Chamber may also sit *ex parte* to consider whether or not to authorise special measures to facilitate testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence[100].

Article 76 para. 4 of the *Statute* seems to imply that the presence of the accused when sentence is imposed is not indispensable, because it says this should take place "wherever possible". The curious phrase was introduced when the Preparatory Committee was considering the possibility of *in absentia* trials[101], and remained in the final version of the *Statute*, although the concept of *in absentia* trials had been abandoned, without any thought being given to the matter[102]. Thus, article 76 para. 4 should not be seen as an attenuation of the principle of presence of the accused at trial.

β) Defend oneself in person

30 The accused is entitled to defend himself or herself in person. The most celebrated example of this situation took place during the prosecution of Slobodan Milošević before the International Criminal Tribunal for the former Yugoslavia. In an initial challenge to the accused's insistence on defending himself, the Prosecutor invoked the fragile medical condition of the defendant. Presiding Judge Richard May wrote: "A plain reading of this provision indicates that there is a right to defend oneself in person and the Trial Chamber is unable to accept the Prosecution's proposition that it would allow for the assignment of defence counsel for the Accused against his wishes in the present circumstances"[103]. Judge May noted that the right to defend oneself was especially important in the essentially adversarial-type proceedings of the ICTY. Here he referred to a relevant decision of the United States Supreme Court, which held that "forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so"[104]. As Judge May explained:

> "There is a further practical reason for the right to self-representation in common law. While it may be the case that in civil law systems it is appropriate to appoint defence counsel for an accused who wishes to represent himself, in such systems the court is fulfilling a more investigative role in an attempt to establish the truth. In the adversarial systems, it is the responsibility of the parties to put forward the case and not for the court, whose function it is to judge. Therefore, in an adversarial system, the imposition of defence counsel on an unwilling accused would effectively deprive that accused of the possibility of putting forward a defence. In this connection, Article 21 (4) (d) of the Statute may be said to be reflective of the common law position"[105].

But in another case involving an obstreperous defendant, another Trial Chamber of the ICTY signalled the difference in approach between common law and "civil law" systems, noting that

98 *Supra* note 4, Rome Statute, article 72 para. 7.

99 *Supra* note 54, Rules of Procedure and Evidence, rule 74 para. 4.

100 *Ibid.*, rule 88(2).

101 *Supra* note 5, Draft Statute, article 76, fn. 25.

102 *Supra* note 97, Report of the Working Group on Procedural Matters (15 July), p. 10. In this respect, there is an error in Report of the Drafting Committee to the Committee of the Whole, U.N. Doc. A/CONF.183/C.1/L.88 (16 July), p. 14, which states that the Committee of the Whole adopted the following: "The sentence shall be pronounced in public and in the presence of the accused", without the words "whenever possible".

103 *Prosecutor* v. *Milošević*, Case No. IT-02-54-T, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel, 4 Apr. 2003, para. 18.

104 *Faretta* v. *California*, 422 US 806, 817 (1975).

105 *Supra* note 103, *Prosecutor* v. *Milošević*, para. 24.

international human rights case law acknowledged that the right to defend oneself was subject to limitations. It also observed that "[t]he Accused is in fact increasingly demonstrating a tendency to act in an obstructionist fashion while at the same time revealing a need for legal assistance". Consequently, the Trial Chamber ordered the appointment of "standby counsel", who would be mandated to assist the accused, and "in exceptional circumstances to take over the defence from the Accused at trial should the Trial Chamber find, following a warning, that the Accused is engaging in disruptive conduct or conduct requiring his removal from the courtroom"[106]. Subsequently, the Trial Chamber attempted to impose counsel on Šešelj, who went on a hunger strike in protest. After he had been without food for many days, the Appeals Chamber overruled the Trial Chamber[107].

After Judge May withdrew from the *Milošević* case because of a serious illness of his own, his two colleagues, together with the new judge appointed in his place, and inspired by the *Šešelj* ruling of the other Trial Chamber, revised their earlier decision. Noting the ongoing medical problems of the accused, which had occasioned several adjournments in the course of the two and half years of hearings, the Trial Chamber said: "If at any stage of a trial there is a real prospect that it will be disrupted and the integrity of the trial undermined with the risk that it will not be conducted fairly, then the Trial Chamber has a duty to put in place a regime which will avoid that. Should self-representation have that impact, we conclude that it is open to the Trial Chamber to assign counsel to conduct the defence case, if the Accused will not appoint his own counsel"[108]. The Trial Chamber said it "was of the opinion that it was necessary to relieve the Accused of the burden of conducting his own case with a view to stabilising his health to ensure, so far as possible, that the trial proceeds with the minimum of interruption in a way that will permit the orderly presentation of the Accused's case and the completion of the trial within a reasonable time in his interests and the interests of justice: in other words, to secure for the Accused a fair and expeditious trial"[109].

The "assigned counsel" appealed the decision, which was reversed, in part, by the Appeals Chamber. The Appeals Chamber stated that the right of an accused person to defend himself or herself could indeed be curtailed on the grounds that a defendant's self-representation is substantially and persistently obstructing the proper and expeditious conduct of his trial. It reasoned by analogy with the right to be tried in one's own presence, which the Tribunal noted was subject to limitation in the event of disruption. "If a defendant's right to be present for his trial - which, to reiterate, is listed in the same string of rights and indeed in the same *clause* as the right to self-representation – may thus be restricted on the basis of substantial trial disruption, the Appeals Chamber sees no reason to treat the right to self-representation any differently", it said[110]. In the case of disruption, the accused can be said to have consciously and intentionally waived the right to be present at trial, and to act in his or her own defence. The Appeals Chamber said that "it cannot be that the only kind of disruption legitimately cognizable by a Trial Chamber is the intentional variety. How should the Tribunal treat a defendant whose health, while good enough to engage in the ordinary and non-strenuous activities of everyday life, is not sufficiently robust to withstand all the rigours of trial work – the late nights, the

106 *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj With his Defence, 9 May 2003.

107 *Prosecutor v. Šešelj*, Case No. IT-03-67-AR73.3, Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel, 20 Oct. 2006.

108 *Prosecutor v. Milošević*, Case No. IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel, 22 Sep. 2004, para. 33. See also: *Prosecutor v. Milošević*, Case No. IT-02-54-T, Order on Future Conduct of the Trial, 6 July 2004.

109 *Ibid.*, para. 66.

110 *Prosecutor* v. *Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 Nov. 2004, para. 13.

stressful cross-examinations, the courtroom confrontations – unless the hearing schedule is reduced to one day a week, or even one day a month"[111]?

The Trial Chamber of the Special Court for Sierra Leone has also considered the question of self-representation[112]. Referring to the formulation of the right of self-representation, the SCSL Trial Chamber said that because article 17 Para. 4 (d) of the Court's *Statute* spoke of 'the right to have legal assistance assigned', this proved that "the right to defend himself or herself in person" was only a qualified and not an absolute right. Unlike *Milošević*, the SCSL defendant, Hinga Norman, had no apparent medical problems, nor was he misbehaving in court. The judges simply felt he wasn't up to the job of defending itself, adding that the problems this might cause would also impact negatively on the right of the other two defendants in the case to a speedy trial[113]. Finally, the judges laid emphasis on the "time limited mandate of the Court"[114], a reference to the parsimonious resources allocated by the United Nations. The Trial Chamber concluded with an oxymoron, writing that "[t]he right to self-representation in this case ... can only be exercised with the assistance of Counsel"[115].

The Rules of Procedure and Evidence of the International Criminal Court do not contemplate this situation, probably because the issues had not yet arisen before the *ad hoc* tribunals when the Rules were drafted. No clear formula has yet emerged at the *ad hoc* tribunals, where the approach sometimes seems rather improvised. Even where the fundamental justification for setting aside the right to self-representation is expediency, it is doubtful whether such a result is in fact achieved.

γ) Choice of counsel

31 Although the accused is entitled to choice of counsel, this right cannot be unlimited. The Court may impose ethical, linguistic and other professional requirements in order to establish qualifications for counsel, as under domestic legal systems. The European Commission of Human Rights dismissed claims alleging a violation of the right to counsel on the basis of failure to respect professional ethics[116], where counsel was also a defence witness[117], and even for a refusal to wear a gown[118]. There is no right to choice of counsel when a defendant relies upon legal aid. According to the ICTR Appeals Chamber, "in the light of a textual and systematic interpretation of the provisions of the Statute and the Rules, read in conjunction with relevant decisions from the Human Rights Committee and the organs of the European Convention for the Protection of Human Rights and Fundamental Freedoms, that the right to free legal assistance by counsel does not confer the right to choose one's counsel"[119]. Nevertheless, the practice of the *ad hoc* tribunals has been to accommodate representation by counsel chosen by the accused, where feasible, and this approach is reflected in the Regulations of the Court:

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111 *Ibid.*, para. 14.

112 *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-PT, Ruling on the Issue of Non-Appearance of the First Accused Samual Hinga Norman, the Second Accused Moinina Fofana, and the Third Accused, Allieu Kondewa at the Trial Proceedings, 1 Oct. 2004, para. 23.

113 *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-PT, Decision on the Application of Sam Hinga Norman for Self-Representation Under Article 17(4)(d) of the Statute of the Special Court, 8 June 2004.

114 *Ibid.*, para. 26.

115 *Ibid.*, para. 32.

116 *Ensslin, Baader and Raspe v. Federal Republic of Germany*, App. Nos. 7572/76, 7586/76 and 7587/76, (1978) 14 D.R. 64.

117 *K. v. Denmark* (No. 19524/92), unreported.

118 *X. and Y v. Federal Republic of Germany*, App. Nos. 5217/71 and 5367/72, (1972) 42 COLL. 139.

119 *Prosecutor v. Kambanda*, ICTR 97-23-A, Judgment, 19 Oct 2000, para. 33; *Prosecutor v. Akayesu*, ICTR-96-4-A, Judgment, 1 June 2001, paras. 60-61; *Prosecutor v. Ntakirutimana et al.*, ICTR-96-10-T and ICTR-96-17-T, Decision on the Motions of the Accused for Replacement of Assigned Counsel, 11 June 1997.

"Regulation 75

Choice of defence counsel

1. If the person entitled to legal assistance chooses a counsel included in the list of counsel, the Registrar shall contact that counsel. If the counsel is willing and ready to represent the person, the Registrar shall facilitate the issuance of a power of attorney for this counsel by the person.

2. If the person entitled to legal assistance chooses a counsel not on the list of counsel who is willing and ready to represent him or her and to be included in the list, the Registrar shall decide on the eligibility of that counsel in accordance with regulation 70 and, upon inclusion in the list, shall facilitate the issuance of a power of attorney. Until the filing of a power of attorney, the person entitled to legal assistance may be represented by duty counsel in accordance with regulation 73".

The classic problem in domestic legal systems concerning choice of counsel on legal aid is the low tariff, in effect discouraging more senior and expert lawyers from agreeing to take such cases. Remuneration at the international tribunals is however sufficient to attract top notch professionals.

The *ad hoc* Tribunals have adopted a rule requiring that counsel be either admitted to the practice of law in a State or be a university professor of law[120]. The Rules of Procedure and Evidence of the International Criminal Court are somewhat different, and focus on substance rather than form, requiring that "counsel for the defence shall have established competence in international or criminal law and procedure, as well as the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings". Counsel must have a minimum of ten years of relevant experience, and shall not have been convicted of "a serious criminal or disciplinary offence considered to be incompatible with the nature of the office of counsel before the Court"[121]. Defence counsel must also have "an excellent knowledge of and be fluent in at least one of the working languages of the Court"[122]. In the *Darfur Situation*, the Pre-Trial Chamber instructed the Registrar to appoint *ad hoc* counsel for the defence who was not only fluent in one of the working languages, but who was also capable of working in Arabic[123]. The Registrar may remove lawyers from the list of counsel for various disciplinary factors[124].

The Statute and the Rules of Procedure and Evidence establish norms that apply to defence counsel, including a Code of Professional Conduct for Counsel to be adopted by the Assembly of States Parties pursuant to a proposal from the Registrar, following consultation with the Prosecutor[125].

The accused is entitled to be informed of the right to counsel. In practice, this is unlikely to pose any problem. 32

δ) Free legal assistance

In the *ICCPR*, the right to funded counsel for indigent defendants is subject to the requirement that this be in cases "where the interests of justice so require". Arguably, this will be the situation in all cases before the ICC. Indeed, the ILC removed the condition in its Draft Statute[126], only to have it introduced again by the Preparatory Committee[127]. Consequently, the 33

120 *Supra* note 85, Rules of Procedure and Evidence, rule 44.

121 *Supra* note 33, Regulations of the Court, regulation 67.

122 *Supra* note 54, Rules of Procedure and Evidence, rule 22.

123 *Situation in Darfur*(ICC-02/05), Décision du Greffier relative à la nomination de Me Hadi Shalluf en qualité de conseil ad hoc de la Défense, 25 Aug. 2006, p. 2.

124 *Supra* note 33, Regulations of the Court, regulation 71; *supra* note 30, Regulations of the Registry, regulation 122 *et seq.*

125 *Supra* note 54, Rules of Procedure and Evidence, rule 8.

126 *Supra* note 15, 1994 ILC Draft Statute, p. 116. See also: Code of Crimes against the Peace and Security of Mankind, U.N. Doc. A/51/332 (1996), article 11 (e).

127 *Supra* note 19, Preparatory Committee Decisions Aug. 1997.

rule is not an absolute one, although it is hard to imagine an example of a matter before the Court where the interests of justice would not require funded counsel for an indigent defendant

34 The most far-reaching discussion of this provision took place in the informal working group at the August 1996 session of the Preparatory Committee. There, a number of practical recommendations were made, closely following the practice of the *ad hoc* tribunals[128]. A detailed codification of principles governing the appointment of counsel was also set out at that time[129].

35 Administration of the system of legal aid to indigent defendants is the responsibility of the Registrar[130]. Legal aid is to encompass all that is necessary for "effective and efficient defence, including the remuneration of counsel"[131]. The right to counsel includes a right to adequate, qualified counsel. Unlike situations where a defendant chooses and remunerates counsel, when counsel are authorized and funded by the Court, it becomes responsible for their competence[132].

The experience of the *ad hoc* Tribunals shows that it is likely that counsel will be remunerated by the Tribunal in virtually all cases, given the fact that defendants, even if they were once powerful rulers who looted their countries before losing power, become suddenly and mysteriously impoverished at the time of indictment. The first defendant to come before the Court, Thomas Lubanga, was declared indigent and provided with Court-appointed counsel[133]. The Regulations of the Court indicate the criteria for determining eligibility for legal aid[134].

36 Legal assistance before the *ad hoc* Tribunals has had a turbulent history, and practice appears to differ between The Hague and Arusha. David Tolbert, who has worked in several senior positions with the ICTY over the years, describes the defence counsel and legal aid systems as 'the ICTY's Achilles' heel'[135].

(e) Rights of the defence

37 The first sentence of article 67 para. 1 (e) is virtually identical, aside from the changes to gender neutral terminology, to the text of article 14 para. 3 (e) of the *ICCPR*. The second sentence, dealing with entitlement to raise defences, is an original contribution.

α) Examination of witnesses

38 The ILC attempted to rewrite somewhat the *ICCPR* provision dealing with examination of witnesses, limiting the application of the right to prosecution witnesses, and thereby eliminating witnesses called by the Court on its own motion from the scope of the provision[136]. The Preparatory Committee adopted the language of the ILC[137] but the Rome Conference, in its wisdom, returned to the original *ICCPR* text[138]. According to Judge Vohrah, of the ICTY:

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128 *Supra* note 18, 1996 Preparatory Committee I, para. 272.

129 *Ibid.*, pp. 197-199.

130 *Supra* note 54, Rules of Procedure and Evidence, rule 21; *supra* note 30, Regulations of the Registry, regulation 130 *et seq.*

131 *Supra* note 33, Regulations of the Court, regulation 83.

132 The Right to a Fair Trial, Report to the U.N. Sub-Commission on the Prevention of Discrimination and the Protection of Minorities by Mr. S. Chernichenko and Mr. W. Treat on The Administration of Justice and the Human Rights of Detainees, U.N. Doc. E/CN.4/Sub.2/1991/29, paras. 54-57.

133 *Prosecutor v. Lubanga*, ICC-01/04-01/06, Décision du Greffier sur la demande de l'aide judiciaire aux frais de la Cour déposée par M. Thomas Lubanga Dyilo, 31 Mar. 2006.

134 *Supra* note 33, Regulations of the Court, regulation 84.

135 David Tolbert, *The ICTY and Defence Counsel: A Troubled Relationship*, 37 NEW ENGLAND L. J. 975 (2003).

136 *Supra* note 15, 1994 ILC Draft Statute, p. 116, article 41.

137 *Supra* note 78, 1996 Preparatory Committee II, p. 199; *supra* note 19, Preparatory Committee Decisions Aug. 1997, p. 35; *supra* note 20, Zutphen Draft, p. 114; *supra* note 20, Draft Statute, p. 127.

138 *Supra* note 22; Draft proposal for article 67; *supra* note 22, Report of the Working Group on Procedural Matters (4 July), pp. 4-5; *supra* note 22, Compendium of draft articles, pp. 41-42. But see: *supra* note 74,

> "The principle is intended in an ordinary trial to ensure that the Defence has means to prepare and present its case equal to those available to the Prosecution which has all the advantages of the State on its side ... [T]he European Commission of Human Rights equates the principle of equality of arms with the right of the accused to have procedural equality with the Prosecution"[139].

It is foreseeable that there be certain limits to this right. The formal provisions governing testimony of victims of sexual crimes is an example. Article 68 para. 2 enables the Court to allow the presentation of evidence by electronic or other special means. Of course, this is not a breach of article 67 para. 1 (e) unless it is read as including a right to cross-examination and to confrontation. **39**

During the Preparatory Committee sessions, the issue was presented as a right to "confront and cross-examine all witnesses"[140]. But the wording of the provision is based on an international model which recognizes the legitimacy of trials without confrontation of witnesses and cross-examination, at least in the sense of common law procedure[141]. Article 14 of the *ICCPR* was not intended to impose a common law model on domestic justice systems, and those which do not indulge in cross-examination of witnesses before the Court cannot be considered, *prima facie*, to be in breach of the international norm. Thus, although the defence has the right to examine witnesses on the same basis as the Prosecutor, there is no explicit provision for a full right to cross-examination, as it is understood in the common law. The Regulations further confirm this perspective:

> "Subject to the Statute and the Rules, the Presiding Judge, in consultation with the other members of the Chamber, shall determine the mode and order of questioning witnesses and presenting evidence so as to:
>
> (a) Make the questioning of witnesses and the presentation of evidence fair and effective for the determination of the truth..."[142].

Under continental or Romano-Germanic legal systems, questions may be posed by the judge at the request of counsel. At trial, the presiding judge may issue directions as to the conduct of the proceedings[143], failing which the Prosecutor and the defence are to agree on the order and the manner in which evidence is to be presented[144]. Witnesses are questioned by the party that presents them, followed by questioning by the other party and by the Court. The defence has the right to be the last to examine a witness[145].

Nothing in the Statute provides for compellability of witnesses, for example by issuance of *subpoenae* or similar orders to appear before the Court. Although this may create hardship for the defence, it does not seem that it can argue that the right to a fair trial is being denied because of the impossibility of obtaining witnesses and compelling their attendance in court.

There are limits to the right to examine witnesses. The formal provisions governing the testimony of victims of sexual crimes are an example. In such circumstances, the Statute authorises the Court to allow the presentation of evidence by electronic or other special means[146]. Some questions are out of bounds: the Rules of Procedure and Evidence state that evidence of the prior or subsequent sexual conduct of a victim or witness is not to be admitted[147]. It may also disallow questions because they are abusive or repetitive. What is important is that the parties, prosecution and defence, be treated equally and that the trial be fundamentally fair.

Proposal submitted by the Delegations of Egypt, Oman and the Syrian Arab Republic, p. 1.

139 *Prosecutor* v. *Tadić*, Case No. IT-94-1-T, Separate Opinion of Judge Vohrah on Prosecution Motion for Production of Defence Witness statements, 27 Nov. 1996, p. 4.

140 *Supra* note 18, 1996 Preparatory Committee I, p. 58, para. 275.

141 F.G. Jacobs/R.C.A. White, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 158 (1996).

142 *Supra* note 33, Regulations of the Court, regulation 43.

143 *Supra* note 4, Rome Statute, article 64 para. 8 (b).

144 *Supra* note 54, Rules of Procedure and Evidence, rule 140 para. 1.

145 *Ibid.*, rule 140 para. 2.

146 *Supra* note 4, Rome Statute, article 68 para. 2.

147 *Supra* note 54, Rules of Procedure and Evidence, rule 71.

The Statute also allows the Court to recognise witness privileges. The Assembly of States Parties agreed to confirm a principle already recognised by the International Criminal Tribunal for the former Yugoslavia, by which the International Committee of the Red Cross has a right to non-disclosure of evidence obtained by a former employee in the course of official duties. The Tribunal relied on customary international law in reaching its decision[148]. The Rules also recognise solicitor client privilege, and enable the Court to extend privilege to other categories of witnesses[149]. It has been suggested that on this basis privilege might be extended to other non-governmental organisations with humanitarian purposes, and bodies such as a truth and reconciliation commission.

β) Defences

40 The second sentence of subparagraph (e) recognizes the right of the accused to raise defences and to present other admissible evidence. The Preparatory Committee had appended to the provision, in square brackets, a sentence stating: "In addition the accused shall also be entitled to present any other evidence"[150]. At Rome, the Chair of the Working Group added the reference to raising defences[151].

41 These rights must surely be included within the general principle of the right to a fair trial, established in the *chapeau* of article 67 para. 1. Moreover, defences are described in considerable detail in Part 2 of the *Statute*, concerning general principles of law. It should be observed that some defences are formally excluded by Part 2, namely the defence of official capacity[152], lack of knowledge (in the case of command responsibility)[153] and superior orders (in cases of genocide and crimes against humanity)[154].

(f) Interpreter

42 The provision in the ICC *Statute* is considerably more detailed than the corresponding text in the *ICCPR* although it is doubtful whether anything really new has been added. Article 14 para. 3 (f) recognizes the right to "free assistance of an interpreter" if the accused "cannot understand or speak the language used in court"[155]. Here, too, the ILC attempted to improve on the text of the *ICCPR*, adding the requirement that the interpreter be "competent", specifying extension of the principle to include documents, and modifying the requirement that the accused either understand or speak the language to become a cumulative requirement, "understands and speaks"[156]. The *Statute* provision is essentially identical to the ILC Draft, except for the order of the phrases. These were reversed at the August 1997 session of the Preparatory Committee[157], and the word "fully" added during the Rome Conference[158].

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148 *Ibid.*, Rule 73 (3), (4), (5), confirming: *Prosecutor v. Simić et al.*, Case No. IT-95-9-PT, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999.

149 *Supra* note 54, Rules of Procedure and Evidence, rule 73.

150 *Supra* note 18, 1996 Preparatory Committee II, p. 199; *supra* note 19, Preparatory Committee Decisions Aug. 1997, p. 35; *supra* note 20, Zutphen Draft, p. 114; *supra* note 20, Draft Statute, p. 127.

151 *Supra* note 22Draft proposal for article 67.

152 *Supra* note 4, Rome Statute, article 27.

153 *Ibid.*, article 28.

154 *Ibid.*, article 33.

155 Specific responsibility for ensuring respect of this right lies with the registry: *supra* note 30, Regulations of the Registry, regulation 40.

156 *Supra* note 15, 1994 ILC Draft Statute, p. 115, article 41. For a particularly interesting discussion of the difficulties of trials with interpreters, see *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment of 2 Sep 1998.

157 *Supra* note 19, Preparatory Committee Decisions Aug. 1997, p. 35; *supra* note 20, Zutphen Draft, pp. 114-115; *supra* note 20, Draft Statute, pp. 114-115; *supra* note 22, Draft proposal for article 67.

158 *Supra* note 76, Report of the Working Group on Procedural Matters (11 July), pp. 3-4; *supra* note 22, Compendium of draft articles, pp. 5-7.

An accused who does not understand the proceedings is not "present" at trial. Thus, the right to an interpreter seems axiomatic. Supervision of the quality of such interpretation is a constant difficulty, however, because frequently the accused is the only person who is actually listening to the interpretation. Although the requirement that documents be translated may be cumbersome, time-consuming and costly, it has been recognized by the European Court of Human Rights as a corollary of the right to an interpreter[159]. **43**

The provision does not require interpretation into the accused's mother tongue, or into a language of the accused's choice[160]. In an interlocutory ruling, the ICTY denied an accused's request for a "Croatian" interpreter, given that the languages are similar enough and there was regular translation of Serbo-Croatian[161]. **44**

(g) Right to silence

The right to silence provision is also based on the norm in article 14 para. 3 of the *ICCPR*, but goes considerably farther. The *ICCPR* says that an accused has the right "[n]ot to be compelled to testify against himself or to confess guilt". The ICC *Statute* removes the qualification "against himself", and adds an additional norm that is not at all implicit in the *ICCPR*, namely that the silence of an accused cannot be a consideration in the determination of guilt or innocence. **45**

The words "against himself" were removed by the ILC in its Draft Statute, but otherwise the text of article 14 para. 3 (g) remained intact[162]. But this is not the same as the general right against self-incrimination found in the Fifth Amendment to the United States Constitution, because the right may only be invoked by an accused[163]. The text clarifies the fact that an accused may refuse to testify altogether, and not merely to testify when the evidence is "against himself". **46**

The second arm of the provision, providing that silence includes the right not to have it invoked against an accused, was added during the August 1997 Preparatory Committee[164]. Without square brackets, it sailed along effortlessly into the final version of the *Statute*[165], although at the Rome Conference the United Kingdom made an interesting proposal that changed the form without modifying the content[166]. The provision reflects concerns with encroachments upon the right to silence in some national justice systems. Specifically, English common law has always prevented any adverse inference being drawn from an accused's failure to testify. But in recent years, legislation adopted within the United Kingdom now allows prosecutors to propose such conclusions[167]. **47**

At the *ad hoc* tribunals, the right to silence has arisen in proceedings concerning provisional release, where prosecutors argued that the silence of the accused is a pejorative factor militating

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159 *Supra* note 79, *Luedicke, Belkacem and Koc v. Federal Republic of Germany*, para. 48; *Kamasinski v. Federal Republic of Germany*, Ser. A, No. 168, 19 Dec. 1989, para. 74.

160 *Guesdon v. France* (No. 219/1986), U.N. Doc. A/44/40, p. 222, paras. 10.2, 10.3.

161 *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Order on Zdravko Mucić's Oral Request for Croatian Interpretation, 23 June 1997.

162 *Supra* note 15, 1994 ILC Draft Statute, p. 116, article 41.

163 According to *supra* note 18, 1996 Preparatory Committee I, para. 276, "The right of the accused not to be compelled to give testimony was supported, as was the right of witnesses to enjoy some degree of protection from giving self-incriminating testimony". But article 67 does not apply to witnesses, who have no general protection against self-incrimination.

164 *Supra* note 19, Preparatory Committee Decisions Aug. 1997, p. 35; *supra* note 20, Zutphen Draft, p. 117; *supra* note 20, Draft Statute, p. 127.

165 *supra* note 22, Draft proposal for article 67; *supra* note 22, Report of the Working Group on Procedural Matters (4 July), pp. 4-5; *supra* note 22, Compendium of draft articles, pp. 41-42.

166 *Supra* note 41, Proposal submitted by the United Kingdom of Great Britain and Northern Ireland, p. 1: "Neither to be compelled to testify nor to confess guilt and to be permitted to remain silent without any inference as to guilt or innocence being drawn from such silence".

167 Criminal Justice and Public Order Act (1994), s. 4 (3).

against release. But Trial Chambers have said that "lack of co-operation of an accused should not, as a rule, be taken into consideration as a factor" that might justify denying an application for provisional release. According to an ICTY Trial Chamber, "[t]he alternative would easily result in infringement of the fundamental right of an accused to remain silent"[168].

Cooperation with the Prosecutor may be cited as a mitigating factor at the sentencing stage, and to this extent there may be a price to be paid by an accused for exercising the right to silence. However, Trial Chambers have frequently insisted that the fact the accused does not plead guilty should not be viewed as an aggravating factor,"since an accused person has no obligation to do so and he has the right to remain silent should he choose that course"[169]. In *Niyitegeka*, an ICTR Trial Chamber wrote:

> The Accused chose not to testify in his own defence in the present case. The Defence made submissions concerning the right to remain silent and the right not to testify. The Chamber is mindful of the Accused's rights in this regard and has not drawn any adverse inference in the present case[170].

In *Čelebići*, the ICTY Appeals Chamber said there is 'an absolute prohibition against consideration of silence in the determination of guilt or innocence is guaranteed within the Statute and the Rules... Similarly, this absolute prohibition must extend to an inference being drawn in the determination of sentence'[171].

The right to silence can of course be waived. An accused who pleads guilty in effect waives the right to silence, as well as certain other procedural rights[172]. This is often spelled out in plea agreements at the *ad hoc* tribunals[173]. Many accused before international tribunals have chosen to testify in their own defence. In the case of a defence of alibi, for example, it is virtually essential that the accused take the witness stand in order to explain his or her whereabouts at the time of the crime.

(h) Unsworn statement

48 The idea that an accused is entitled to make an unsworn oral or written statement in his or her defence, at least as a fundamental right, is a genuine innovation. There is nothing comparable in any of the international human rights instruments. But it is a practice recognized under many criminal codes throughout the world. In fact, continental European jurists are "astonished" that it could be otherwise, as in their jurisdictions the accused is never sworn[174]. The proposal first surfaced during the informal working group of the August 1996 session of the Preparatory Committee[175]. It was retained, in square brackets, by the Working Group in August 1997[176], and adopted without difficulty at the Rome Conference[177].

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168 *Prosecutor v. Jokić et al.*, Cases No. IT-01-42-PT and IT-01-46-PT, Orders on Motions for Provisional Release, 20 Feb. 2002. Also: *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-PT, Decisions Granting Provisional Release to Enver Hadžihasanović, Mehmed Alagic and Amir Kubura, 9 Dec. 2001, para. 15.

169 *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Judgment, 29 Nov. 2002, para. 298; *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgment, 20 Feb. 2001, para. 783; *Prosecutor* v. *Plavšić*, Case No. IT-00-39&40/1, Sentencing Judgment, 27 Feb. 2003, para. 64; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment, 29 July 2004, para. 687.

170 *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-T, Judgment and Sentence, 16 May 2003, para. 46.

171 *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgment, 20 Feb. 2001, para. 783. Also: *Prosecutor v. Plavšić*, Case No. IT-00-39&40/1, Sentencing Judgment, 27 Feb. 2003, para. 64.

172 *Prosecutor v. Sikirica et al.*, Case No. IT-95-8, Sentencing Judgment, 13 Nov. 2001, para. 17.

173 See, *e.g.*, *Prosecutor v. Obrenović*, Case No. IT-02-60-T, Plea Agreement, para. 17; *Prosecutor v. Momir Nikolić*, Case No. IT-02-60-PT, Amended Plea Agreement, para. 5.

174 J. Pradel, DROIT PÉNAL COMPARÉ 449, fn. 1 (1995).

175 *Supra* note 78, 1996 Preparatory Committee II, p. 117, 200.

176 *Supra* note 18, 1996 Preparatory Committee I, p. 35; *supra* note 20, Zutphen Draft, p. 117; *supra* note 20, Draft Statute, p. 128.

177 *Supra* note 22, Draft proposal for article 67; *supra* note 22, Report of the Working Group on Procedural Matters (4 July), pp. 4-5; *supra* note 22, Compendium of draft articles, pp. 41-42. See also: *supra* note 74, Proposal submitted by the Delegations of Egypt, Oman and the Syrian Arab Republic, p. 1.

Under common law systems, an unsworn statement would in principle be inadmissible as evidence. If the accused chooses to testify, then he or she must be sworn and, moreover, must submit to cross-examination. Article 69 para. 1 requires every witness to "give an undertaking as to the truthfulness of the evidence to be given by that witness". In so doing, the witness submits to the possibility of prosecution for perjured testimony[178]. Although there is a lack of consistency with the terminology used in article 67 para. 1 (h), logically, testimony subsequent to the undertaking as to truthfulness must be the equivalent of a "sworn statement". Therefore, the "unsworn statement" seems to present itself as an exception to the general rule requiring that testimony be accompanied by an undertaking as to truthfulness. Although the judges cannot consider the accused's decision not to testify as a factor influencing guilt or innocence, pursuant to article 67 para. 1 (g), this surely does not require them to attribute the same weight to the unsworn statement of an accused as they would to sworn testimony. But an alternative view suggests that the unsworn statement is not evidence at all. If it is not, then the Court may not base its judgment on "facts" revealed in the course of the unsworn statement[179]. An accused who believes the unsworn statement is a way to introduce evidence might have an unfortunate surprise if the Court, in its final judgment, indicates that it does not consider such "facts" as being part of the record. 49

(i) Reverse onus

The prohibition of any reverse onus or duty or rebuttal is really a corollary of the presumption of innocence, protected by article 66 of the ICC *Statute*. Reverse onus provisions are common to most criminal law systems. Upon proof of one fact, the Court is entitled, or in some cases is obliged, to conclude that another fact has been proven. Thus, the prosecution does not in reality prove a decisive fact in the case against the accused. The accused bears the onus of disproving such a fact, sometimes by raising a reasonable doubt as to its existence, and sometimes by actually proving the contrary, according to the principle of preponderance of evidence. Although many offences in national criminal codes are drafted in such a fashion, there are no examples in the ICC *Statute*. This does not mean that a reverse onus issue may not arise. For example, in the *Čelebići* trial before the ICTY, the Trial Chamber noted that "there is a presumption of sanity of the person alleged to have committed the offence"[180] and that the accused who raises a defence of insanity or diminished mental capacity "is to rebut the presumption of sanity"[181]. This question is discussed in greater detail in the commentary on article 66, particularly margin Nos. 18-22. 50

The provision was not included in the ILC Draft Statute, nor did it form part of the first series of amendments, during the 1996 sessions of the Preparatory Committee. Article 67 para. 1 (i) was proposed during the August 1997 meeting, although it was left in square brackets[182]. It posed no problem during the debates at Rome and was adopted promptly[183]. 51

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178 *Supra* note 4, Rome Statute, article 70 para. 1 (a).

179 *Ibid.*, article 74 para. 2.

180 *Prosecutor* v. *Delalić* et al., Case No. IT-96-21-T, Judgment, 16 Nov. 1998, para. 1157.

181 *Ibid.*, para. 1158.

182 *Supra* note 19, Preparatory Committee Decisions Aug. 1997, p. 35; also: *supra* note 20, Zutphen Draft, p. 155; *supra* note 20, Draft Statute, p. 128. Note the error in the *nota bene* at the end of article 60 in the Zutphen Draft. The reference is to paragraph 1 in general, and not to subparagraph 1 (j). The error is corrected in the Draft Statute of April 1998.

183 *Supra* note 22, Draft proposal for article 67, p. 5; *supra* note 22, Compendium of draft articles, p. 42; Draft Statute for the International Criminal Court, U.N. Doc. A/CONF.183/C.1/L.76/Add.6, p. 5.

II. Paragraph 2

52 International human rights law is somewhat uncertain as to an obligation on the prosecution to disclose evidence to the defence prior to trial. Although the instruments impose no clear duty in this respect[184], recently, the European Court of Human Rights has declared "that it is a requirement of fairness ... that the prosecution authorities disclose to the defence all material evidence for or against the accused"[185]. The Rules of the *ad hoc* Tribunals make detailed provision for disclosure of the prosecution case and, according to recent amendments, for the defence case as well[186]. A duty on the prosecution to disclose its evidence, both exculpatory and inculpatory, is now recognized in many legal systems[187]. Existence of a reciprocal duty on the defence is less common although in some cases, such as a defence of alibi, the credibility of the defence will depend on prompt disclosure of material facts[188]. In an interlocutory decision in the *Tadić* case, Judge Stephen said the defence has "no disclosure obligation at all unless an alibi or a special defence is sought to be relied upon and then only to a quite limited extent ..."[189]. It is obvious that the defence can never be required to disclose inculpatory evidence, as this would violate the right against self-incrimination set out in paragraph (g).

53 In an effort to clarify this point, the ILC proposed the following provisions, to comprise a second paragraph in the article on rights of the accused: "Exculpatory evidence that becomes available to the Procuracy prior to the conclusion of the trial shall be made available to the defence. In case of doubt as to the application of this paragraph or as to the admissibility of the evidence, the Trial Chamber shall decide"[190]. At the August 1996 session of the Preparatory Committee, delegates observed that it was fundamental to a fair trial that provision be made for the full disclosure of evidence by the Prosecutor to the defence, and not only exculpatory evidence, as well as a reciprocal duty of disclosure on the part of the defence[191]. At Rome, a new version submitted by Australia formed the basis of debate[192]. The Drafting Committee added, at the beginning of the Australian text, the words "[i]n addition to any other disclosure provided for in this Statute ...". Australia had left two options as to the body competent for resolving questions about whether or not disclosure was required, the Pre-Trial Chamber and the Trial Chamber. The Preparatory Committee did not choose either, leaving the matter to "the Court"[193].

54 It is perhaps unfortunate that the obligation on the prosecution to disclose all relevant evidence is not explicitly included within the provision concerning rights of the defence. It is surely implicit in the general right to a "fair hearing" found within the *chapeau* of article 67, especially in light of recent case law of international human rights tribunals. Moreover, article

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184 The closest is Principle 21 of the United Nations Basic Principles on the Role of Lawyers, U.N. Doc. A/CONF.144/28/Rev.1 (1990): "It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients".

185 *Edwards* v. *United Kingdom*, Ser. A, No. 247B, 16 Dec. 1992.

186 *Supra* note 85, Rules of Procedure and Evidence, Rule 66. See: *supra* note 32, A.-M. La Rosa, 974.

187 *Supra* note 174, J. Pradel, 414-420.

188 *Williams* v. *Florida*, 399 U.S. 78 (1970).

189 *Prosecutor* v. *Tadić*, Case No. IT-94-1-T, Separate opinion of Judge Stephen on prosecution motion for production of defence witness statements, 27 Nov. 1996.

190 *Supra* note 15, 1994 ILC Draft Statute, p. 115.

191 *Supra* note 18, 1996 Preparatory Committee I, para. 274, p. 58.

192 Proposal submitted by Australia, U.N. Doc. A/CONF.183/C.1/WGPM/L.35 (29 June), p. 1: "The Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the [Pre-Trial Chamber/Trial Chamber] shall decide". There were other proposals relating to article 67 para. 2: *supra* note 41, Proposal submitted by the United Kingdom of Great Britain and Northern Ireland, p. 1; *supra* note 74, Proposal submitted by the Delegations of Egypt, Oman and the Syrian Arab Republic, p. 1.

193 *Supra* note 22, Draft proposal for article 67; *supra* note 76, Report of the Working Group on Procedural Matters (11 July), pp. 3-4.

64 of the *Statute*, entitled "Functions and powers of the Trial Chamber", requires that the Trial Chamber "ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused". In this context, the *Statute* imposes upon the Trial Chamber assigned to deal with a case the obligation ("the Trial Chamber ... *shall*"; the ILC Draft had left this to the discretion of the Presidency[194]) "[s]ubject to any other relevant provisions of this Statute, [to] provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial". The relevant provisions that may qualify somewhat this duty on the prosecution are article 68 para. 5, concerning protection of witnesses, and article 72 para. 1, concerning protection of national security information, which makes express reference to article 67 para. 2.

55 The ICTY has set guidelines for disclosure pursuant to its rule 66. The Tribunal has concluded that documents and other objects "material to the preparation of the Defence" consist of material that is "... significantly helpful to an understanding of important inculpatory or exculpatory evidence; it is material if there is a strong indication that ... it will 'play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal'"[195].

The Rules of Procedure and Evidence of the International Criminal Court establish a thorough regime of disclosure, applicable to both Prosecutor and defence. The prosecution is required to provide the defence with the names of witnesses it intends to call at trial together with copies of their statements, subject to certain exceptions relating to the protection of the witnesses themselves[196]. The defence has a corresponding obligation with respect to witnesses, although this is worded slightly more narrowly, applying only to those expected to support specific defences[197]. Both sides are required to allow the other to inspect books, documents, photographs and other tangible objects in their possession or control which they intend to use as evidence. The Prosecutor must also disclose any such items that may assist the defence, although a comparable duty is not imposed upon the defence to disclose items that might assist the prosecution[198].

56 The second sentence of article 67 para. 2 provides for a determination by the Court in cases where the prosecution is not sure about the nature of the evidence. An early amendment described this as a hearing "*ex parte*" and "*in camera*"[199]. The August 1997 session of the Preparatory Committee included a cross-reference to the provision enabling the Court to make orders for the conduct of the trial (now article 64 para. 3)[200]. Given that there are obligations of disclosure at both the pre-trial and the trial phase, and that the obligation set out in article 67 para. 2 must be respected "as soon as practicable", the appropriate body would be either the Pre-Trial Chamber or the Trial Chamber, depending on the circumstances. It is unclear whether this provision entitles the Prosecutor to seek a ruling in cases of doubt, or whether the defence could also apply where it suspects the Prosecution may have such evidence. There may be circumstances where the Prosecutor cannot seek such a determination without informing the Court of the evidence in question, and it would obviously defeat the purpose of the provision to allow the defence access to such evidence prior to the determination by the Court that it must be disclosed. Yet the defence is entitled to be present at trial, and the trial must be public. Should the Court decide to conduct some form of *ex parte* determination, this must be done with the

194 *Supra* note 15, 1994 ILC Draft Statute, article 27 para. 5 (b), p. 95.
195 *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, 26 Sep. 1996.
196 *Supra* note 54, Rules of Procedure and Evidence, rule 76.
197 *Ibid.*, rule 79.
198 *Ibid.*, rules 77–78.
199 *Supra* note 78, 1996 Preparatory Committee II, p. 200.
200 *Supra* note 19, Preparatory Committee Decisions Aug. 1997, p. 35; also: *supra* note 20, Zutphen Draft, p. 115; *supra* note 20, Draft Statute, p. 128.

greatest discretion. The Court might consider appointing a *amicus curiae* to ensure that the rights of the defence are protected and to assess, in appropriate circumstances, the usefulness of an appeal of its decision pursuant to article 81 para. 2 (d) of the *Statute*.

C. Special Remarks

1. Omitted provisions

57 The drafts of article 67 that were considered by the Preparatory Committee contained two provisions based rather closely on the United States constitutional model rather than the international instruments. The first concerned the protection against unreasonable search and seizure[201], while the second provided a guarantee not to be deprived of life or liberty without due process[202]. Another proposal entitled the accused to invoke the Court's power to compel state co-operation in order to assist the defence in the preparation of its case[203]. They were deleted at the Rome Conference[204]. The due process proposal is derived from article V of the United States Bill of Rights, which is an anachronistic provision, in that it recognizes the legitimacy of capital punishment, something which is excluded from the Rome Statute[205] and prohibited by contemporary human rights norms[206]. In any case, the notion of "due process" is comprised within that of "fair trial" in the *chapeau* of article 67 para. 1. Search and seizure, too, is governed by other provisions in the Statute. The protection against unreasonable search and seizure in effect enables a court to sanction misconduct at the investigation stage. Here, the Court has the power to exclude evidence, pursuant to article 69 para. 7 (b), where its admission "would be antithetical to and would seriously damage the integrity of the proceedings". Finally, the state co-operation provision is also incorporated in other provisions of the Statute.

2. Role of article 67 in the applicable law

58 Article 67 closely resembles article 14 para. 3 of the *ICCPR*, as well as the various fair trial clauses found in national constitutions. It is not, however, a typical provision found within criminal or penal codes as such. In effect, such clauses generally belong in constitution-type instruments, and claim a judicial role which is hierarchically superior to the criminal law texts that they frame and control. It is against the constitutional fair trial standard that provisions of the ordinary criminal law, as well as actions of the authorities in implementing it, including those of the Courts, are to be assessed. In national legal systems, two principal consequences result: where a provision of the ordinary criminal law is in conflict with the fundamental fair trial norm, the former must give way to the latter; where the investigating authorities, the prosecution or the Courts themselves have breached the fair trial rights of the accused, the

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201 *Supra* note 78, 1996 Preparatory Committee II, pp. 200-201; *supra* note 20, Zutphen Draft, p. 115; *supra* note 20, Draft Statute, p. 128.

202 *Supra* note 78, 1996 Preparatory Committee II, p. 201; *supra* note 20, Zutphen Draft, p. 115; *supra* note 20, Draft Statute, p. 128.

203 *Supra* note 20, Zutphen Draft, p. 115; *supra* note 20, Draft Statute, p. 128.

204 See also: *supra* note 74, Proposal submitted by the Delegations of Egypt, Oman and the Syrian Arab Republic, p. 1.

205 *Supra* note 4, Rome Statute, article 77.

206 Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, E.T.S. No. 114, *entered into force* 30 Mar. 1985; Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in all Circumstances, E.T.S. No. 187, *entered into force* 7 Jan. 2003; Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at Abolition of the Death Penalty, U.N. Res. 44/128, *entered into force* 7 July 1991; Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty, O.A.S.T.S. No. 73, 29 I.L.M. 1447, *entered into force* 6 Oct. 1993. See W.A. Schabas, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW (3rd ed. 2003).

Courts must grant an appropriate remedy, which may range from compensation to an order for a new trial and even, in some systems, the right to a stay of proceedings.

The application of these concepts to the ICC *Statute* is not obvious, and this raises questions about the role of article 67 itself within the general structure and legal philosophy of the *Statute*. To take the case of a breach of article 67 by the investigating authorities, the prosecution or the Courts, a number of scenarios may be contemplated. Although article 67 applies at the trial stage of the proceedings, it may be threatened by pre-trial events, such as irregular or illegal investigation, either by the national authorities or by the Prosecutor's office. The *Statute* provides the Court with the power to exclude evidence in cases of abuse[207] but there may be breaches of article 67 for which this may be an insufficient or inappropriate remedy. For example, what is the Court to do in cases of a violation of the right to a speedy trial, set out in article 67 para. 1 (c)? An acquittal would be inappropriate, because there would be nothing to suggest the innocence of the accused, and such a finding would offend the victims. The obvious remedy would be to suspend or stay the proceedings, but no such power is set out, at least explicitly, within the *Statute*. Moreover, it would seem unlikely that the Court will intervene to sanction what would quite possibly be, in effect, its own shortcomings. The accused is also entitled to a fair trial "in full equality", which must surely mean that he or she is protected from abusive prosecution based, for example, on prohibited criteria such as race, national origin or gender. The only conceivable remedy would be a stay of proceedings, as the Court must prevent abuse of its own process by the Prosecutor. Other examples abound, as a cursory review of constitutional jurisprudence of national courts indicates. **59**

Even more difficult is the problem of applicable law that is incompatible with article 67. In some cases, provisions of the *Statute* are explicitly protected from conflict with article 67. For example, article 67 para. 1 (d) employs the words "[s]ubject to article 63, paragraph 2 ...". In others, it was surely the intent to the *Statute*'s drafters to except other provisions from the scope of article 67. For example, despite the right to "raise defences" set out in article 67 para. 1 (e), this cannot be unlimited, because other provisions of the *Statute* prohibit or limit the defences of official capacity and superior orders. What if a provision of the applicable law is not sheltered, either implicitly or explicitly, from article 67? Can the Court determine that it is inoperative to the extent that there is an incompatibility with the provisions of article 67? If the Court may indeed make such a determination, does this only cover procedural issues or does it also concern substantive law? **60**

It is suggested that article 67, given its unique formulation and its historical origin, may be entitled to a form of hierarchically superior status within the *Statute*. In appropriate cases, some of which may have been unthinkable in July 1998 but which may become apparent over time, the Court may be required to declare provisions of the *Statute* inoperative because they conflict with article 67. The "fair trial" norm in the *chapeau* of article 67 para. 1 is a powerful concept and one that will evolve, in keeping with the development of international human rights law. Provisions of the *Statute* that meet the fair trial standard in 1998 may no longer do so at some point in the future. **61**

But for the sake of argument, even if it is assumed that the other norms in the Statute are either compatible with article 67 or else they are implicit or explicit exceptions to it, it must be born in mind that much of the applicable law remains to be devised. The two other principal sources, the Rules of Procedure and Evidence and the Elements of Crimes, are hierarchically subordinate to the *Statute*. Article 52 para. 5 of the *Rome Statute* declares that in the event of conflict between it and the Rules, the *Statute* shall prevail. Rules of evidence adopted by the Assembly of States Parties may conflict with fair trial rights enshrined in article 67[208], and the

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[207] *Supra* note 4, Rome Statute, article 69 para. 7 (b).

[208] For an example drawn from the Rules of the ICTY, see: A.-M. La Rosa, *Défi de taille pour les Tribunaux pénaux internationaux: conciliation des exigences du droit international humanitaire et d'une procédure*

Court is clearly entitled to disregard them or declare them inoperative in such cases. Moreover, the wording of article 67 – particularly its reference to defences and to onus of proof -- suggests that this extends to substantive as well as procedural matters.

équitable, 828 REV. INT'L CROIX-ROUGE 677, 680-684 (1997).

An Introduction to the International Criminal Court

Third Edition

William A. Schabas

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General principles of criminal law

The statutes of the Nuremberg and Tokyo tribunals, as well as those of the *ad hoc* tribunals for the former Yugoslavia and Rwanda, are very thin when it comes to what criminal lawyers call 'general principles'. Once the crimes were defined, the drafters of these earlier models left issues such as the appreciation of the evidence or the assessment of responsibility for accomplices and other 'secondary' offenders to the discretion of the judges. After all, those appointed to preside over these tribunals were eminent jurists in their own countries and could draw on a rich, multicultural resource of domestic criminal law practice. The Rome Statute is far less generous to the judges. It seeks to delimit in great detail any possible exercise of judicial discretion. Part 3 of the Statute, consisting of Articles 22–33, is entitled 'General principles of criminal law'.[1] It directs the Court on such issues as criminal participation, the mental element of crimes and the availability of various defences. But elsewhere in the Statute can be found other provisions that are also germane to the issue of general principles. They present a fascinating experiment in comparative criminal law, drawing upon elements from the common law, the Romano-Germanic system, *Sharia* law and other regimes of penal justice.

Sources of law

Article 21 of the Rome Statute, entitled 'Applicable law', sets out the legal sources upon which the International Criminal Court may draw. The

[1] On the general principles, see Per Saland, 'International Criminal Law Principles', in Roy Lee, ed., *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, The Hague: Kluwer Law International, 1999, pp. 189–216; William A. Schabas, 'General Principles of Criminal Law in the International Criminal Court Statute (Part III)', (1998) 6 *European Journal of Crime, Criminal Law and Criminal Justice* 84; Kai Ambos, 'General Principles of Law in the Rome Statute', (1999) 10 *Criminal Law Forum* 1; Robert Cryer, 'General Principles of Liability in International Criminal Law', in Dominic McGoldrick, Peter Rowe and Eric Donnelly, eds., *The Permanent International Criminal Court: Legal and Policy Issues*, Oxford and Portland, OR: Hart Publishing, 2004, pp. 233–62.

humanitarian law instruments.[48] The general right to a 'fair hearing' established in the *chapeau* of Article 67 of the Statute provides defendants with a powerful tool to go beyond the text of the Statute, and to require that the Court's respect for the rights of an accused keep pace with the progressive development of human rights law. Although Article 67 is placed with the provisions dealing with the trial itself, the right to a fair hearing applies at all stages of the proceedings, and even during the investigation, when no defendant has even been identified.[49] The case law of the Strasbourg organs, established to implement the European Convention on Human Rights, has used this residual right to a fair hearing to fill in some of the gaps in the more specific provisions.[50] That the term 'fair hearing' invites the Court to exceed the precise terms of Article 67 in appropriate circumstances is confirmed by the reference within the *chapeau* to 'minimum guarantees'. As Judge Steiner, sitting as a single judge of Pre-Trial Chamber I, has noted, the reference to 'minimum guarantees' in Article 67(1) means that sometimes the competent Chamber will need to go beyond the terms of Article 67 itself. She cited the case law of the European Court of Human Rights in support.[51] The term 'fair hearing' also suggests that, where individual problems with specific rights set out in Article 67 do not, on their own, amount to a violation, the requirement of a fair hearing may allow a cumulative view and lead to the conclusion that there is a breach where there have been a number of apparently minor or less significant encroachments on Article 67.[52]

[48] Geneva Convention (III) Relative to the Treatment of Prisoners of War, (1950) 75 UNTS 135, Arts. 84–87 and 99–108; Geneva Convention (IV) Relative to the Protection of Civilians, (1950) 75 UNTS 287, Arts. 5 and 64–76; Protocol Additional I to the 1949 Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts, (1979) 1125 UNTS 3, Art. 75; Protocol Additional II to the 1949 Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts, (1979) 1125 UNTS 3, Art. 6.

[49] *Situation in the Democratic Republic of Congo* (ICC-01/04), Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 31 March 2006, para. 35.

[50] D. J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights*, London: Butterworths, 1995, pp. 202–3.

[51] *Lubanga* (ICC-01/04–01/06), Décision relative au système définitif de divulgation et à l'établissment d'un échéancier, Annexe 1, Analyse de la décisions relative au système définitif de divulgation, 15 May 2006, para. 97. Judge Steiner also referred to the previous edition of this book as authority for such a view.

[52] *Stanford* v. *United Kingdom*, Series A, No. 182-A, 30 August 1990, para. 24.

Second Annual Report of the President of the

SPECIAL COURT FOR SIERRA LEONE

FOR THE PERIOD 1 JANUARY 2004 - 17 JANUARY 2005

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INTRODUCTION

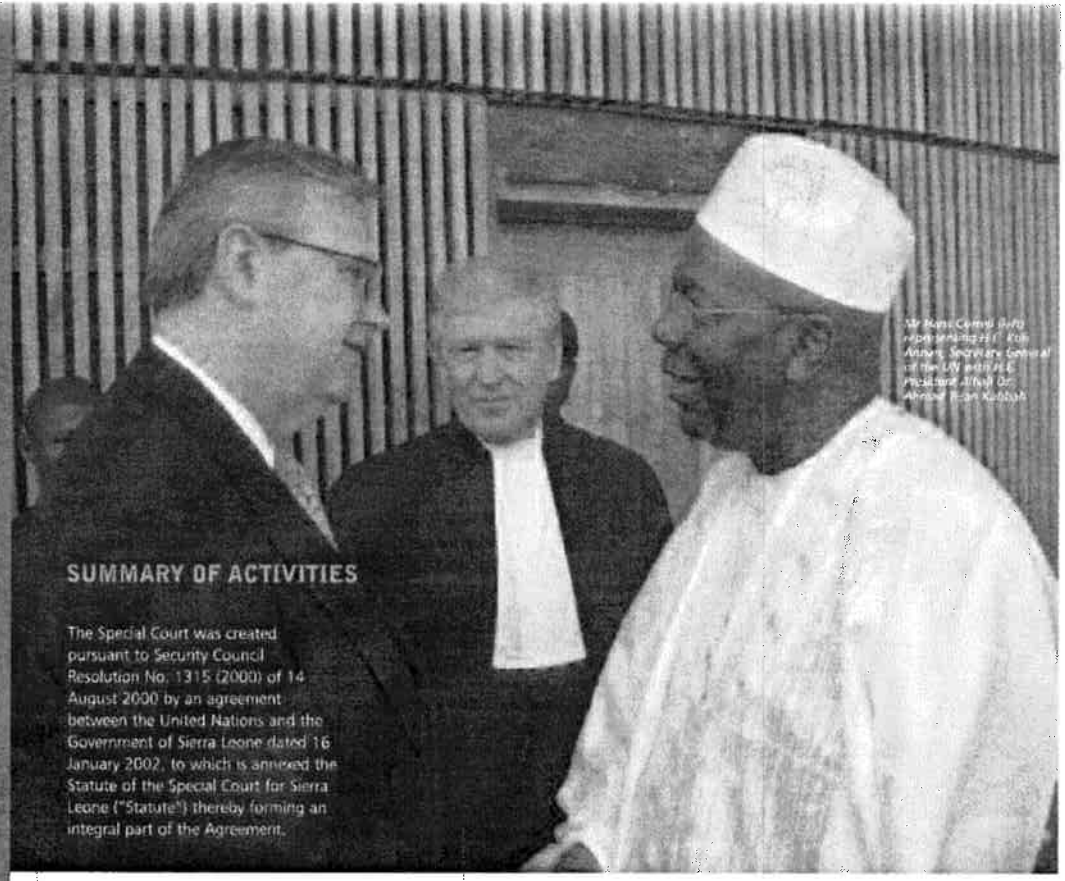
This is the second Annual Report of the Special Court for Sierra Leone, prepared pursuant to Article 25 of the Statute of the Special Court, which states "The President of the Special Court shall submit an annual report on the operation and activities of the Court to the Secretary-General and to the Government of Sierra Leone".

This report covers the period from 2 December 2003 and the ensuing 12 months. However, following the approach adopted in the previous Annual Report, where it is sensible to include events that occurred up until the time of writing, such as the swearing in of the Special Court's Trial Chamber II on 17 January 2005, then such events will be included.

The report covers the activities of all Sections of the Court: Chambers, Registry (including the Office of the Principal Defender) and the Office of the Prosecutor. Drawing upon the first Annual Report, it will also reflect the significant steps forward taken by the Court during the period in respect of creating, defining and implementing policies to ensure a sustainable legacy. The Report will explain the Court's funding situation and illustrate the work undertaken by the Management Committee during the period in relation to its funding and administration duties.

The Special Court for Sierra Leone was set up jointly by the Government of Sierra Leone and the United Nations. It is mandated to prosecute those 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.

Currently eleven persons alleged to be associated with all three of the country's former warring factions have been indicted by the Special Court. In accordance with the Special Court Statute, they are charged with war crimes, crimes against humanity, and other serious violations of international humanitarian law. Some of the charges include murder, rape, extermination, acts of terror, enslavement, looting and burning, sexual slavery, conscription of children into an armed force and attacks on UN peacekeepers and humanitarian workers. At the time of writing, there are nine individuals in custody in Freetown.



Mr Hans Corell (left) representing H.E. Kofi Annan, Secretary-General of the UN and H.E. President Alhaji Dr. Ahmad Tejan Kabbah

SUMMARY OF ACTIVITIES

The Special Court was created pursuant to Security Council Resolution No. 1315 (2000) of 14 August 2000 by an agreement between the United Nations and the Government of Sierra Leone dated 16 January 2002, to which is annexed the Statute of the Special Court for Sierra Leone ("Statute") thereby forming an integral part of the Agreement.

The period of this report saw significant growth on the foundations laid in the previous year, including the construction of the courthouse in Freetown.

The new courthouse was opened and dedicated on 10 March 2004. The ceremony was attended by members of the Cabinet of the Government of Sierra Leone, senior representatives of interested and donor states, as well as members of the international diplomatic community. The courthouse was officially inaugurated by His Excellency President Alhaji Dr. Ahmad Tejan Kabbah and Mr Hans Corell, the then Under Secretary-General for Legal Affairs for the United Nations, on behalf of H.E. Kofi Annan, Secretary-General.

"I would like to extend to the President of the Court, the judges and the Court's other members my best wishes for success in the difficult work ahead. Your efforts matter greatly not only to Sierra Leone, but to the international community as a whole. In your rulings and convictions lie the capacity to advance the cause of international criminal justice, to uphold the principles of responsibility and accountability, and to build up a deterrent that could help other military and political leaders from directing and committing atrocities in the future." A message by His Excellency Kofi Annan delivered by Mr Hans Corell, Legal Counsel of the UN on 10 March 2004.

The opening of the courthouse coincided with the fifth Plenary of the Judges of the Special Court and the swearing in of the fifth Appeals Chamber Judge, Justice Raja Fernando of Sri Lanka, who replaced Justice Hassan Jallow. During the Plenary, several amendments to the Rules of Procedure and Evidence were adopted, including Rule 18, which by a unanimous vote limited the mandate of the Presiding Judge of the Appeals Chamber (who is also the President of the Court) to a non-renewable term of one year. As a result, Justice Geoffrey Robertson completed his term as the first President and Vice President Justice Renate Winter became acting President.

In May, the fifth Plenary reconvened and the Appeals Chamber Judges also met. Justice Emmanuel Ayoola from Nigeria was elected as President. The Appeals Chamber issued five decisions which greatly contributed to the development of international jurisprudence. The decisions on head of state immunity and the recruitment of child soldiers are considered landmark decisions for international jurisprudence.

On 3 June, the first trial before the Special Court for Sierra Leone opened before Trial Chamber I. Prosecutor David Crane, assisted by Trial Attorney Joseph Kamara, delivered the opening statement in the trial of three alleged leaders of the CDF before Trial Chamber I, comprised of Justice Benjamin Itoe (Cameroon, Presiding), Justice Pierre Boutet (Canada) and Justice Bankole Thompson (Sierra Leone). The second trial, of three alleged members of the Revolutionary United Front (RUF), began on 5 July before the same Chamber.

On 4 December, the first foreign head of state visited the Court. German President Horst Kohler was welcomed by the President of the Special Court, Justice Emmanuel Ayoola.

On 17 January 2005, Trial Chamber II was sworn in. Presiding Justice Teresa Doherty (Northern Ireland), Justice Richard Lussick (Samoa) and Justice Julia Sebutinde (Uganda) began hearing evidence in the third trial, that of three alleged former members of the Armed Forces Revolutionary Council (AFRC), shortly thereafter.

The year under review saw significant cooperation between the Court and the international community in a number of respects. In Freetown, both international and Sierra Leonean staff worked together to implement the many and varied functions of a hybrid court.

Interaction between the Special Court and governments and international organisations resulted in agreements on a number of issues, including detention of indictees and the relocation of witnesses. The Court also reached agreements with health care institutions within Sierra Leone.

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United Nations A/66/183–S/2011/453

General Assembly
Security Council

Distr.: General
26 July 2011

Original: English

General Assembly
Sixty-sixth session
Item 113 (c) of the provisional agenda*
Elections to fill vacancies in principal organs: election of five members of the International Court of Justice

Security Council
Sixty-sixth year

List of candidates nominated by national groups

Note by the Secretary-General**

1. By a communication dated 8 March 2011 addressed on behalf of the Secretary-General to States parties to the Statute of the International Court of Justice, attention was drawn to the fact that the terms of office of the following five members of the Court will expire on 5 February 2012:

Mr. Abdul G. Koroma (Sierra Leone)

Mr. Hisashi Owada (Japan)

Mr. Bruno Simma (Germany)

Mr. Peter Tomka (Slovakia)

Ms. Xue Hanqin (China)

2. In conformity with Article 4 and Article 13 of the Statute of the Court, the General Assembly and the Security Council, during the sixty-sixth session of the General Assembly, will elect five judges for a period of nine years, beginning on 6 February 2012. In accordance with Article 5, paragraph 1, of the Statute of the Court, national groups were thus invited to undertake the nomination of persons in a position to accept the duties of a member of the Court and to submit such nominations to the Secretary-General no later than 30 June 2011.

3. In accordance with Article 7 of the Statute of the Court, the Secretary-General has the honour to submit to the General Assembly and to the Security Council a list in alphabetical order of all the persons thus nominated (see annex).

* A/66/150.

** In accordance with the Statute of the Court, the Secretary-General requested States parties to the Statute to provide nominations to the Court from national groups by 30 June 2011. The present document could therefore not be prepared earlier.

11-43056 (E) 250811

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4. The composition of the Court and the voting procedure to be followed in the General Assembly and in the Security Council are set out in a memorandum by the Secretary-General (A/66/182-S/2011/452). The curricula vitae of the candidates appear in document A/66/184-S/2011/454.

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Annex

List of candidates nominated by national groups

Name and nationality	*Nominated by the national group of*
Gaja, Giorgio (Italy)	Argentina
	Australia
	Belgium
	Bulgaria
	Canada
	Chile
	China
	Colombia
	Denmark
	Finland
	France
	Germany
	Hungary
	Italy
	Japan
	Netherlands
	New Zealand
	Peru
	Spain
	Sweden
	United Kingdom of Great Britain and Northern Ireland
Kamenova, Tsvetana (Bulgaria)	Brazil
	Bulgaria
	Hungary
	Italy
	Lithuania
	Ukraine

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Name and nationality	*Nominated by the national group of*
Koroma, Abdul G. (Sierra Leone)	Finland
	Hungary
	Republic of Korea
	Russian Federation
	Sierra Leone
	Singapore
Owada, Hisashi (Japan)	Argentina
	Australia
	Austria
	Belgium
	Brazil
	Burkina Faso
	Canada
	Chile
	China
	Croatia
	Czech Republic
	Finland
	France
	Germany
	Hungary
	Italy
	Japan
	Lithuania
	Mexico
	Morocco
	Netherlands
	Peru
	Poland

Name and nationality	*Nominated by the national group of*
	Republic of Korea
	Russian Federation
	Singapore
	Slovenia
	Spain
	Sweden
	Switzerland
	Thailand
	United Kingdom of Great Britain and Northern Ireland
	United States of America
Sebutinde, Julia (Uganda)	Croatia
	Denmark
	Uganda
Tall, El Hadji Mansour (Senegal)	Senegal
Tomka, Peter (Slovakia)	Australia
	Belgium
	Cameroon
	Canada
	Chile
	Colombia
	Czech Republic
	Denmark
	France
	Germany
	Lithuania
	Netherlands
	New Zealand
	Peru

Name and nationality	*Nominated by the national group of*
	Russian Federation
	Singapore
	Slovak Republic
	Spain
	Sweden
	Switzerland
	United Kingdom of Great Britain and Northern Ireland
Xue, Hanqin (China)	Australia
	Belgium
	Bulgaria
	Canada
	Chile
	China
	Colombia
	Denmark
	Finland
	France
	Germany
	Italy
	Japan
	Netherlands
	New Zealand
	Pakistan
	Peru
	Russian Federation
	Singapore
	Slovenia
	Spain

Name and nationality	*Nominated by the national group of*
	Sweden
	Switzerland
	Thailand
	United Kingdom of Great Britain and Northern Ireland
	United States of America

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United Nations S/PV.6682

Security Council

Sixty-sixth year

Provisional

6682nd meeting

Tuesday, 13 December 2011, 3 p.m.

New York

President:	Mr. Pankin	(Russian Federation)
Members:	Bosnia and Herzegovina	Mr. Vukašinović
	Brazil	Mr. Fernandes
	China	Mr. Tian Lin
	Colombia	Mr. Alzate
	France	Mr. Briens
	Gabon	Mr. Moungara Moussotsi
	Germany	Mr. Eick
	India	Mr. Kumar
	Lebanon	Mr. Jaber
	Nigeria	Mrs. Ogwu
	Portugal	Mr. Moraes Cabral
	South Africa	Mr. Sangqu
	United Kingdom of Great Britain and Northern Ireland	Mr. Wilson
	United States of America	Mr. Simonoff

Agenda

Election of five members of the International Court of Justice (S/2011/452, S/2011/453 and S/2011/454)

11-63468 (E)

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The meeting was called to order at 3.30 p.m.

Adoption of the agenda

The agenda was adopted.

Election of five members of the International Court of Justice (S/2011/452, S/2011/453 and S/2011/454)

The President (*spoke in Russian*): The Security Council will now proceed to the election of one remaining member of the International Court of Justice, in accordance with Article 13 of the Statute of the International Court of Justice, to fill the remaining seat that will become vacant on 5 February 2012.

Document S/2011/453 indicates, inter alia, the national groups by which each of the two remaining candidates was nominated.

On 10 and 22 November the Council conducted a total of eight ballots. Today the Council will conduct a ninth ballot.

The Security Council has before it a memorandum by the Secretary-General contained in document S/2011/452, describing the present composition of the Court and setting out the procedure to be followed in the conduct of the election.

I should like to remind the Council that, under Article 10, paragraph 1, of the Statute of the International Court of Justice,

> "Those candidates who obtain an absolute majority of votes in the General Assembly and in the Security Council shall be considered as elected".

The required majority in the Security Council is eight votes.

The voting will be held by secret ballot. When we proceed to the vote, members of the Council will receive a ballot containing the names of the two remaining candidates. No candidacy withdrawal will be accepted once the ballot papers have been distributed. However, it will be possible to withdraw between ballots.

Members of the Council will be requested to place an "X" in the box next to the name of the candidate for whom they wish to vote. Only the two candidates whose names appear on the ballot are eligible for election.

I should like to remind members of paragraph 10 of the Secretary-General's memorandum, which specifies that "[e]ach elector may vote for not more than five candidates on the first ballot". Given that the Council will now vote to elect the one remaining member of the International Court of Justice, any ballot paper containing votes for more than one name will be considered invalid.

I should like to inform Council members that, in accordance with established practice, the ballot papers in the Security Council will not be counted until it has been verified that the ballot papers in the General Assembly have also been collected. The Council will remain in session pending the receipt of that information.

When one candidate has obtained the required majority of votes in the Security Council, I shall communicate the result to the President of the General Assembly. I will request the Council to remain in session pending receipt from the President of the General Assembly of the result of the voting in the Assembly.

At the 6551st meeting of the Council, the delegations of Gabon and Nigeria were selected to serve as tellers. The delegation of Gabon is unable to serve as a teller today. The delegations of Nigeria and South Africa have been invited to serve as tellers. I invite the tellers to be seated at the tables behind the Council table.

At the invitation of the President, Mrs. Aguwa (Nigeria) and Mr. Laher (South Africa) acted as tellers.

The President (*spoke in Russian*): May I take it that the Council is now ready to proceed with the election of the one remaining member of the International Court of Justice?

It is so decided.

The Council will now proceed to the ninth ballot. I request the Conference Officer to distribute the ballot papers.

Members of the Council should place an "X" in the box next to the name of the candidate for whom they wish to vote.

* * *

The President (*spoke in Russian*): I take it that all the members of the Council have now voted and I ask the Conference Officer to collect the ballot papers.

* * *

The President (*spoke in Russian*): All the ballot papers have been collected. I should like to remind Council members that, in accordance with the established practice, the ballots will not be counted until it has been verified that the ballot papers in the General Assembly have also been collected. The Council will remain in session pending the receipt of that information.

* * *

The President (*spoke in Russian*): I have now been informed that the ballot papers have been collected in the General Assembly. The counting of the ballots in the Security Council will now begin. The tellers will now count the ballots. As agreed in our consultations, there will be two independent countings of the ballots, one by each teller. I should like to remind Council members that in accordance with established practice, I shall wait for the General Assembly to complete its count before I announce the results of the voting in the Security Council. The Council will remain in session.

* * *

The President (*spoke in Russian*): The result of the voting is as follows:

Number of ballot papers:	15
Number of invalid ballots:	0
Number of valid ballots:	15
Number of abstentions:	0
Required majority:	8
Number of votes obtained:	
Ms. Julia Sebutinde	9
Ms. Julia Sebutinde	6

I wish to inform members of the Council that I have received the following letter from the President of the General Assembly:

(*spoke in English*)

> "I have the honour to inform you that, at the 84th plenary meeting of the General Assembly, held today for the purpose of electing five members of the International Court of Justice, the following candidate obtained an absolute majority of votes in the General Assembly: Ms. Julia Sebutinde."

(*spoke in Russian*)

Accordingly, the same candidate has received the required absolute majority of votes in the Council and in the General Assembly. As both the Security Council and the General Assembly have agreed on the same candidate, the jurists Mr. Giorgio Gaja, Mr. Hisashi Owada, Ms. Julia Sebutinde, Mr. Peter Tomka and Ms. Xue Hanqin have been elected to the International Court of Justice for a period of nine years, beginning on 6 February 2012. I should like to congratulate them warmly and to wish them every success in the high office to which they have been elected.

On behalf of the Council, I would like to thank the tellers for their assistance in the conduct of the elections.

The Security Council has thus concluded its consideration of the item on its agenda.

The meeting rose at 4.10 p.m.

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United Nations A/C.5/53/11

General Assembly

Distr.: General
6 October 1998

Original: English

Fifty-third session
Fifth Committee
Agenda item 113
Programme budget for the biennium 1998–1999

Conditions of service and compensation for officials other than Secretariat officials: members of the International Court of Justice

Report of the Secretary-General

I. Introduction

1. The General Assembly, in section IV, paragraph 3, of its resolution 50/216 of 23 December 1995, requested the Secretary-General to address the issues raised by the Advisory Committee on Administrative and Budgetary Questions (ACABQ) concerning the conditions of service of members of the International Court of Justice (ICJ) in the context of the next review, at the fifty-third session of the General Assembly, in the light of the recommendation contained in the report of the Advisory Committee.[1]

2. In order to facilitate consideration of the various issues regarding the compensation and conditions of service of members of the Court, the present report is divided into the following sections: remuneration, including adjustment for currency fluctuation and cost of living; other conditions of service; pensions; analysis of the practice of the Court with respect to Article 16, paragraph 1, of the Statute of the Court; residence and non-residence status of the members of the Court; financial implications; and the next comprehensive review.

II. Remuneration

3. Article 32 of the Statute of ICJ provides, *inter alia*, that each member of the Court shall receive an annual salary (para. 1), that these salaries and allowances "shall be fixed by the General Assembly" and that "they may not be decreased during the term of office" (para. 5).

4. Since 1976, the General Assembly has conducted periodic reviews of the emoluments of the members of the Court, with the last comprehensive review having been undertaken at the fiftieth session of the General Assembly (see A/C.5/50/18). By paragraph 1 of its resolution 45/250 A of 21 December 1990, the General Assembly decided that, with effect from 1 January 1991, the annual salary of the members of ICJ would be US$ 145,000. By paragraph 2 of its resolution 48/252 A of 26 May 1994, the Assembly maintained the annual salary of the members of ICJ at $145,000. On the occasion of the comprehensive review of the emoluments of the members of the Court undertaken in 1995, the Assembly, by paragraph 2 of part IV of its resolution 50/216, agreed with ACABQ's recommendation to maintain the salary of the members of the Court at $145,000 per annum.

5. The emoluments of the members of the Court are sui generis. However, on the occasion of the periodic

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comprehensive reviews of the emoluments and conditions of service of the members of the Court, information on the net remuneration of senior Secretariat officials, of the Chairman of the Advisory Committee on Administrative and Budgetary Questions, of the Chairman and Vice-Chairman of the International Civil Service Commission (ICSC) and of the members of the Joint Inspection Unit (JIU) as well as the gross emoluments of the president and members of the highest courts in national judiciaries of a number of States and of international courts have been provided as reference points for purposes of comparative assessment.

6. Tables 1 and 2 contain updated information concerning the evolution of emoluments from January 1995 to June 1998. Table 1 compares the movement of the judges' total emoluments with changes in the remuneration of senior Secretariat officials and that of full-time members of other subsidiary bodies of the United Nations; Table 2 provides information obtained, with the assistance of permanent missions to the United Nations, on the movement of gross emoluments of the president and members of the highest courts in a number of national judiciaries. The table also presents information on the movement in emoluments of the President and members of the Court of the European Communities in Luxembourg and of the Iran-United States Claims Tribunal in The Hague, as well as the emoluments of the President and members of the European Court of Human Rights in Strasbourg which, as of the last quarter of 1998, will be transformed into a full-time court.

Table 1
Changes in net remuneration of members of the Court, Secretariat officials and members of United Nations bodies, 1995–1998

(In United States dollars, dependency rate)

	January 1995	*January 1996*	*January 1997*	*January 1998*	*June 1998*
International Court of Justice					
President[a]	160 000	160 000	160 000	160 000	160 000
Index	100.0	100.0	100.0	100.0	100.0
Members of the Court	145 000	145 000	145 000	145 000	145 000
Index	100.0	100.0	100.0	100.0	100.0
Senior Secretariat officials					
The Hague					
ASG[b] (dep. rate)	121 098	140 383	134 558	119 022	122 993
Index (dep. rate)	100.0	115.9	111.1	98.2	101.5
ASG[b] (single rate)	109 851	127 265	122 091	108 027	111 656
Index (single rate)	100.0	115.9	111.1	98.3	101.6
Geneva					
USG[c]	173 461	198 406	172 995	161 207	159 238
Index	100.0	114.4	99.7	92.9	91.8
ASG[b]	158 427	181 306	157 999	147 187	145 380
Index	100.0	114.4	99.7	92.9	91.8
New York					
USG[c]	132 942	141 322	147 041	149 617	149 637
Index	100.0	106.3	110.6	112.5	112.6
ASG[b]	121 263	128 949	134 195	136 557	136 575
Index	100.0	106.3	110.7	112.6	112.6

	January 1995	January 1996	January 1997	January 1998	June 1998
Full-time members of subsidiary bodies					
Chairman, ICSC/ ACABQ[d]	128 776	137 230	137 230	143 692	143 692
Index	100.0	106.6	106.6	111.6	111.6
Vice-Chairman, ICSC	120 776	129 230	129 230	135 692	135 692
Index	100.0	107.0	107.0	112.4	112.4
Members of JIU, Geneva	137 678	157 943	137 299	127 722	126 122
Index	100.00	114.7	99.7	92.8	91.6

[a] Includes special allowance of $15,000.
[b] Includes representation allowance of $3,000 a year.
[c] Includes representation allowance of $4,000 a year.
[d] Includes special allowance of $8,000 a year.

Table 2

Movement in gross emoluments of officers of national judiciaries, the Court of the European Communities and the Iran-United States Claims Tribunal 1995–1998

	1995	1996	1997	1998
1. United States Supreme Court				
Chief Justice (US$)	171 500	171 500	171 500	175 400
Index	100.0	100.0	100.0	102.3
Associate Justice (US$)	164 100	164 100	164 100	167 900
Index	100.0	100.0	100.0	102.3
2. Supreme Court of Canada				
Chief Justice				
(Can$)[a b]	199 900	199 900	204 000	208 200[d]
(US$)	142 786	146 985	152 239	147 660
Index	100.0	102.9	106.6	103.4
Puisne judge				
(Can$)[b c]	185 200	185 200	189 000	192 900[d]
(US$)	132 286	136 176	141 045	136 809
Index	100.0	102.9	106.6	103.4
3. United Kingdom				
Lord Chief Justice				
(£ stg.)	118 179	124 138	132 178	140 006
(US$)	184 655	190 982	222 522	233 347
Index	100.0	103.4	120.5	126.4
Master of the Rolls				
(£ stg.)	109 435	114 874	122 231	131 034
(US$)	170 992	176 729	205 776	218 390
Index	100.0	103.4	120.3	127.7
4. Australia				
Chief Justice				
($A)[e]	211 871	—	—	253 348
(US$)	164 241	—	—	165 587
Index	100.0	—	—	100.8
Justice				
($A)[e]	192 604	—	—	230 309
(US$)	149 305	—	—	150 529
Index	100.0	—	—	100.8
5. Japan				

	1995	1996	1997	1998
Chief Justice				
(¥)	44 268 943	44 665 263	44 883 240	44 883 240
(US$)	444 021	437 895	387 593	345 256
Index	100.0	98.6	87.3	77.8
Associate Judge				
(¥)	32 300 080	32 597 320	32 755 847	32 755 847
(US$)	323 972	319 582	282 866	251 968
Index	100.0	98.6	87.3	77.8
6. Court of the European Communities				
President				
(Bf)[f]	8 679 311	8 774 796	8 897 622	9 093 361
(US$)	271 228	297 451	278 051	246 433
Index	100.0	109.7	102.5	90.9
Member				
(BF)	7 075 526	7 153 367	7 253 496	7 413 066
(US$)	221 110	242 487	226 672	200 896
Index	100.0	109.7	102.5	90.9
7. European Court of Human Rights				
President				
(FF)[g]	—	—	—	1 100 000
(US$)[h]	—	—	—	193 000
Index	—	—	—	100.0
Member				
(FF)[i]	—	—	—	1 100 000
(US$)[h]	—	—	—	193 000
Index	—	—	—	100.0
8. Iran-United States Claims Tribunal				
President (US$)	245 000	—	—	252 000
Index	100.0	—	—	102.9
United States-Iranian Judge		—	—	
(US$)	210 000	—	—	217 500
Index	100.0	—	—	103.6
Third-country judge (US$)	235 000	—	—	242 500
Index	100.0	—	—	103.2

[a] Also entitled to a representation allowance of Can$ 10,000.
[b] Also entitled to an incidental allowance of Can$ 2,500.
[c] Also entitled to a representation allowance of Can$ 5,000.
[d] Salary effective as from 1 April 1998.
[e] Also entitled to an annual allowance of $A 20,000.
[f] Also entitled to a residential allowance of BF 70,661.
[g] Salary will become effective 1 November 1998. Also entitled to annual additional remuneration of FF 75,000, paid on *pro rata temporis* basis.
[h] Estimated United States dollar amount derived using exchange rate of FF 5.7 to US$ 1.00.
[i] Salary will become effective 1 November 1998. Also entitled to annual additional remuneration of FF 37,500, paid on *pro rata temporis* basis.

7. In April 1987, ICSC introduced the concept of a local currency floor and ceiling at a number of duty stations, including The Hague, to protect staff against the weakening of the dollar. The background and the functioning of the floor/ceiling system, as applied to the emoluments of the members of the Court, are discussed in paragraphs 11 to 15 of the Secretary-General's report to the General Assembly at its forty-eighth session (A/C.5/48/66).

8. In paragraph 4 of its resolution 48/252 A, the General Assembly decided to continue the system of floor/ceiling measures introduced for members of the Court pursuant to section VI of General Assembly resolution 43/217. In paragraph 8 of his report to the General Assembly, at its

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fiftieth session (A/C.5/50/18), the Secretary-General indicated that the 1994 floor/ceiling exchange rates had been derived by applying the previous formula of 4 per cent above and 4 per cent below the average exchange rate to the year 1993. The average exchange rate in 1994 was 1.82 guilders to the dollar and yielded revised floor/ceiling exchange rates of 1.75 and 1.89 guilders, respectively. The floor exchange rate of 1.75 guilders to the dollar resulted in a revised currency floor of 21,145 guilders per month and the ceiling exchange rate of 1.89 guilders to the dollar resulted in a revised currency ceiling of 22,837 guilders per month.

9. In paragraph 12 of the same report, the Secretary-General expressed the opinion that the annual emoluments of members of the Court should be maintained at their current level of $145,000. He also noted that the mechanism used to regulate emoluments against the weakening/strengthening of the dollar had provided only limited protection for the judges over the period since the beginning of 1994. Although he proposed that the same mechanism continue to be applied, he drew the attention of ACABQ to the serious diminution in the real level of emoluments as a result of the use of the United States dollar as a reference currency. He inferred that action could be taken to restore the real 1991 value of those emoluments, in line with the spirit of Article 32 of the Statute of the Court.

10. In paragraph 6 of its report,[1] the Advisory Committee expressed its agreement with the Secretary-General's opinion that the annual emoluments of the members of the Court should be maintained at the current level of $145,000 and recommended that, "should the current mechanism used to regulate emoluments against the weakening/strengthening of the dollar be considered inadequate, the Secretary-General [should] make proposals in this regard, bearing in mind the various studies that have been carried out on this issue in the recent past."

11. In 1996, the Advisory Committee was advised that it had been found reasonable to continue to apply through 1996 the floor/ceiling mechanism that had been applied in 1995 in the light of the provisions of Article 32 of the Statute of the Court, which specify that the remuneration and allowances of the members of the Court "shall be fixed by the General Assembly, and may not be decreased during the term of office", and pending the next review of the conditions of service for the members of the Court.

12. Consequently, floor/ceiling exchange rates of 1.75 and 1.89 guilders, respectively, applied in 1995 for the purpose of effecting monthly payments in guilders to the members of the Court, were applied in 1996 and 1997.

13. The Advisory Committee was further advised that the movement in the exchange rate of the guilder to the dollar would continue to be monitored. If any significant strengthening of the dollar were to be noted vis-à-vis the guilder and if it was found that a revision in the floor/ceiling exchange rates was needed, the Committee would be informed accordingly.

14. The dollar strengthened significantly during 1997. In this light, for the year 1998, it was found reasonable to revise the floor/ceiling rates used for effecting monthly payments in guilders to the members of the Court. Based on the methodology proposed by the Secretary-General and, as recommended by ACABQ and approved by the General Assembly, the floor/ceiling rates were set at 4 per cent below and 4 per cent above the average exchange rate of the previous year. For the year 1997, the average exchange rate is 1.94 guilders to $1.00. On this basis, the floor/ceiling exchange rates were revised to 1.86 and 2.02 guilders, respectively. The floor exchange rate of 1.86 guilders to the dollar results in a currency floor of 22,474 guilders per month and the ceiling exchange rate of 2.02 guilders to the dollar results in a currency ceiling of 24,408 guilders per month.

15. Table 3 indicates the official exchange rate for the guilder against the dollar for the period from January 1994 to September 1998. Over the period, the floor amount has been payable for 26 months and the ceiling amount for 17 months.

Table 3
Exchange rate of the guilder to the dollar, January 1994–September 1998

	1994	1995	1996	1997	1998
January	1.92	1.74	1.61	1.75	2.02
February	1.95	1.70	1.67	1.85	2.06
March	1.92	1.64	1.63	1.90	2.02
April	1.88	1.57	1.65	1.89	2.08
May	1.88	1.54	1.70	1.95	2.02
June	1.85	1.54	1.71	1.91	2.00
July	1.78	1.56	1.71	1.94	2.04
August	1.76	1.56	1.67	2.07	2.04
September	1.74	1.65	1.67	2.02	2.03
October	1.76	1.59	1.71	2.02	
November	1.69	1.57	1.71	1.94	
December	1.75	1.61	1.72	1.99	

16. The floor/ceiling mechanism used to regulate emoluments against the weakening/strengthening of the dollar has served to limit the diminution of the emoluments of the members of ICJ expressed in guilders, particularly in 1995 and 1996, when the dollar weakened against the guilder, as well as restricting the increase in the judges' emoluments in 1997 and 1998, when the dollar strengthened against the guilder. Overall, the floor/ceiling mechanism has served to offset fluctuations in the value of the dollar against the guilder. Nevertheless, as a result of the increase in the cost of living in the Netherlands, the emoluments of the members of ICJ have experienced a diminution in real value since 1991. According to official statistics of the Netherlands provided by the Court, the consumer price index for the Netherlands for the period from 1 January 1990 to 31 December 1997 increased by 19 per cent.

17. The Court has noted that, if the emoluments of the members of the Court had been adjusted every year in relation to the consumer price index, the total sum of these emoluments would, over the period from 1 January 1990 to 31 December 1997, have reached a level of $1,101,275, or $157,325 per year. A comparison of the latter amount with the annual salary of $145,000 shows a difference, i.e, a loss, of $12,325 per year. When compared to the real value of the emoluments, while taking into account the floor/ceiling mechanism for the conversion of salary from United States dollars into guilders, the value of the annual salary over the seven-year period would show a difference of $1,035,125, or an annual salary of $147,732. On this basis it can be seen that, while the floor/ceiling mechanism provided a certain amount of protection in maintaining the value of the level of annual remuneration, it failed to keep pace with the increase in the cost of living in the Netherlands. The total loss in remuneration over the seven-year period was $66,150 or, on average, $9,450 per year.

18. In its earlier report on the subject,[2] the Advisory Committee had expressed its view that under the existing system of adjustment for currency fluctuations and cost of living, the strengthening of the United States dollar vis-à-vis the guilder had more than offset the increases in the local cost of living. While this may have been the case in some years, it has not been so in other years, and is not so currently. It is a fact that, over time, the cost of living in the Netherlands has continued to increase cumulatively. As at 1 January 1994, the rise in the cost of living in the Netherlands, compared to 1 January 1991, was 8.7 per cent. As at 1 January 1998, the cost of living in the Netherlands had increased by 19 per cent. Even when taking into account the floor/ceiling mechanism, the loss in purchasing power has been considerable. As at 1 January 1991, the floor/ceiling exchange rates were 1.77 and 1.91, respectively. With effect from 1 January 1998, the floor/ceiling exchange rates are 1.86 and 2.02, respectively. There has been a 5.4 per cent increase in the floor/ceiling exchange rates. In real terms, the loss in purchasing power between 1 January 1991 and 1 January 1998 was 13.57 per cent (18.97% – 5.4% = 13.57%). The members of the Court have made representations to the effect that, in order to restore the real level of the emoluments of the members of ICJ, the annual salary should be increased by $19,500, from $145,000 to $164,500, i.e., by 13.4 per cent.

19. Paragraph 5 of Article 32 of the Statute of the Court provides, *inter alia*, that the salaries of the members of the Court "may not be decreased during the term of office". Based on the above information and, in line with the spirit of Article 32 of the Statute of the Court, it would seem reasonable that measures should be taken to restore the purchasing power of the emoluments of the judges. In this regard, it is also noted that no retroactive adjustment is proposed to be made to the salaries of members of ICJ to offset fluctuations in the value of the United States dollar against the guilder. Consequently, it is recommended that action be taken to increase the level of annual remuneration of the members of the Court from the current level of $145,000 to $164,500. It is also noted that the mechanism used to regulate emoluments against the weakening/strengthening of the dollar has provided a measure of protection against the erosion in the level of salary of the judges. Therefore, it is also proposed that the same floor/ceiling mechanism continue to be applied to the emoluments of the judges.

III. Other conditions of service

20. The background of other conditions of service of the members of ICJ is provided in the report of the Secretary-General to the General Assembly at its forty-eighth session (A/C.5/48/66), i.e., in section IV (paras. 16-21), concerning the special allowances of the President and of the Vice-President when acting as President; section V (in paras. 22 and 23), relating to compensation of ad hoc judges; and in section VI (paras. 24-31), pertaining to the costs of educating children.

21. Article 32 of the Statute of the Court provides that the President shall receive a special annual allowance (paragraph 2) and that the Vice-President shall receive a special allowance for each day on which he acts as President (paragraph 3). As is the case with remuneration, these allowances "shall be fixed by the General Assembly" and "may not be decreased during the term of office" (paragraph 5). General Assembly resolution 31/204 provides that the allowances "shall be reviewed concurrently with the periodic review of their annual salary" (paragraph 3).

22. The General Assembly, by its resolution 50/216, part IV, paragraph 2, decided that the President's special allowance should remain at $15,000 a year and that the special daily allowance paid to the Vice-President when acting as President should remain at $94 per day, subject to a maximum of $9,400 per year.

23. Accordingly, the Secretary-General recommends no change in the current level of the special allowances of the President of the Court and the Vice-President when acting as President.

24. Turning to the issue of compensation of ad hoc judges, under Article 31 of the Statute of the Court, persons whom parties to cases before the Court choose to "take part in the decision on terms of complete equality with their colleagues" (para. 6) are known as ad hoc judges. Further to Article 32, paragraph 4, of the Statute, they "shall receive compensation for each day on which they exercise their functions". The historical background to the determination of the amount of that compensation was presented in the report of the Secretary-General to the General Assembly at its fortieth session (A/C.5/40/32, paras. 35-41).

25. The General Assembly, in paragraph 3 of its resolution 48/252 A, decided that, with effect from 1 January 1994, the ad hoc judges referred to in Article 31 of the ICJ Statute should receive for each day they exercise their functions, one three-hundred-and-sixty-fifth of the annual salary payable at the time to a member of the Court. On the occasion of the 1995 review, the Secretary-General proposed that no change be made in these arrangements. The General Assembly, by part IV, paragraph 2, of its resolution 50/216, concurred with this proposal. On this occasion, the Secretary-General proposes that no change be effected in these arrangements.

26. The background to the issue of costs of educating children, as applied to the members of the Court, is provided in paragraphs 24 through 29 of document A/C.5/48/66. By paragraphs 1 and 2 of its resolution 48/252 C of 26 May 1994, the General Assembly decided that, with effect from 1 January 1994, the President and the members of the International Court of Justice who had taken up residence at The Hague should be reimbursed, up to a ceiling of $9,750, for the actual cost of educating their children, and $13,000 for the actual cost of educating their disabled children, in respect of each child each year up to the award of the first recognized degree and that provision should be made for one related return journey per year in respect of each child from the place of scholastic attendance, when outside the Netherlands, and The Hague.

27. In his report to the General Assembly at its fiftieth session, the Secretary-General proposed that, further to resolution 45/250 C, the increase in the level of the education grant (including that for disabled children) applicable to staff in the Professional and higher categories approved by the General Assembly in resolution 49/223 should be extended, under the same conditions, to the members of the Court, as from the school year in progress on 1 January 1995 (A/C.5/50/18, para. 21). In paragraph 8 of its report,[3] ACABQ agreed with the proposal of the Secretary-General, on the understanding that this benefit would be extended only to the members of the Court who had taken up residence at The Hague. The General Assembly, in part IV, paragraph 2, of its resolution 50/216, concurred with the recommendation of the Advisory Committee.

28. Subsequent to the 1996 review of the level of the education grant by the International Civil Service Commission, the General Assembly, by part IV of its resolution 51/216 of 18 December 1996, approved the increases in the maximum reimbursement levels in seven currency areas, as well as other adjustments to the management of the reimbursement of expenses under the education grant, recommended by ICSC in its report to the Assembly at its fifty-first session[4] (see table 4).

Table 4
Education grant

Currency	*Maximum admissible educational expenses (local currency)*[a]	*Maximum grant (local currency)*	*Ceiling for boarding costs (local currency)*
Swiss franc	22 107	16 680	4 913
Italian lira	20 790 000	15 592 500	4 620 000
Norwegian krone	71 632	53 724	15 918
Netherlands guilder	28 836	21 627	6 408
Pound sterling	12 375	9 281	2 750
Swedish krona	91 575	68 681	20 350
United States dollar	18 675	14 006	4 166

[a] The amount of the special education grant for each disabled child is equal to 100 per cent of the revised amount of maximum admissible educational expenses for the regular education grant. In areas where education-related expenses are reimbursed in other currencies, the amounts remained unchanged.

29. The Secretary-General recalls that, in accordance with the recommendation of the Advisory Committee in its seventh report to the General Assembly at its forty-eighth session,[5] the next review of the costs of educating children of the members of ICJ will be conducted at the time of the next comprehensive review of conditions of service.

30. The Secretary-General would propose that, further to General Assembly resolution 45/250 C of 21 December 1990, the increase in the level of education grant (including that for disabled children) effective 1 January 1997, applicable to staff in the Professional and higher categories approved by the Assembly in part IV of resolution 51/216 of 18 December 1996, should be extended, under the same conditions, to the members of the Court, as from the school year in progress on 1 January 1998. The programme budget implications of the proposed change are discussed in paragraph 60 below.

31. ICSC has made recommendations to the General Assembly to update the current levels of the education grant. It is expected that a decision thereon will be taken by the Assembly at its fifty-third session. Any increase decided upon by the Assembly in the level of the grant or changes in the provisions regarding disabled children should be extended to the members of the Court.

32. No change is proposed with regard to other conditions of service of the members of the International Court of Justice.

IV. Pensions

33. The members of ICJ are entitled to retirement pensions in accordance with Article 32, paragraph 7, of the Statute of the Court, the specific conditions of which are governed by regulations adopted by the General Assembly. The General Assembly, in paragraph 1 of its resolution 48/252 B of 26 May 1994, invited the Secretary-General to undertake a study of the pension scheme for the members of ICJ and to report thereon to the Assembly at its forty-ninth session.

34. A review of the pension benefits and the corollary aspects of the current pension scheme were presented in the report of the Secretary-General to the forty-eighth and forty-ninth sessions of the Assembly (A/C.5/48/66, paras. 32-41 and A/C.5/49/8, paras. 6-16). In reviewing the latter report, the Advisory Committee reiterated its 1994 recommendation that it was not necessary to recommend a change in the pension benefits of the members of the Court. The Advisory Committee expressed its view that the request by the General Assembly for a study of the pension scheme for the members of the International Court of Justice had not been fully addressed. It recommended that the Secretary-General include a comprehensive review of the pension scheme for the members of the Court in his report to be submitted to the General Assembly at its fiftieth session. The report should include, on the advice of qualified actuaries, a review of benefit provisions, including those of retirement age, minimum period of service, rate of accumulation of pension benefits, early retirement benefits, contributory participation, cost-of-living adjustments and retroactive rights of pensioners.[6]

35. Pursuant to the request of the Advisory Committee, the Secretary-General sought the advice of a consulting actuary on the pension scheme of the members of ICJ. The text of the comprehensive actuarial review conducted by the consultant is contained in the annex to the Secretary-General's report (A/C.5/50/18) to the fiftieth session of the General Assembly. Based on the findings of the consultant's report, the Secretary-General concluded that the review corroborated most of the recommendations he had presented to the General Assembly at its forty-eighth session (A/C.5/48/66 paras. 32-41). On that basis, the Secretary-General recommended that:

(a) The pensionable remuneration of a judge should be defined as being equal to half the annual salary;

(b) The pension should constitute the pensionable remuneration of a judge who completes a nine-year term, with a proportional reduction for a judge who has not completed a full term. A judge who is re-elected should receive 1/300th of his pension benefit for each further month of service, up to a maximum pension of two thirds of annual salary;

(c) The pension scheme should remain non-contributory;

(d) An actuarial reduction factor at a rate of one half of one per cent per month should be applied in a case of early retirement;

(e) Surviving spouses should receive a pension equal to 60 per cent of a judge's pension; alternatively, judges could opt to increase a spouse's pension up to a maximum of a further 50 per cent by means of an actuarial reduction in their pension;

(f) Upon remarriage, a surviving spouse should be granted a lump sum equal to twice the amount of the spouse's current annual benefit as a final settlement (A/C.5/50/18, para. 27).

36. However, in reviewing the Secretary-General's recommendations, ACABQ, expressed its belief "that the various recommendations and options discussed in the report of the consulting actuary should have been analysed in the main text of the report of the Secretary-General. In particular, the rationale for the recommendations of the Secretary-General, as mentioned in paragraphs 27 (a) to (f) of the report, should have been explained in the main text of the report and cross-referenced to the corresponding paragraphs in the report of the consulting actuary in the annex". Therefore, the Advisory Committee recommended, and the General Assembly agreed, "that the Secretary-General re-examine the pension scheme of the members of the Court in a report that takes full account of the request of the Advisory Committee".[7]

37. As described in paragraph 35 (a) and (b) above, the Secretary-General recommended that the pensionable remuneration of a judge should be defined as being equal to half the annual salary, and that the pension should constitute the pensionable remuneration of a judge who completes a nine-year term, with a proportional reduction for a judge who has not completed a full term. A judge who is re-elected should receive 1/300th of his pension benefit for each further month of service, up to a maximum pension of two-thirds of annual salary. Those recommendations were based on the findings of the consulting actuary as set out in part II of the annex to the Secretary-General's report (A/C.5/50/18).

38. In response to the request of the General Assembly, the following analysis of the actuary is as follows:

(a) *Design of pension scheme.* In regard to the designing of the pension scheme, the consulting actuary observed that "the modern view on pension scheme design is that an acceptable scheme should provide a reasonable replacement income, after allowing for social security and personal savings, following a full career with the employer. A 'reasonable replacement income' is generally held to be an income sufficient to maintain a standard of living after retirement equivalent to that enjoyed in the immediate years prior to retirement. A 'full career' is usually defined as a career assuming entry age for a typical new entrant at the start of his or her career and continued employment until normal retirement age" (para. 2.2). Reference to the practice of certain Member States is contained in para. 2.3 of the consultant's report;

The consulting actuary also noted the unusual nature of service in the Court. First, members were elected at a relatively advanced age, the average age at entry for all cohorts being around age 60. Second, the average service was about 10 years' duration, with an average retirement age in the range of 70 to 72. He also observed that, over the last 21 years, 8 out of the 36 deceased judges, or approximately 22 per cent, had died in the course of service and therefore prior to receipt of a pension payment. Finally, the consulting actuary noted that the average duration of pension for a retired member of the ICJ was about 12 years, (paras. 2.7, 2.9 and 2.10). In view of the foregoing, the consulting actuary concluded that a full career in the service of the Court could reasonably be taken to mean two full terms, i.e., 18 years. Moreover, based solely on general principles as applied to pension scheme construction, he further concluded that the overall design of the scheme in force prior to 1 January 1991 was "not unreasonable" (para. 2.12);

(b) *Pensionable remuneration – methodology for its determination.* Based on the analysis presented and the comparative data available, the consulting actuary indicated that a soundly designed pension scheme should relate pension benefits directly to pay at or near retirement by formula rather than by fixed amount, since this provided an automatic link between pre-retirement and post-retirement income (para. 2.24). In summary, the consulting actuary recommended that the pension formula relating to the accrual rate should revert to that in effect immediately prior to 1 January 1991, subject to a review of the definition of pensionable remuneration. Such a change would make clear the relationship between pre-retirement and post-retirement income and thus facilitate direct comparison with other schemes, as opposed to the current regime of fixed pensions which had the appearance of being arbitrary (para. 2.26);

Regarding pensionable remuneration, the consulting actuary concluded that pensionable remuneration could be defined as full annual salary or the portion of such salary that did not reflect the cost of living in The Hague (para. 2.43). In the former case, there would be less need for a local currency provision with attendant initial adjustment in

pension for high-cost countries, and the principle of full retroactivity for pensioners would be maintained. In the latter case, retirees in high-cost countries would not achieve the levels of replacement income envisaged in the scheme design during periods when the United States dollar was weak; that would therefore suggest a need for a two-track pension adjustment system along the lines of that employed by the United Nations Joint Staff Pension Fund (UNJSPF). In practical terms, the choice would appear to be between simplicity with some inequity on the one hand and complexity with equity on the other hand. If the full annual salary were applied to the pension regime in force prior to 1 January 1991, simplicity would result but there would be some inequity as regards those who retire to particularly high-cost countries. If only a portion of the full annual salary were applied to pensionable remuneration with the introduction of a local currency pension adjustment system, there would be a larger degree of equity coupled with more complexity in administration. On balance, the consultant tended to favour the simple approach given the size of the group in question. It followed therefore that a return to the 1 January 1991 pension regime but with the application of the revised annual salary in force as of that date would be suitable;

(c) *Contributory participation*. On the issue of establishing a contribution requirement, the consulting actuary recommended against having the members of the Court contribute to their pensions in the light of the fact that, for the members of the Court, anticipated service was much shorter than for those participating in the UNJSPF, "which leads us to believe that meaningful cost-sharing could not occur without the members' contributions being set at inordinately high levels" (para. 2.36). In addition, in the more usual pension schemes, members' contributions were made on the expectation that they would be returned as part of the pension payments over many years of retirement. This was not the case for the members of the Court, who often served beyond the age when most employed persons retired and who had a more limited expectation of return. Moreover, those members who chose to serve longer would be treated inequitably in comparison with those who served the Court for a limited period, because they would be required to contribute over a longer period while expecting to receive pension payments over a shorter number of years. This issue did not arise in the more usual pension arrangements because the vast majority of members retired either before or at normal retirement age, with the result that the expected length of pension payments was relatively similar for all retirees. It did not seem appropriate to require contributions if the scheme was not funded;

(d) *Retirement benefits*:

(i) *Early retirement benefits*. As regards the question of early-retirement benefits, is was noted that the pension scheme provided that members of the Court retiring before age 60 might elect to receive an immediate pension of equivalent actuarial value to the pension which would have been paid at age 60. However, the actuarial basis for determining actuarial equivalence was not defined in the scheme rules. The consulting actuary expressed the view that the early retirement provisions as set forth in the scheme were reasonable and in keeping with sound, modern pension design. Therefore, the recommendation was made that actuarial reduction factors be adopted as part of the scheme rules as that would provide a readily available basis for determining early retirement pensions. As the calculations indicated that the actuarial equivalencies could be approximated very closely by a standard reduction of ½ per cent per month by which the pension commencement date preceded age 60, it was recommended that that factor be adopted as part of the scheme rules. (para. 2.28);

(ii) *Surviving spouse pension benefit*. On the issue of surviving spouse's pensions, the consulting actuary noted that pension schemes in several European countries, such as Germany and the Netherlands, commonly provided surviving spouses' pensions at the rate of 60 per cent rather than the rate of 50 per cent more commonly found in the United States and within the United States-based international organizations (para. 2.32). The consulting actuary therefore submitted that a rate of 60 per cent for surviving spouses pensions was not unreasonable and that a lump sum settlement of twice the annual pension upon the remarriage of the surviving spouse also was reasonable (para. 2.33).

V. Conclusions regarding the pension scheme for the judges of the International Court of Justice

39. Based on the analysis and findings of the consulting actuary's report, the Secretary-General believes that the pension scheme for the members of ICJ should provide adequate after-service benefits to judges having met the requisite eligibility criteria relating to retirement age and period of service based upon the premise that the pension benefit maintains a standard of living as replacement income.

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40. Based on the consulting actuary's recommendations vis-à-vis the pension scheme for the members of the Court, the Secretary-General recommends that:

(a) The pensionable remuneration, or retirement pension, of a judge should be defined as being equal to half the annual salary;

(b) The pension benefit should constitute the retirement pension of a judge who completes a nine-year term, with a proportional reduction for a judge who has not completed a full term. A judge who is re-elected should receive 1/300th of his pension benefit for each further month of service, up to a maximum pension of two thirds of annual salary;

(c) The pension scheme should be non-contributory;

(d) An actuarial reduction factor at a rate of one-half of one per cent per month should be applied in a case of early retirement;

(e) Surviving spouses should receive a pension equal to 60 per cent of a judge's pension; alternatively, judges could opt to increase a spouse's pension up to a maximum of a further 50 per cent by means of an actuarial reduction in their pension;

(f) Upon remarriage, a surviving spouse should be granted a lump sum equal to twice the amount of the spouse's current annual benefit as a final settlement.

41. However, in order to avoid a disproportionate increase in pension, the Secretary-General would propose that the recommendation to base the retirement pension at half the annual salary shall be implemented in two stages: half to come into force as of 1 January 1999 and half as of 1 January 2000. Therefore, he would recommend that, with effect from 1 January 1999, the pension benefit be increased from $50,000 to $66,125 and that, effective 1 January 2000, the retirement pension be set at 50 per cent of the annual salary.

Table 5
Percentage increase in level of pension benefits

Amount of annual pension (United States dollars)		
From	*To*	*Percentage increase*
50 000	66 125	32.25
50 000	82 250	64.50
66 125	82 250	24.40

42. Should the proposals above with regard to pensions be found acceptable, the Secretary-General would propose that the Registrar of the Court amend the pension scheme regulations accordingly.

VI. Analysis of the practice of the Court with respect to Article 16, paragraph 1, of the Statute of the Court

43. In paragraph 8 of its report,[8] the Advisory Committee expressed its view that the broader review of the conditions of service of the judges should include an analysis of the practice of the Court with respect to Article 16 of the Statute of the Court. That Article provides as follows:

> "1. No member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature.
>
> "2. Any doubt on this point shall be settled by the decision of the Court."

44. In keeping with Article 16, paragraph 2, of the Statute of ICJ, the Secretary-General requested the Court to provide clarification on the matters raised by the Advisory Committee. The response of the Court was presented in paragraphs 29 to 33 of his report (A/C.5/50/18), presented to the Assembly at its fiftieth session.

45. The Advisory Committee indicated in its report[9] that, despite the analysis presented, there were still a number of questions which remained unanswered. Consequently, it recommended, and the General Assembly agreed, to invite the Court to look again at this issue in the light of the observations and concerns of the Advisory Committee.

46. In response to the comments and concerns of the Advisory Committee regarding the application of Article 16, the Court has provided clarification of its practice as follows. The Court has interpreted the provisions of Article 16 as prohibiting judges of the Court from maintaining or exercising any political or administrative function, whether international, national, or local, whether commercial or otherwise; engaging in any other occupation of a professional nature, *inter alia*, holding a position in a commercial concern, engaging in the practice of law, maintaining membership in a law firm or rendering legal or expert opinions; or holding a permanent teaching or administrative position in a university or faculty of law.

47. Under the authority vested in the Court under Article 16, paragraph 2, ICJ has, in view of the judicial character of the activities involved, interpreted the bar to the members of

the Court engaging in other occupations of a professional nature as not debarring a limited participation of judges in other judicial or quasi-judicial activities of an occasional nature, as well as scholarly pursuits in the sphere of international law as members of learned societies or as occasional lecturers. The judges accepting such occasional activities give the fullest precedence to their supervening duties as members of the Court. Based on a long-standing tradition of the Permanent Court of International Justice, founded in 1922, as well as the recorded intention of the Conference that adopted the text of Article 16 of the Statute, the Court further interpreted the Article as permitting acceptance of occasional appointments as arbitrators. In doing so, the Court referred to a similar practice existing in the courts of a number of Member States, such as France, Germany, the Netherlands, India, Canada, Australia, Sweden, Norway, Denmark, Tunisia and the Libyan Arab Jamahiriya, as well as some states of the United States of America.

48. The Court has consistently taken the position that contributions by its members to third-party settlement of disputes by legal processes in other forums, as occasional service as arbitrators, are compatible with the judges' functions as members of the Court. These activities are subject, however, to two conditions. The first is that the judges must give absolute precedence to their obligations as members of the Court. The second is that they should not accept appointment in an arbitral case, which, in another phase, is subject to being submitted to the Court.

49. As regards its practice, the possibilities of members of the Court engaging in such outside activities have varied in accordance with the intensity of the work of the Court. During times when the workload of the Court was reduced (as it was in the years 1967–1983), participation in outside activities was more feasible than when the work of the Court was as intense as it has been during the past decade. Thus at one time a judge could simultaneously sit on the Court and on the European Court of Human Rights, an arrangement which nowadays would not be conceivable.

50. At the present time, because of the Court's heavy caseload, the members of the Court have little possibility of engaging in activities other than those required by the Court. A certain number of members occasionally lecture or write articles in learned journals. Members of the Court participate in meetings of learned societies such as the Institute of International Law. These activities are largely without compensation, and the Court provides no kind of payment or travel or other expenses incidental to such activities. When on exceptional occasion a judge acts as arbitrator, the Court ensures that such service in no way detracts from the work of the Court and that the Court pays no expenditures arising out of such service.

51. In reply to questions of ACABQ as to whether the premises or resources of the Court, including staff, have been utilized for outside activities, the Court has affirmed that all judges, in accordance with guidelines circulated to them, are obligated to reimburse all telephone, facsimile and postage and other expenses relating to any of these activities. Court premises are not used for arbitral sessions; however, judges as well as Registry staff give lectures on the work of the Court to visiting groups on Court premises. Staff of the Court do not participate in arbitral activities.

52. In clarification of its practice under Article 16 of the Statute, and in response to its own concerns as well as those of ACABQ, the Court, in July 1996, adopted a new directive as follows:

> "In cases in which a member of the Court is invited to accept an arbitral commitment, membership in another tribunal, remunerated series of lectures or a contract for the publication of a book, or series of articles, he or she shall consult, before acceptance, the President of the Court, who, should the need arise, shall consult the Court; in cases where the President of the Court is invited, he or she shall, before acceptance, consult the Court. In view of the increased workload of the Court, members of the Court shall exercise restraint in accepting undertakings of this kind (whether remunerated or not)."

VII. Residence and non-residence status of the Members of the Court

53. In paragraph 6 of its report,[9] the Advisory Committee recommended that "the Secretary-General address the issue of residence and non-residence status of the members of the Court as it impacts on their salary and other conditions of service, as well as the need to issue rules and procedures that regulate the administration of the benefits of the members of the Court".

54. Article 22, paragraph 2, of the Statute of ICJ provides that the President and the Registrar shall reside at the seat of the Court. Article 23 provides that members of the Court shall hold themselves permanently at the disposal of the Court.

55. Article 3 of the Travel and Subsistence Regulations of ICJ provides that "the President of the Court, who by virtue of Article 22 of its Statute shall reside at the seat of the Court,

and any other member of the Court who takes up residence at the seat of the Court in compliance with Article 23 of the Statute, shall be entitled ... to full removal costs of household goods and personal effects to the seat of the Court from his home at the time of appointment (or any country other than that where the Court has its seat if less expenditure is entailed) [and] to an amount corresponding to the installation grant provisions applicable to senior officials of the Secretariat of the United Nations".

56. Based on the above, bona fide residence status at The Hague could be defined as being applicable to any member for whom full removal and installation have been paid under the provisions of Article 3, paragraph 1, of the Travel and Subsistence Regulations of the International Court of Justice, adopted by the General Assembly in its resolution 37/240 of 21 December 1982.

57. As regards the impact of residence or non-residence of members of the Court on conditions of service, the Secretary-General recalls that the General Assembly has conditioned the eligibility of members of the Court for education, installation and repatriation allowances on their having taken up residence in The Hague, whereas travel entitlements of non-resident and resident members are governed by General Assembly resolution 37/240.

58. As far as the effect of the status of residence or non-residence on the salary of the members of the Court, the Secretary-General notes that the annual salary is expressed in United States dollars and paid in guilders and it is not affected by residential status.

59. The Court has communicated its view on residence status as follows:

> "As a consequence of its increased workload over the last dozen years, the Court meets throughout the year, except for mid-summer and the turn of the year. The presence of the judges at the seat of the Court is accordingly required throughout the year. This situation is not going to change soon. Under these circumstances, the appropriate definition of the residence status of judges is the establishment, through acquisition or long-term lease, of a permanent residence in The Hague, coupled with the option by the judge concerned for resident status."

VIII. Financial implications

60. Should the General Assembly approve the proposals contained in paragraphs 19, 25, 30, 31, 40 and 41 above, the programme budget implications of the increase in annual salary and the changes proposed in the pension scheme for members of the International Court of Justice and costs of educating children of its members are estimated at $726,400 for the biennium 1998–1999, as reflected in Table 6 below. No changes are proposed to the other conditions of service of the members of the Court.

Table 6
Programme budget implications 1998–1999
(In United States dollars)

Salary increase (para. 19)	292 500
Increase in emoluments of ad hoc judges (para. 25)	38 500
Education grant increase (paras. 30 and 31)	4 200
Pensions (paras. 40 and 41)	391 200
Total	**726 400**

61. The estimated requirements of $38,500 for the emoluments of ad hoc judges would fall under the provisions of paragraph 1 (b) (i) of General Assembly resolution 52/223 of 22 December 1997 on unforeseen and extraordinary expenses for the biennium 1998–1999.

62. In respect of the balance of the estimated requirements, i.e. $687,900, arising from the Secretary-General's proposals, relating to an increase in the annual salary and the costs of educating children of members of the Court, and additional pension payments in respect of former judges and the widows of judges, for the 1998–1999 biennium, the requirements are seen as relating to inflation and should be treated outside the procedure related to the contingency fund, as provided for in paragraph 11 of annex I to General Assembly resolution 41/213 of 23 December 1986. In accordance with the decision of the General Assembly contained in part III, paragraph 34, of its resolution 52/220 of 22 December 1997, any resource change resulting from decisions taken by the Assembly with regard to emoluments and other conditions of service for the members of the Court will be reported in the performance report on the programme budget for the biennium 1998–1999.

63. In accordance with their respective statutes, the terms and conditions of service of the judges of the International

Tribunal for the Former Yugoslavia are those of the judges of the International Court of Justice, while the terms and conditions of service of the judges of the International Tribunal for Rwanda are those of judges of the International Tribunal for the Former Yugoslavia. In its review of the conditions of service for the judges of the two ad hoc Tribunals as contained in the report of the Secretary-General (A/52/520), the General Assembly, upon the recommendation of ACABQ, agreed in its resolutions 52/217 and 52/218 of 22 December 1998, respectively, to defer the consideration of the pension entitlement for members of the two Tribunals until the review of the report of the Secretary-General on the emoluments and pension scheme of members of the International Court of Justice to be submitted to the General Assembly at its fifty-third session.

64. Should the General Assembly approve the proposals contained in paragraphs 19, 25, 30, 31, 40 and 41 of the present report, the financial implications for the proposed resource requirements for 1999 for the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda to be submitted to the General Assembly at its fifty-third session will be as follows:

Table 7

	Former Yugoslavia Tribunal	*Rwanda Tribunal*
	(In United States dollars)	
Emoluments – salary increase	273 000	175 500
Relocation allowance	—	9 000
Pensions	49 600	8 800
Total	**322 600**	**193 300**

IX. Next comprehensive review

65. By its resolution 48/252 A, the General Assembly decided that the periodicity of review of the conditions of service of the members of ICJ should be determined at the fiftieth session of the Assembly.

66. By its resolution 50/216 of 23 December 1995, the General Assembly, decided that the next comprehensive review of the conditions of service of the judges would take place at its fifty-third session. Should the General Assembly decide to continue the three-year review cycle, the next comprehensive review by the Assembly would be undertaken at its fifty-sixth session in 2001.

Notes

[1] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 7A* (A/50/7/Add.1-16), document A/50/7/Add.11, para. 14.

[2] Ibid., *Forty-eighth Session, Supplement No. 7A* (A/48/7/Add.1-17), document A/48/7/Add.6, para. 4.

[3] Ibid., *Fiftieth Session, Supplement No. 7A* (A/50/7/Add.1-16), document A/50/7/Add.11.

[4] Ibid., *Fifty-first Session, Supplement No. 30*, (A/51/30), para. 230 (a)-(f).

[5] Ibid., *Forty-eighth Session, Supplement No. 7A* (A/48/7/Add.1-17), document A/48/7/Add.6, para. 7.

[6] Ibid., *Forty-ninth Session, Supplement No. 7* (A/49/7 and Add.1-14), document A/49/7/Add.11, paras. 6–8.

[7] Ibid., *Fiftieth Session, Supplement No. 7A* (A/50/7/Add.1-16), document A/50/7/Add.11, paras. 12 and 14.

[8] Ibid., *Forty-ninth Session, Supplement No. 7* (A/49/7 and Add.1-14), document A/49/7/Add.11.

[9] Ibid., *Fiftieth Session, Supplement No. 7A* (A/50/7/Add.1-16), document A/50/7/Add.11.

SCS

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CODE OF JUDICIAL ETHICS

ICC-BD/02-01-05

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Table of contents

Preamble

The judges of the International Criminal Court;

Noting the solemn undertaking required by article 45 of the Rome Statute of the International Criminal Court (the "Statute") and rule 5 (1) (a) of the Rules of Procedure and Evidence (the "Rules");

Recalling the principles concerning judicial independence, impartiality and proper conduct specified in the Statute and the Rules;

Recognising the need for guidelines of general application to contribute to judicial independence and impartiality and with a view to ensuring the legitimacy and effectiveness of the international judicial process;

Having regard to the United Nations Basic Principles on the Independence of the Judiciary (1985) and other international and national rules and standards relating to judicial conduct;

Mindful of the international character of the Court and the special challenges facing the judges of the Court in the performance of their responsibilities;

Have agreed as follows:

Article 1
Adoption of the Code

This Code has been adopted by the judges pursuant to regulation 126 and shall be read subject to the Statute, the Rules and the Regulations of the Court.

Article 2
Use of terms

In this Code of Judicial Ethics the terms "Court", "Statute", "Rules" and "Regulations" shall have the meaning attached to them in the Regulations of the Court.

Article 3
Judicial independence

1. Judges shall uphold the independence of their office and the authority of the Court and shall conduct themselves accordingly in carrying out their judicial functions.
2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

Article 4
Impartiality

1. Judges shall be impartial and ensure the appearance of impartiality in the discharge of their judicial functions.
2. Judges shall avoid any conflict of interest, or being placed in a situation which might reasonably be perceived as giving rise to a conflict of interest.

Article 5
Integrity

1. Judges shall conduct themselves with probity and integrity in accordance with their office, thereby enhancing public confidence in the judiciary.
2. Judges shall not directly or indirectly accept any gift, advantage, privilege or reward that can reasonably be perceived as being intended to influence the performance of their judicial functions.

Article 6
Confidentiality

Judges shall respect the confidentiality of consultations which relate to their judicial functions and the secrecy of deliberations.

Article 7
Diligence

1. Judges shall act diligently in the exercise of their duties and shall devote their professional activities to those duties.
2. Judges shall take reasonable steps to maintain and enhance the knowledge, skills and personal qualities necessary for judicial office.
3. Judges shall perform all judicial duties properly and expeditiously.
4. Judges shall deliver their decisions and any other rulings without undue delay.

Article 8
Conduct during proceedings

1. In conducting judicial proceedings, judges shall maintain order, act in accordance with commonly accepted decorum, remain patient and courteous towards all participants and members of the public present and require them to act likewise.
2. Judges shall exercise vigilance in controlling the manner of questioning of witnesses or victims in accordance with the Rules and give special attention to the right of participants to the proceedings to equal protection and benefit of the law.
3. Judges shall avoid conduct or comments which are racist, sexist or otherwise degrading and, to the extent possible, ensure that any person participating in the proceedings refrains from such comments or conduct.

Article 9
Public expression and association

1. Judges shall exercise their freedom of expression and association in a manner that is compatible with their office and that does not affect or appear to affect judicial independence or impartiality.
2. While judges are free to participate in public debate on matters pertaining to legal subjects, the judiciary or the administration of justice, they shall not comment on pending cases and shall avoid expressing views which may undermine the standing and integrity of the Court.

Article 10
Extra-judicial activity

1. Judges shall not engage in any extra-judicial activity that is incompatible with their judicial function or the efficient and timely functioning of the Court, or that may affect or may reasonably appear to affect their independence or impartiality.
2. Judges shall not exercise any political function.

Article 11
Observance of the Code

1. The principles embodied in this Code shall serve as guidelines on the essential ethical standards required of judges in the performance of their duties. They are advisory in nature and have the object of assisting judges with respect to ethical and professional issues with which they are confronted.
2. Nothing in this Code is intended in any way to limit or restrict the judicial independence of the judges.

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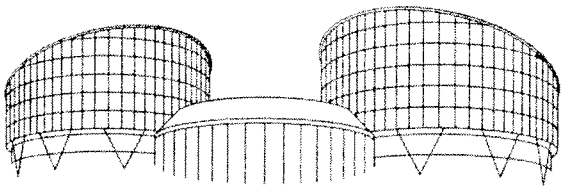

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Rules of Court

1 September 2012

Registry of the Court

Strasbourg

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Title I – Organisation and Working of the Court

Chapter I – Judges

Rule 2[1] – Calculation of term of office

1. Where the seat is vacant on the date of the judge's election, or where the election takes place less than three months before the seat becomes vacant, the term of office shall begin as from the date of taking up office which shall be no later than three months after the date of election.

2. Where the judge's election takes place more than three months before the seat becomes vacant, the term of office shall begin on the date on which the seat becomes vacant.

3. In accordance with Article 23 § 3 of the Convention, an elected judge shall hold office until a successor has taken the oath or made the declaration provided for in Rule 3.

Rule 3 – Oath or solemn declaration

1. Before taking up office, each elected judge shall, at the first sitting of the plenary Court at which the judge is present or, in case of need, before the President of the Court, take the following oath or make the following solemn declaration:

> "I swear" – or "I solemnly declare" – "that I will exercise my functions as a judge honourably, independently and impartially and that I will keep secret all deliberations."

2. This act shall be recorded in minutes.

Rule 4[2] – Incompatible activities

1. In accordance with Article 21 § 3 of the Convention, the judges shall not during their term of office engage in any political or administrative activity or any professional activity which is incompatible with their independence or impartiality or with the demands of a full-time office. Each judge shall declare to the President of the Court any additional activity. In the event of a disagreement between the President and the judge concerned, any question arising shall be decided by the plenary Court.

2. A former judge shall not represent a party or third party in any capacity in proceedings before the Court relating to an application lodged before the date on which he or she ceased to hold office. As regards applications lodged subsequently, a former judge may not represent a party or third party in any capacity in proceedings before the Court until a period of two years from the date on which he or she ceased to hold office has elapsed.

1. As amended by the Court on 13 November 2006 and 2 April 2012.
2. As amended by the Court on 29 March 2010.

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CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

Resolution on Judicial Ethics

Adopted by the Plenary Court on 23 June 2008

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The European Court of Human Rights,

Having regard to Article 21 of the European Convention on Human Rights, which sets forth the criteria for judicial office;

Having regard to Rules 3, 4 and 28 of the Rules of Court, which develop these criteria;

Considering that it is appropriate, in the interests of clarity and transparency, to articulate the principles underlying these criteria, without prejudice to the interpretation or application of the provisions referred to above;

Considering that the principles set forth in this text should enhance public confidence in the Court, which is an international court for the protection of human rights;

Adopts the present resolution on judicial ethics:

I. Independence

In the exercise of their judicial functions, judges shall be independent of all external authority or influence. They shall refrain from any activity or membership of an association, and avoid any situation, that may affect confidence in their independence.

II. Impartiality

Judges shall exercise their function impartially and ensure the appearance of impartiality. They shall take care to avoid conflicts of interest as well as situations that may be reasonably perceived as giving rise to a conflict of interest.

III. Integrity

Judges' conduct must be consistent with the high moral character that is a criterion for judicial office. They should be mindful at all times of their duty to uphold the standing and reputation of the Court.

IV. Diligence and competence

Judges shall perform the duties of their office diligently. In order to maintain a high level of competence, they shall continue to develop their professional skills.

V. Discretion

Judges shall exercise the utmost discretion in relation to secret or confidential information relating to proceedings before the Court. They shall respect the secrecy of deliberations.

VI. Freedom of expression

Judges shall exercise their freedom of expression in a manner compatible with the dignity of their office. They shall refrain from public statements or remarks that may undermine the authority of the Court or give rise to reasonable doubt as to their impartiality.

VII. Additional activity

Judges may not engage in any additional activity except insofar as this is compatible with independence, impartiality and the demands of their full-time office. They shall declare any additional activity to the President of the Court, as provided for in Rule 4 of the Rules of Court.

VIII. Favours and advantages

Judges shall not accept any gift, favour or advantage that could call their independence or impartiality into question.

IX. Decorations and honours

Judges may accept decorations and honours only where such acceptance does not give rise to a reasonable doubt as to their independence or impartiality. They should inform the President of the Court beforehand.

X. Scope of this resolution

The principles set forth above apply to the members of the Court and, where relevant, to former judges and *ad hoc* judges.

Final provisions

In case of doubt as to application of these principles in a given situation, a judge may seek the advice of the President of the Court. The President may consult the Bureau if necessary.

The President may report to the Plenary Court on the application of these principles.

PROTOCOL (No 3)

ON THE STATUTE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

THE HIGH CONTRACTING PARTIES,

DESIRING to lay down the Statute of the Court of Justice of the European Union provided for in Article 281 of the Treaty on the Functioning of the European Union,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community:

Article 1

The Court of Justice of the European Union shall be constituted and shall function in accordance with the provisions of the Treaties, of the Treaty establishing the European Atomic Energy Community (EAEC Treaty) and of this Statute.

TITLE I

JUDGES AND ADVOCATES-GENERAL

Article 2

Before taking up his duties each Judge shall, before the Court of Justice sitting in open court, take an oath to perform his duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court.

Article 3

The Judges shall be immune from legal proceedings. After they have ceased to hold office, they shall continue to enjoy immunity in respect of acts performed by them in their official capacity, including words spoken or written.

The Court of Justice, sitting as a full Court, may waive the immunity. If the decision concerns a member of the General Court or of a specialised court, the Court shall decide after consulting the court concerned.

Where immunity has been waived and criminal proceedings are instituted against a Judge, he shall be tried, in any of the Member States, only by the court competent to judge the members of the highest national judiciary.

Articles 11 to 14 and Article 17 of the Protocol on the privileges and immunities of the European Union shall apply to the Judges, Advocates-General, Registrar and Assistant Rapporteurs of the Court of Justice of the European Union, without prejudice to the provisions relating to immunity from legal proceedings of Judges which are set out in the preceding paragraphs.

Article 4

The Judges may not hold any political or administrative office.

They may not engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the Council, acting by a simple majority.

When taking up their duties, they shall give a solemn undertaking that, both during and after their term of office, they will respect the obligations arising therefrom, in particular the duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits.

Any doubt on this point shall be settled by decision of the Court of Justice. If the decision concerns a member of the General Court or of a specialised court, the Court shall decide after consulting the court concerned.

Article 5

Apart from normal replacement, or death, the duties of a Judge shall end when he resigns.

Where a Judge resigns, his letter of resignation shall be addressed to the President of the Court of Justice for transmission to the President of the Council. Upon this notification a vacancy shall arise on the bench.

Save where Article 6 applies, a Judge shall continue to hold office until his successor takes up his duties.

Article 6

A Judge may be deprived of his office or of his right to a pension or other benefits in its stead only if, in the unanimous opinion of the Judges and Advocates-General of the Court of Justice, he no longer fulfils the requisite conditions or meets the obligations arising from his office. The Judge concerned shall not take part in any such deliberations. If the person concerned is a member of the General Court or of a specialised court, the Court shall decide after consulting the court concerned.

The Registrar of the Court shall communicate the decision of the Court to the President of the European Parliament and to the President of the Commission and shall notify it to the President of the Council.

In the case of a decision depriving a Judge of his office, a vacancy shall arise on the bench upon this latter notification.

Article 7

A Judge who is to replace a member of the Court whose term of office has not expired shall be appointed for the remainder of his predecessor's term.

Article 8

The provisions of Articles 2 to 7 shall apply to the Advocates-General.

TITLE II

ORGANISATION OF THE COURT OF JUSTICE

Article 9

When, every three years, the Judges are partially replaced, 14 and 13 Judges shall be replaced alternately.

When, every three years, the Advocates-General are partially replaced, four Advocates-General shall be replaced on each occasion.

Article 10

The Registrar shall take an oath before the Court of Justice to perform his duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court of Justice.

Article 11

The Court of Justice shall arrange for replacement of the Registrar on occasions when he is prevented from attending the Court of Justice.

Article 12

Officials and other servants shall be attached to the Court of Justice to enable it to function. They shall be responsible to the Registrar under the authority of the President.

Article 13

At the request of the Court of Justice, the European Parliament and the Council may, acting in accordance with the ordinary legislative procedure, provide for the appointment of Assistant Rapporteurs and lay down the rules governing their service. The Assistant Rapporteurs may be required, under conditions laid down in the Rules of Procedure, to participate in preparatory inquiries in cases pending before the Court and to cooperate with the Judge who acts as Rapporteur.

The Assistant Rapporteurs shall be chosen from persons whose independence is beyond doubt and who possess the necessary legal qualifications; they shall be appointed by the Council, acting by a simple majority. They shall take an oath before the Court to perform their duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court.

Article 14

The Judges, the Advocates-General and the Registrar shall be required to reside at the place where the Court of Justice has its seat.

Article 15

The Court of Justice shall remain permanently in session. The duration of the judicial vacations shall be determined by the Court with due regard to the needs of its business.

Article 16

The Court of Justice shall form chambers consisting of three and five Judges. The Judges shall elect the Presidents of the chambers from among their number. The Presidents of the chambers of five Judges shall be elected for three years. They may be re-elected once.

The Grand Chamber shall consist of 13 Judges. It shall be presided over by the President of the Court. The Presidents of the chambers of five Judges and other Judges appointed in accordance with the conditions laid down in the Rules of Procedure shall also form part of the Grand Chamber.

The Court shall sit in a Grand Chamber when a Member State or an institution of the Union that is party to the proceedings so requests.

The Court shall sit as a full Court where cases are brought before it pursuant to Article 228(2), Article 245(2), Article 247 or Article 286(6) of the Treaty on the Functioning of the European Union.

Moreover, where it considers that a case before it is of exceptional importance, the Court may decide, after hearing the Advocate-General, to refer the case to the full Court.

Article 17

Decisions of the Court of Justice shall be valid only when an uneven number of its members is sitting in the deliberations.

Decisions of the chambers consisting of either three or five Judges shall be valid only if they are taken by three Judges.

Decisions of the Grand Chamber shall be valid only if nine Judges are sitting.

Decisions of the full Court shall be valid only if 15 Judges are sitting.

In the event of one of the Judges of a chamber being prevented from attending, a Judge of another chamber may be called upon to sit in accordance with conditions laid down in the Rules of Procedure.

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Article 18

No Judge or Advocate-General may take part in the disposal of any case in which he has previously taken part as agent or adviser or has acted for one of the parties, or in which he has been called upon to pronounce as a member of a court or tribunal, of a commission of inquiry or in any other capacity.

If, for some special reason, any Judge or Advocate-General considers that he should not take part in the judgment or examination of a particular case, he shall so inform the President. If, for some special reason, the President considers that any Judge or Advocate-General should not sit or make submissions in a particular case, he shall notify him accordingly.

Any difficulty arising as to the application of this Article shall be settled by decision of the Court of Justice.

A party may not apply for a change in the composition of the Court or of one of its chambers on the grounds of either the nationality of a Judge or the absence from the Court or from the chamber of a Judge of the nationality of that party.

TITLE III

PROCEDURE BEFORE THE COURT OF JUSTICE

Article 19

The Member States and the institutions of the Union shall be represented before the Court of Justice by an agent appointed for each case; the agent may be assisted by an adviser or by a lawyer.

The States, other than the Member States, which are parties to the Agreement on the European Economic Area and also the EFTA Surveillance Authority referred to in that Agreement shall be represented in same manner.

Other parties must be represented by a lawyer.

Only a lawyer authorised to practise before a court of a Member State or of another State which is a party to the Agreement on the European Economic Area may represent or assist a party before the Court.

Such agents, advisers and lawyers shall, when they appear before the Court, enjoy the rights and immunities necessary to the independent exercise of their duties, under conditions laid down in the Rules of Procedure.

As regards such advisers and lawyers who appear before it, the Court shall have the powers normally accorded to courts of law, under conditions laid down in the Rules of Procedure.

University teachers being nationals of a Member State whose law accords them a right of audience shall have the same rights before the Court as are accorded by this Article to lawyers.

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Article 20

The procedure before the Court of Justice shall consist of two parts: written and oral.

The written procedure shall consist of the communication to the parties and to the institutions of the Union whose decisions are in dispute, of applications, statements of case, defences and observations, and of replies, if any, as well as of all papers and documents in support or of certified copies of them.

Communications shall be made by the Registrar in the order and within the time laid down in the Rules of Procedure.

The oral procedure shall consist of the reading of the report presented by a Judge acting as Rapporteur, the hearing by the Court of agents, advisers and lawyers and of the submissions of the Advocate-General, as well as the hearing, if any, of witnesses and experts.

Where it considers that the case raises no new point of law, the Court may decide, after hearing the Advocate-General, that the case shall be determined without a submission from the Advocate-General.

Article 21

A case shall be brought before the Court of Justice by a written application addressed to the Registrar. The application shall contain the applicant's name and permanent address and the description of the signatory, the name of the party or names of the parties against whom the application is made, the subject-matter of the dispute, the form of order sought and a brief statement of the pleas in law on which the application is based.

The application shall be accompanied, where appropriate, by the measure the annulment of which is sought or, in the circumstances referred to in Article 265 of the Treaty on the Functioning of the European Union, by documentary evidence of the date on which an institution was, in accordance with those Articles, requested to act. If the documents are not submitted with the application, the Registrar shall ask the party concerned to produce them within a reasonable period, but in that event the rights of the party shall not lapse even if such documents are produced after the time limit for bringing proceedings.

Article 22

A case governed by Article 18 of the EAEC Treaty shall be brought before the Court of Justice by an appeal addressed to the Registrar. The appeal shall contain the name and permanent address of the applicant and the description of the signatory, a reference to the decision against which the appeal is brought, the names of the respondents, the subject-matter of the dispute, the submissions and a brief statement of the grounds on which the appeal is based.

The appeal shall be accompanied by a certified copy of the decision of the Arbitration Committee which is contested.

If the Court rejects the appeal, the decision of the Arbitration Committee shall become final.

If the Court annuls the decision of the Arbitration Committee, the matter may be re-opened, where appropriate, on the initiative of one of the parties in the case, before the Arbitration Committee. The latter shall conform to any decisions on points of law given by the Court.

Article 23

In the cases governed by Article 267 of the Treaty on the Functioning of the European Union, the decision of the court or tribunal of a Member State which suspends its proceedings and refers a case to the Court of Justice shall be notified to the Court by the court or tribunal concerned. The decision shall then be notified by the Registrar of the Court to the parties, to the Member States and to the Commission, and to the institution, body, office or agency of the Union which adopted the act the validity or interpretation of which is in dispute.

Within two months of this notification, the parties, the Member States, the Commission and, where appropriate, the institution, body, office or agency which adopted the act the validity or interpretation of which is in dispute, shall be entitled to submit statements of case or written observations to the Court.

In the cases governed by Article 267 of the Treaty on the Functioning of the European Union, the decision of the national court or tribunal shall, moreover, be notified by the Registrar of the Court to the States, other than the Member States, which are parties to the Agreement on the European Economic Area and also to the EFTA Surveillance Authority referred to in that Agreement which may, within two months of notification, where one of the fields of application of that Agreement is concerned, submit statements of case or written observations to the Court.

Where an agreement relating to a specific subject matter, concluded by the Council and one or more non-member States, provides that those States are to be entitled to submit statements of case or written observations where a court or tribunal of a Member State refers to the Court of Justice for a preliminary ruling a question falling within the scope of the agreement, the decision of the national court or tribunal containing that question shall also be notified to the non-member States concerned. Within two months from such notification, those States may lodge at the Court statements of case or written observations.

Article 23a [1]

The Rules of Procedure may provide for an expedited or accelerated procedure and, for references for a preliminary ruling relating to the area of freedom, security and justice, an urgent procedure.

Those procedures may provide, in respect of the submission of statements of case or written observations, for a shorter period than that provided for by Article 23, and, in derogation from the fourth paragraph of Article 20, for the case to be determined without a submission from the Advocate General.

In addition, the urgent procedure may provide for restriction of the parties and other interested persons mentioned in Article 23, authorised to submit statements of case or written observations and, in cases of extreme urgency, for the written stage of the procedure to be omitted.

[1] Article inserted by Decision 2008/79/EC, Euratom (OJ L 24, 29.1.2008, p. 42).

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Article 24

The Court of Justice may require the parties to produce all documents and to supply all information which the Court considers desirable. Formal note shall be taken of any refusal.

The Court may also require the Member States and institutions, bodies, offices and agencies not being parties to the case to supply all information which the Court considers necessary for the proceedings.

Article 25

The Court of Justice may at any time entrust any individual, body, authority, committee or other organisation it chooses with the task of giving an expert opinion.

Article 26

Witnesses may be heard under conditions laid down in the Rules of Procedure.

Article 27

With respect to defaulting witnesses the Court of Justice shall have the powers generally granted to courts and tribunals and may impose pecuniary penalties under conditions laid down in the Rules of Procedure.

Article 28

Witnesses and experts may be heard on oath taken in the form laid down in the Rules of Procedure or in the manner laid down by the law of the country of the witness or expert.

Article 29

The Court of Justice may order that a witness or expert be heard by the judicial authority of his place of permanent residence.

The order shall be sent for implementation to the competent judicial authority under conditions laid down in the Rules of Procedure. The documents drawn up in compliance with the letters rogatory shall be returned to the Court under the same conditions.

The Court shall defray the expenses, without prejudice to the right to charge them, where appropriate, to the parties.

Article 30

A Member State shall treat any violation of an oath by a witness or expert in the same manner as if the offence had been committed before one of its courts with jurisdiction in civil proceedings. At the instance of the Court of Justice, the Member State concerned shall prosecute the offender before its competent court.

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Article 31

The hearing in court shall be public, unless the Court of Justice, of its own motion or on application by the parties, decides otherwise for serious reasons.

Article 32

During the hearings the Court of Justice may examine the experts, the witnesses and the parties themselves. The latter, however, may address the Court of Justice only through their representatives.

Article 33

Minutes shall be made of each hearing and signed by the President and the Registrar.

Article 34

The case list shall be established by the President.

Article 35

The deliberations of the Court of Justice shall be and shall remain secret.

Article 36

Judgments shall state the reasons on which they are based. They shall contain the names of the Judges who took part in the deliberations.

Article 37

Judgments shall be signed by the President and the Registrar. They shall be read in open court.

Article 38

The Court of Justice shall adjudicate upon costs.

Article 39

The President of the Court of Justice may, by way of summary procedure, which may, in so far as necessary, differ from some of the rules contained in this Statute and which shall be laid down in the Rules of Procedure, adjudicate upon applications to suspend execution, as provided for in Article 278 of the Treaty on the Functioning of the European Union and Article 157 of the EAEC Treaty, or to prescribe interim measures pursuant to Article 279 of the Treaty on the Functioning of the European Union, or to suspend enforcement in accordance with the fourth paragraph of Article 299 of the Treaty on the Functioning of the European Union or the third paragraph of Article 164 of the EAEC Treaty.

Should the President be prevented from attending, his place shall be taken by another Judge under conditions laid down in the Rules of Procedure.

The ruling of the President or of the Judge replacing him shall be provisional and shall in no way prejudice the decision of the Court on the substance of the case.

Article 40

Member States and institutions of the Union may intervene in cases before the Court of Justice.

The same right shall be open to the bodies, offices and agencies of the Union and to any other person which can establish an interest in the result of a case submitted to the Court. Natural or legal persons shall not intervene in cases between Member States, between institutions of the Union or between Member States and institutions of the Union.

Without prejudice to the second paragraph, the States, other than the Member States, which are parties to the Agreement on the European Economic Area, and also the EFTA Surveillance Authority referred to in that Agreement, may intervene in cases before the Court where one of the fields of application of that Agreement is concerned.

An application to intervene shall be limited to supporting the form of order sought by one of the parties.

Article 41

Where the defending party, after having been duly summoned, fails to file written submissions in defence, judgment shall be given against that party by default. An objection may be lodged against the judgment within one month of it being notified. The objection shall not have the effect of staying enforcement of the judgment by default unless the Court of Justice decides otherwise.

Article 42

Member States, institutions, bodies, offices and agencies of the Union and any other natural or legal persons may, in cases and under conditions to be determined by the Rules of Procedure, institute third-party proceedings to contest a judgment rendered without their being heard, where the judgment is prejudicial to their rights.

Article 43

If the meaning or scope of a judgment is in doubt, the Court of Justice shall construe it on application by any party or any institution of the Union establishing an interest therein.

Article 44

An application for revision of a judgment may be made to the Court of Justice only on discovery of a fact which is of such a nature as to be a decisive factor, and which, when the judgment was given, was unknown to the Court and to the party claiming the revision.

The revision shall be opened by a judgment of the Court expressly recording the existence of a new fact, recognising that it is of such a character as to lay the case open to revision and declaring the application admissible on this ground.

No application for revision may be made after the lapse of 10 years from the date of the judgment.

Article 45

Periods of grace based on considerations of distance shall be determined by the Rules of Procedure.

No right shall be prejudiced in consequence of the expiry of a time limit if the party concerned proves the existence of unforeseeable circumstances or of *force majeure*.

Article 46

Proceedings against the Union in matters arising from non-contractual liability shall be barred after a period of five years from the occurrence of the event giving rise thereto. The period of limitation shall be interrupted if proceedings are instituted before the Court of Justice or if prior to such proceedings an application is made by the aggrieved party to the relevant institution of the Union. In the latter event the proceedings must be instituted within the period of two months provided for in Article 263 of the Treaty on the Functioning of the European Union; the provisions of the second paragraph of Article 265 of the Treaty on the Functioning of the European Union shall apply where appropriate.

This Article shall also apply to proceedings against the European Central Bank regarding non-contractual liability.

TITLE IV

GENERAL COURT

Article 47

The first paragraph of Article 9, Articles 14 and 15, the first, second, fourth and fifth paragraphs of Article 17 and Article 18 shall apply to the General Court and its members.

The fourth paragraph of Article 3 and Articles 10, 11 and 14 shall apply to the Registrar of the General Court *mutatis mutandis*.

Article 48

The General Court shall consist of 27 Judges.

Article 49

The Members of the General Court may be called upon to perform the task of an Advocate-General.

It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on certain cases brought before the General Court in order to assist the General Court in the performance of its task.

The criteria for selecting such cases, as well as the procedures for designating the Advocates-General, shall be laid down in the Rules of Procedure of the General Court.

A Member called upon to perform the task of Advocate-General in a case may not take part in the judgment of the case.

Article 50

The General Court shall sit in chambers of three or five Judges. The Judges shall elect the Presidents of the chambers from among their number. The Presidents of the chambers of five Judges shall be elected for three years. They may be re-elected once.

The composition of the chambers and the assignment of cases to them shall be governed by the Rules of Procedure. In certain cases governed by the Rules of Procedure, the General Court may sit as a full court or be constituted by a single Judge.

The Rules of Procedure may also provide that the General Court may sit in a Grand Chamber in cases and under the conditions specified therein.

Article 51

By way of derogation from the rule laid down in Article 256(1) of the Treaty on the Functioning of the European Union, jurisdiction shall be reserved to the Court of Justice in the actions referred to in Articles 263 and 265 of the Treaty on the Functioning of the European Union when they are brought by a Member State against:

(a) an act of or failure to act by the European Parliament or the Council, or by those institutions acting jointly, except for:

— decisions taken by the Council under the third subparagraph of Article 108(2) of the Treaty on the Functioning of the European Union;

— acts of the Council adopted pursuant to a Council regulation concerning measures to protect trade within the meaning of Article 207 of the Treaty on the Functioning of the European Union;

— acts of the Council by which the Council exercises implementing powers in accordance with the second paragraph of Article 291 of the Treaty on the Functioning of the European Union;

(b) against an act of or failure to act by the Commission under the first paragraph of Article 331 of the Treaty on the Functioning of the European Union.

Jurisdiction shall also be reserved to the Court of Justice in the actions referred to in the same Articles when they are brought by an institution of the Union against an act of or failure to act by the European Parliament, the Council, both those institutions acting jointly, or the Commission, or brought by an institution of the Union against an act of or failure to act by the European Central Bank.

Article 52

The President of the Court of Justice and the President of the General Court shall determine, by common accord, the conditions under which officials and other servants attached to the Court of Justice shall render their services to the General Court to enable it to function. Certain officials or other servants shall be responsible to the Registrar of the General Court under the authority of the President of the General Court.

Article 53

The procedure before the General Court shall be governed by Title III.

Such further and more detailed provisions as may be necessary shall be laid down in its Rules of Procedure. The Rules of Procedure may derogate from the fourth paragraph of Article 40 and from Article 41 in order to take account of the specific features of litigation in the field of intellectual property.

Notwithstanding the fourth paragraph of Article 20, the Advocate-General may make his reasoned submissions in writing.

Article 54

Where an application or other procedural document addressed to the General Court is lodged by mistake with the Registrar of the Court of Justice, it shall be transmitted immediately by that Registrar to the Registrar of the General Court; likewise, where an application or other procedural document addressed to the Court of Justice is lodged by mistake with the Registrar of the General Court, it shall be transmitted immediately by that Registrar to the Registrar of the Court of Justice.

Where the General Court finds that it does not have jurisdiction to hear and determine an action in respect of which the Court of Justice has jurisdiction, it shall refer that action to the Court of Justice; likewise, where the Court of Justice finds that an action falls within the jurisdiction of the General Court, it shall refer that action to the General Court, whereupon that Court may not decline jurisdiction.

Where the Court of Justice and the General Court are seised of cases in which the same relief is sought, the same issue of interpretation is raised or the validity of the same act is called in question, the General Court may, after hearing the parties, stay the proceedings before it until such time as the Court of Justice has delivered judgment or, where the action is one brought pursuant to Article 263 of the Treaty on the Functioning of the European Union, may decline jurisdiction so as to allow the Court of Justice to rule on such actions. In the same circumstances, the Court of Justice may also decide to stay the proceedings before it; in that event, the proceedings before the General Court shall continue.

Where a Member State and an institution of the Union are challenging the same act, the General Court shall decline jurisdiction so that the Court of Justice may rule on those applications.

Article 55

Final decisions of the General Court, decisions disposing of the substantive issues in part only or disposing of a procedural issue concerning a plea of lack of competence or inadmissibility, shall be notified by the Registrar of the General Court to all parties as well as all Member States and the institutions of the Union even if they did not intervene in the case before the General Court.

Article 56

An appeal may be brought before the Court of Justice, within two months of the notification of the decision appealed against, against final decisions of the General Court and decisions of that Court disposing of the substantive issues in part only or disposing of a procedural issue concerning a plea of lack of competence or inadmissibility.

Such an appeal may be brought by any party which has been unsuccessful, in whole or in part, in its submissions. However, interveners other than the Member States and the institutions of the Union may bring such an appeal only where the decision of the General Court directly affects them.

With the exception of cases relating to disputes between the Union and its servants, an appeal may also be brought by Member States and institutions of the Union which did not intervene in the proceedings before the General Court. Such Member States and institutions shall be in the same position as Member States or institutions which intervened at first instance.

Article 57

Any person whose application to intervene has been dismissed by the General Court may appeal to the Court of Justice within two weeks from the notification of the decision dismissing the application.

The parties to the proceedings may appeal to the Court of Justice against any decision of the General Court made pursuant to Article 278 or Article 279 or the fourth paragraph of Article 299 of the Treaty on the Functioning of the European Union or Article 157 or the third paragraph of Article 164 of the EAEC Treaty within two months from their notification.

The appeal referred to in the first two paragraphs of this Article shall be heard and determined under the procedure referred to in Article 39.

Article 58

An appeal to the Court of Justice shall be limited to points of law. It shall lie on the grounds of lack of competence of the General Court, a breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of Union law by the General Court.

No appeal shall lie regarding only the amount of the costs or the party ordered to pay them.

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Article 59

Where an appeal is brought against a decision of the General Court, the procedure before the Court of Justice shall consist of a written part and an oral part. In accordance with conditions laid down in the Rules of Procedure, the Court of Justice, having heard the Advocate-General and the parties, may dispense with the oral procedure.

Article 60

Without prejudice to Articles 278 and 279 of the Treaty on the Functioning of the European Union or Article 157 of the EAEC Treaty, an appeal shall not have suspensory effect.

By way of derogation from Article 280 of the Treaty on the Functioning of the European Union, decisions of the General Court declaring a regulation to be void shall take effect only as from the date of expiry of the period referred to in the first paragraph of Article 56 of this Statute or, if an appeal shall have been brought within that period, as from the date of dismissal of the appeal, without prejudice, however, to the right of a party to apply to the Court of Justice, pursuant to Articles 278 and 279 of the Treaty on the Functioning of the European Union or Article 157 of the EAEC Treaty, for the suspension of the effects of the regulation which has been declared void or for the prescription of any other interim measure.

Article 61

If the appeal is well founded, the Court of Justice shall quash the decision of the General Court. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

Where a case is referred back to the General Court, that Court shall be bound by the decision of the Court of Justice on points of law.

When an appeal brought by a Member State or an institution of the Union, which did not intervene in the proceedings before the General Court, is well founded, the Court of Justice may, if it considers this necessary, state which of the effects of the decision of the General Court which has been quashed shall be considered as definitive in respect of the parties to the litigation.

Article 62

In the cases provided for in Article 256(2) and (3) of the Treaty on the Functioning of the European Union, where the First Advocate-General considers that there is a serious risk of the unity or consistency of Union law being affected, he may propose that the Court of Justice review the decision of the General Court.

The proposal must be made within one month of delivery of the decision by the General Court. Within one month of receiving the proposal made by the First Advocate-General, the Court of Justice shall decide whether or not the decision should be reviewed.

Article 62a

The Court of Justice shall give a ruling on the questions which are subject to review by means of an urgent procedure on the basis of the file forwarded to it by the General Court.

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Those referred to in Article 23 of this Statute and, in the cases provided for in Article 256(2) of the EC Treaty, the parties to the proceedings before the General Court shall be entitled to lodge statements or written observations with the Court of Justice relating to questions which are subject to review within a period prescribed for that purpose.

The Court of Justice may decide to open the oral procedure before giving a ruling.

Article 62b

In the cases provided for in Article 256(2) of the Treaty on the Functioning of the European Union, without prejudice to Articles 278 and 279 of the Treaty on the Functioning of the European Union, proposals for review and decisions to open the review procedure shall not have suspensory effect. If the Court of Justice finds that the decision of the General Court affects the unity or consistency of Union law, it shall refer the case back to the General Court which shall be bound by the points of law decided by the Court of Justice; the Court of Justice may state which of the effects of the decision of the General Court are to be considered as definitive in respect of the parties to the litigation. If, however, having regard to the result of the review, the outcome of the proceedings flows from the findings of fact on which the decision of the General Court was based, the Court of Justice shall give final judgment.

In the cases provided for in Article 256(3) of the Treaty on the Functioning of the European Union, in the absence of proposals for review or decisions to open the review procedure, the answer(s) given by the General Court to the questions submitted to it shall take effect upon expiry of the periods prescribed for that purpose in the second paragraph of Article 62. Should a review procedure be opened, the answer(s) subject to review shall take effect following that procedure, unless the Court of Justice decides otherwise. If the Court of Justice finds that the decision of the General Court affects the unity or consistency of Union law, the answer given by the Court of Justice to the questions subject to review shall be substituted for that given by the General Court.

TITLE IVa

SPECIALISED COURTS

Article 62c

The provisions relating to the jurisdiction, composition, organisation and procedure of the specialised courts established under Article 257 of the Treaty on the Functioning of the European Union are set out in an Annex to this Statute.

TITLE V

FINAL PROVISIONS

Article 63

The Rules of Procedure of the Court of Justice and of the General Court shall contain any provisions necessary for applying and, where required, supplementing this Statute.

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Article 64

The rules governing the language arrangements applicable at the Court of Justice of the European Union shall be laid down by a regulation of the Council acting unanimously. This regulation shall be adopted either at the request of the Court of Justice and after consultation of the Commission and the European Parliament, or on a proposal from the Commission and after consultation of the Court of Justice and of the European Parliament.

Until those rules have been adopted, the provisions of the Rules of Procedure of the Court of Justice and of the Rules of Procedure of the General Court governing language arrangements shall continue to apply. By way of derogation from Articles 253 and 254 of the Treaty on the Functioning of the European Union, those provisions may only be amended or repealed with the unanimous consent of the Council.

ANNEX I

THE EUROPEAN UNION CIVIL SERVICE TRIBUNAL

Article 1

The European Union Civil Service Tribunal (hereafter 'the Civil Service Tribunal') shall exercise at first instance jurisdiction in disputes between the Union and its servants referred to in Article 270 of the Treaty on the Functioning of the European Union, including disputes between all bodies or agencies and their servants in respect of which jurisdiction is conferred on the Court of Justice of the European Union.

Article 2

The Civil Service Tribunal shall consist of seven judges. Should the Court of Justice so request, the Council, acting by a qualified majority, may increase the number of judges.

The judges shall be appointed for a period of six years. Retiring judges may be reappointed.

Any vacancy shall be filled by the appointment of a new judge for a period of six years.

Article 3

1. The judges shall be appointed by the Council, acting in accordance with the fourth paragraph of Article 257 of the Treaty on the Functioning of the European Union, after consulting the committee provided for by this Article. When appointing judges, the Council shall ensure a balanced composition of the Civil Service Tribunal on as broad a geographical basis as possible from among nationals of the Member States and with respect to the national legal systems represented.

2. Any person who is a Union citizen and fulfils the conditions laid down in the fourth paragraph of Article 257 of the Treaty on the Functioning of the European Union may submit an application. The Council, acting on a recommendation from the Court of Justice, shall determine the conditions and the arrangements governing the submission and processing of such applications.

3. A committee shall be set up comprising seven persons chosen from among former members of the Court of Justice and the General Court and lawyers of recognised competence. The committee's membership and operating rules shall be determined by the Council, acting on a recommendation by the President of the Court of Justice.

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The Burgh House Principles On The Independence Of The International Judiciary

The Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals:

Recognising the need for guidelines of general application to contribute to the independence and impartiality of the international judiciary, with a view to ensuring the legitimacy and effectiveness of the international judicial process;

Having regard to the United Nations Basic Principles on the Independence of the Judiciary (1985) and other international rules and standards relating to judicial independence and the right to a fair trial;

Mindful of the special challenges facing the international judiciary in view of the non-national context in which they operate;

Noting in particular that each court or tribunal has its own characteristics and functions and that in certain instances judges serve on a part-time basis or as *ad hoc* or *ad litem* judges;

Considering the following principles of international law to be of general application:

- to ensure the independence of the judiciary, judges must enjoy independence from the parties to cases before them, their own states of nationality or residence, the host countries in which they serve, and the international organisations under the auspices of which the court or tribunal is established;
- judges must be free from undue influence from any source;
- judges shall decide cases impartially, on the basis of the facts of the case and the applicable law;
- judges shall avoid any conflict of interest, as well as being placed in a situation which might reasonably be perceived as giving rise to any conflict of interests;
- judges shall refrain from impropriety in their judicial and related activities;

Proposes the following Principles which shall apply primarily to standing international courts and tribunals (hereafter "courts") and to full-time judges. The Principles should also be applied as appropriate to judges *ad hoc*, judges *ad litem* and part-time judges, to international arbitral proceedings and to other exercises of international judicial power.

1. Independence and freedom from interference

1.1 The court and the judges shall exercise their functions free from direct or indirect interference or influence by any person or entity.

1.2 Where a court is established as an organ or under the auspices of an international organisation, the court and judges shall exercise their judicial functions free from interference from other organs or authorities of that organisation. This freedom shall apply both to the judicial process in pending cases, including the assignment of cases to particular judges, and to the operation of the court and its registry.

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1.3 The court shall be free to determine the conditions for its internal administration, including staff recruitment policy, information systems and allocation of budgetary expenditure.

1.4 Deliberations of the court shall remain confidential.

2. Nomination, election and appointment

2.1 In accordance with the governing instruments, judges shall be chosen from among persons of high moral character, integrity and conscientiousness who possess the appropriate professional qualifications, competence and experience required for the court concerned.

2.2 While procedures for nomination, election and appointment should consider fair representation of different geographic regions and the principal legal systems, as appropriate, as well as of female and male judges, appropriate personal and professional qualifications must be the overriding consideration in the nomination, election and appointment of judges.

2.3 Procedures for the nomination, election and appointment of judges should be transparent and provide appropriate safeguards against nominations, elections and appointments motivated by improper considerations.

2.4 Information regarding the nomination, election and appointment process and information about candidates for judicial office should be made public, in due time and in an effective manner, by the international organisation or other body responsible for the nomination, election and appointment process.

2.5 Where the governing instruments of the court concerned permits the re-election of judges, the principles and criteria set out above for the nomination, election and appointment of judges shall apply *mutatis mutandis* to their re-election.

3. Security of tenure

3.1 Judges shall have security of tenure in relation to their term of office. They may only be removed from office upon specified grounds and in accordance with appropriate procedures specified in advance.

3.2 The governing instruments of each court should provide for judges to be appointed for a minimum term to enable them to exercise their judicial functions in an independent manner.

4. Service and remuneration

4.1 Judges' essential conditions of service shall be enumerated in legally binding instruments.

4.2 No adverse changes shall be introduced with regard to judges' remuneration and other essential conditions of service during their terms of office.

4.3 Judges should receive adequate remuneration which should be periodically adjusted in line with any increases in the cost of living at the seat of the court.

4.4 Conditions of service should include adequate pension arrangements.

5. Privileges and immunities

5.1 Judges shall enjoy immunities equivalent to full diplomatic immunities, and in particular shall enjoy immunities from all claims arising from the exercise of their judicial function.

5.2 The court alone shall be competent to waive the immunity of judges; it should waive immunity in any case where, in its opinion, the immunity would impede the course of justice and can be waived without prejudice to the exercise of the judicial function.

5.3 Documents and papers of the court, judges and registry, in so far as they relate to the business of the court, shall be inviolable.

5.4 The state in which an international court has its seat shall take the necessary measures to protect the security of the judges and their families, and to protect them from adverse measures related to the exercise of their judicial function.

6. Budget

States parties and international organisations shall provide adequate resources, including facilities and levels of staffing, to enable courts and the judges to perform their functions effectively.

7. Freedom of expression and association

7.1 Judges shall enjoy freedom of expression and association while in office. These freedoms must be exercised in a manner that is compatible with the judicial function and that may not affect or reasonably appear to affect judicial independence or impartiality.

7.2 Judges shall maintain the confidentiality of deliberations, and shall not comment extrajudicially upon pending cases.

7.3 Judges shall exercise appropriate restraint in commenting extrajudicially upon judgments and procedures of their own and other courts and upon any legislation, drafts, proposals or subject-matter likely to come before their court.

8. Extra-judicial activity

8.1 Judges shall not engage in any extra-judicial activity that is incompatible with their judicial function or the efficient and timely functioning of the court of which they are members, or that may affect or may reasonably appear to affect their independence or impartiality.

8.2 Judges shall not exercise any political function.

8.3 Each court should establish an appropriate mechanism to give guidance to judges in relation to extra-judicial activities, and to ensure that appropriate means exist for parties to proceedings to raise any concerns.

9. Past links to a case

9.1 Judges shall not serve in a case in which they have previously served as agent, counsel, adviser, advocate, expert or in any other capacity for one of the parties, or as a member of a

national or international court or other dispute settlement body which has considered the subject matter of the dispute.

9.2 Judges shall not serve in a case with the subject-matter of which they have had any other form of association that may affect or may reasonably appear to affect their independence or impartiality.

10. Past links to a party

Judges shall not sit in any case involving a party for whom they have served as agent, counsel, adviser, advocate or expert within the previous three years or such other period as the court may establish within its rules; or with whom they have had any other significant professional or personal link within the previous three years or such other period as the court may establish within its rules.

11. Interest in the outcome of a case

11.1 Judges shall not sit in any case in the outcome of which they hold any material personal, professional or financial interest.

11.2 Judges shall not sit in any case in the outcome of which other persons or entities closely related to them hold a material personal, professional or financial interest.

11.3 Judges must not accept any undisclosed payment from a party to the proceedings or any payment whatsoever on account of the judge's participation in the proceedings.

12. Contacts with a party

12.1 Judges shall exercise appropriate caution in their personal contacts with parties, agents, counsel, advocates, advisers and other persons and entities associated with a pending case. Any such contacts should be conducted in a manner that is compatible with their judicial function and that may not affect or reasonably appear to affect their independence and impartiality.

12.2 Judges shall discourage *ex parte* communications from parties, and except as provided by the rules of the court such communications shall be disclosed to the court and the other party.

13. Post-service limitations

13.1 Judges shall not seek or accept, while they are in office, any future employment, appointment or benefit, from a party to a case on which they sat or from any entity related to such a party, that may affect or may reasonably appear to affect their independence or impartiality.

13.2 Former judges shall not, except as permitted by rules of the court, act in any capacity in relation to any case on which they sat while serving on the court.

13.3 Former judges shall not act as agent, counsel, adviser or advocate in any proceedings before the court on which they previously served for a period of three years after they have left office or such other period as the court may establish and publish.

13.4 Former judges should exercise appropriate caution as regards the acceptance of any employment, appointment or benefit, in particular from a party to a case on which they sat or from any entity related to such a party

14. Disclosure

14.1 Judges shall disclose to the court and, as appropriate, to the parties to the proceedings any circumstances which come to their notice at any time by virtue of which any of Principles 7 to 13 apply.

14.2 Each court shall establish appropriate procedures to enable judges to disclose to the court and, as appropriate, to the parties to the proceedings matters that may affect or may reasonably appear to affect their independence or impartiality in relation to any particular case.

15. Waiver

Notwithstanding Principles 7 to 13, judges shall not be prevented from sitting in a case where they have made appropriate disclosure of any facts bringing any of those Principles into operation, and where the court expresses no objections and the parties give their express and informed consent to the judge acting.

16. Withdrawal or disqualification

Each court shall establish rules of procedure to enable the determination whether judges are prevented from sitting in a particular case as a result of the application of these Principles or for reasons of incapacity. Such procedures shall be available to a judge, the court, or any party to the proceedings.

17. Misconduct

17.1 Each court shall establish rules of procedure to address a specific complaint of misconduct or breach of duty on the part of a judge that may affect independence or impartiality.

17.2 Such a complaint may, if clearly unfounded, be resolved on a summary basis. In any case where the court determines that fuller investigation is required, the rules shall establish adequate safeguards to protect the judges' rights and interests and to ensure appropriate confidentiality of the proceedings.

17.3 The governing instruments of the court shall provide for appropriate measures, including the removal from office of a judge.

17.4 The outcome of any complaint shall be communicated to the complainant.

International Law Association Study Group
on the Practice and Procedure of International Courts and Tribunals[1]

Co-Chairs

Philippe Sands, Professor of Law, University College London; Co-Director, Project on International Courts and Tribunals

Campbell McLachlan, Professor, Deputy Dean, School of Law, Victoria University of Wellington

Members

Laurence Boisson de Chazournes, Professor of International Law, University of Geneva

Rodman Bundy, Frere Cholmeley Eversheds, Paris

James Crawford, Whewell Professor of International Law, Cambridge University

Hans van Houtte, Professor of International Law, Katholieke Universiteit Leuven

Mojtaba Kazazi, United Nations Compensation Commission

Francisco Orrego Vicuna, Professor of International Law, University of Chile

Alain Pellet, Professor of International Law, Université Paris X Nanterre

Davis Robinson, LeBoeuf, Lamb, Greene & MacRae

Soli Sorabjee, Attorney General of India

Margrete Stevens, Senior Counsel, International Centre for Settlement of Investment Disputes

Advisers

Georges Abi-Saab, Chairman, Appellate Body, World Trade Organisation

Mahnoush Arsanjani, Office of Legal Affairs, United Nations

Oscar G. Chase, Director, Institute of Judicial Administration, New York University

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[1] The Burgh House Principles are issued on the authority of the Co-Chairs and members of the Study Group. They reflect the discussions that took place in the Study Group as a whole, and have been the subject of extensive review, consultation and comment. The members participated in the Study Group in their personal capacity. Additionally, the Study Group has benefited from input from advisers, also acting in their personal capacity. The content of the Principles should not be attributed to any individual member of the Study Group or be taken as representing the view of any institution to which anyone associated with the Study Group's work may be affiliated.

Rosalyn Higgins, Judge, International Court of Justice

Francis Jacobs, Advocate General, Court of Justice of the European Communities

Jonathan Mance, Lord Justice, Court of Appeal

Thomas Mensah, Judge, International Tribunal for the Law of the Sea

Eduardo Valencia-Ospina, Consultant, Frere Cholmeley Eversheds, former Registrar, International Court of Justice

Fausto Pocar, Judge, International Criminal Tribunal for the Former Yugoslavia

Nina Vajic, Judge, European Court of Human Rights

Observers

Alfred H. Soons, Director of Studies, International Law Association; Professor of International Law, Netherlands Institute for the Law of the Sea, University of Utrecht

Ian Seiderman, International Commission of Jurists

Secretaries

Ruth Mackenzie, Principal Research Fellow and Assistant Director, Centre for International Courts and Tribunals, Faculty of Laws, University College London

Yuval Shany, Senior Lecturer in Law, College of Management Academic Studies, Israel

Project on International Courts and Tribunals (PICT)

Cesare Romano, Assistant Director

Jessica Almqvist, Research Fellow

Thordis Ingadottir, Associate

Noemi Byrd, Administrator (2001-2003)

Kate Barber, Administrator (2003-2004)

Nathan Miller, Furman Research Fellow, PICT (2001-2002)

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European Charter

on

the statute for judges

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Activities for the development and consolidation
of democratic stability

THEMIS PLAN
Project n° 3

European Charter on the statute for judges

and

Explanatory Memorandum

Strasbourg, 8 - 10 July 1998

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FOREWORD

The activities carried out in the Council of Europe for many years now, on the organisation of Justice in a democratic State governed by the rule of law, have allowed the various aspects of the issue of the status of judges to be addressed on numerous occasions. These meetings over the past years have been devoted to the recruitment, training, career and responsibilities of judges, as well as the disciplinary system governing them. The number of these meetings has increased since the end of the eighties due to the profound changes that have taken place in Eastern Europe.

In 1997, the idea developed to maximise the results of the work and discussions in order to give this work better 'visibility' and above all to give a new impulse to the continuing effort to improve legal institutions as an essential element of the rule of law.

The need to draft a European charter on the statute for judges was confirmed in July 1997, following a first multilateral meeting in Strasbourg devoted to the Status of Judges in Europe. The participants at this meeting came from 13 Western, Central and Eastern European countries, as well as from the European Association of Judges (EAJ) and the European Association of Judges for Democracy and Freedom (MEDEL). The participants expressed a wish for the Council of Europe to give the necessary framework and support to the elaboration of the Charter.

On the basis of these conclusions, the Directorate of Legal Affairs entrusted three experts from France, Poland and United Kingdom with the realisation of a draft charter.

This draft, created in Spring 1998, was laid before the participants of a second multilateral meeting, also held in Strasbourg, on 8-10 July 1998. At the end of the three days of discussion, the text, after having been improved by a certain number of amendments, was unanimously adopted.

The value of this Charter is not a result of a formal status, which, in fact, it does not have, but of the relevance and strength that its authors intended to give to its contents. A thorough knowledge of its contents and a wide distribution of the Charter are essential for its goals to be realised . The Charter is aimed at judges, lawyers, politicians and more generally to every person who has an interest in the rule of law and democracy.

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EUROPEAN CHARTER ON THE STATUTE FOR JUDGES

The participants at the multilateral meeting on the statute for judges in Europe, organized by the Council of Europe, between 8-10 July 1998,

Having regard to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms which provides that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" ;

Having regard to the United Nations Basic Principles on the Independence of the Judiciary, endorsed by the United Nations General Assembly in November 1985;

Having referred to Recommendation No R (94) 12 of the Committee of Ministers to member states on the independence, efficiency and role of judges, and having made their own, the objectives which it expresses ;

Being concerned to see the promotion of judicial independence, necessary for the strengthening of the pre-eminence of law and for the protection of individual liberties within democratic states, made more effective ;

Conscious of the necessity that provisions calculated to ensure the best guarantees of the competence, independence and impartiality of judges should be specified in a formal document intended for all European States ;

Desiring to see the judges' statutes of the different European States take into account these provisions in order to ensure in concrete terms the best level of guarantees;

Have adopted the present European Charter on the statute for judges.

1. GENERAL PRINCIPLES

1.1. The statute for judges aims at ensuring the competence, independence and impartiality which every individual legitimately expects from the courts of law and from every judge to whom is entrusted the protection of his or her rights. It excludes every provision and every procedure liable to impair confidence in such competence, such independence and such impartiality. The present Charter is composed hereafter of the provisions which are best able to guarantee the achievement of those objectives. Its provisions aim at raising the level of guarantees in the various European States. They cannot justify modifications in national statutes tending to decrease the level of guarantees already achieved in the countries concerned.

1.2. In each European State, the fundamental principles of the statute for judges are set out in internal norms at the highest level, and its rules in norms at least at the legislative level.

1.3. In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.

1.4. The statute gives to every judge who considers that his or her rights under the statute, or more generally his or her independence, or that of the legal process, are threatened or ignored in any way whatsoever, the possibility of making a reference to such an independent authority, with effective means available to it of remedying or proposing a remedy.

1.5. Judges must show, in discharging their duties, availability, respect for individuals, and vigilance in maintaining the high level of competence which the decision of cases requires on every occasion - decisions on which depend the guarantee of individual rights and in preserving the secrecy of information which is entrusted to them in the course of proceedings.

1.6. The State has the duty of ensuring that judges have the means necessary to accomplish their tasks properly, and in particular to deal with cases within a reasonable period.

1.7. Professional organizations set up by judges, and to which all judges may freely adhere, contribute notably to the defence of those rights which are conferred on them by their statute, in particular in relation to authorities and bodies which are involved in decisions regarding them.

1.8. Judges are associated through their representatives and their professional organizations in decisions relating to the administration of the courts and as to the determination of their means, and their allocation at a national and local level. They are consulted in the same manner over plans to modify their statute, and over the determination of the terms of their remuneration and of their social welfare.

2. SELECTION, RECRUITMENT, INITIAL TRAINING

2.1. The rules of the statute relating to the selection and recruitment of judges by an independent body or panel, base the choice of candidates on their ability to assess freely and impartially the legal matters which will be referred to them, and to apply the law to them with respect for individual dignity. The statute excludes any candidate being ruled out by reason only of their sex, or ethnic or social origin, or by reason of their philosophical and political opinions or religious convictions.

2.2. The statute makes provision for the conditions which guarantee, by requirements linked to educational qualifications or previous experience, the ability specifically to discharge judicial duties.

2.3. The statute ensures by means of appropriate training at the expense of the State, the preparation of the chosen candidates for the effective exercise of judicial duties. The authority referred to at paragraph 1.3 hereof, ensures the appropriateness of training programmes and of the organization which implements them, in the light of the requirements of open-mindedness, competence and impartiality which are bound up with the exercise of judicial duties.

3. APPOINTMENT AND IRREMOVABILITY

3.1. The decision to appoint a selected candidate as a judge, and to assign him or her to a tribunal, are taken by the independent authority referred to at paragraph 1.3 hereof or on its proposal, or its recommendation or with its agreement or following its opinion.

3.2. The statute establishes the circumstances in which a candidate's previous activities, or those engaged in by his or her close relations, may, by reason of the legitimate and objective

doubts to which they give rise as to the impartiality and independence of the candidate concerned, constitute an impediment to his or her appointment to a court.

3.3. Where the recruitment procedure provides for a trial period, necessarily short, after nomination to the position of judge but before confirmation on a permanent basis, or where recruitment is made for a limited period capable of renewal, the decision not to make a permanent appointment or not to renew, may only be taken by the independent authority referred to at paragraph 1.3 hereof, or on its proposal, or its recommendation or with its agreement or following its opinion. The provisions at point 1.4 hereof are also applicable to an individual subject to a trial period.

3.4. A judge holding office at a court may not in principle be appointed to another judicial office or assigned elsewhere, even by way of promotion, without having freely consented thereto. An exception to this principle is permitted only in the case where transfer is provided for and has been pronounced by way of a disciplinary sanction, in the case of a lawful alteration of the court system, and in the case of a temporary assignment to reinforce a neighbouring court, the maximum duration of such assignment being strictly limited by the statute, without prejudice to the application of the provisions at paragraph 1.4 hereof.

4. CAREER DEVELOPMENT

4.1. When it is not based on seniority, a system of promotion is based exclusively on the qualities and merits observed in the performance of duties entrusted to the judge, by means of objective appraisals performed by one or several judges and discussed with the judge concerned. Decisions as to promotion are then pronounced by the authority referred to at paragraph 1.3 hereof or on its proposal, or with its agreement. Judges who are not proposed with a view to promotion must be entitled to lodge a complaint before this authority.

4.2. Judges freely carry out activities outside their judicial mandate including those which are the embodiment of their rights as citizens. This freedom may not be limited except in so far as such outside activities are incompatible with confidence in, or the impartiality or the independence of a judge, or his or her required availability to deal attentively and within a reasonable period with the matters put before him or her. The exercise of an outside activity, other than literary or artistic, giving rise to remuneration, must be the object of a prior authorization on conditions laiddown by the statute.

4.3. Judges must refrain from any behaviour, action or expression of a kind effectively to affect confidence in their impartiality and their independence.

4.4. The statute guarantees to judges the maintenance and broadening of their knowledge, technical as well as social and cultural, needed to perform their duties, through regular access to training which the State pays for, and ensures its organization whilst respecting the conditions set out at paragraph 2.3 hereof.

5. LIABILITY

5.1. The dereliction by a judge of one of the duties expressly defined by the statute, may only give rise to a sanction upon the decision, following the proposal, the recommendation, or with the agreement of a tribunal or authority composed at least as to one half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties, in

which the judge proceeded against must be entitled to representation. The scale of sanctions which may be imposed is set out in the statute, and their imposition is subject to the principle of proportionality. The decision of an executive authority, of a tribunal, or of an authority pronouncing a sanction, as envisaged herein, is open to an appeal to a higher judicial authority.

5.2. Compensation for harm wrongfully suffered as a result of the decision or the behaviour of a judge in the exercise of his or her duties is guaranteed by the State. The statute may provide that the State has the possibility of applying, within a fixed limit, for reimbursement from the judge by way of legal proceedings in the case of a gross and inexcusable breach of the rules governing the performance of judicial duties. The submission of the claim to the competent court must form the subject of prior agreement with the authority referred to at paragraph 1.3 hereof.

5.3. Each individual must have the possibility of submitting without specific formality a complaint relating to the miscarriage of justice in a given case to an independent body. This body has the power, if a careful and close examination makes a dereliction on the part of a judge indisputably appear, such as envisaged at paragraph 5.1 hereof, to refer the matter to the disciplinary authority, or at the very least to recommend such referral to an authority normally competent in accordance with the statute, to make such a reference.

6. REMUNERATION AND SOCIAL WELFARE

6.1. Judges exercising judicial functions in a professional capacity are entitled to remuneration, the level of which is fixed so as to shield them from pressures aimed at influencing their decisions and more generally their behaviour within their jurisdiction, thereby impairing their independence and impartiality.

6.2. Remuneration may vary depending on length of service, the nature of the duties which judges are assigned to discharge in a professional capacity, and the importance of the tasks which are imposed on them, assessed under transparent conditions.

6.3. The statute provides a guarantee for judges acting in a professional capacity against social risks linked with illness, maternity, invalidity, old age and death.

6.4. In particular the statute ensures that judges who have reached the legal age of judicial retirement, having performed their judicial duties for a fixed period, are paid a retirement pension, the level of which must be as close as possible to the level of their final salary as a judge.

7. TERMINATION OF OFFICE

7.1. A judge permanently ceases to exercise office through resignation, medical certification of physical unfitness, reaching the age limit, the expiry of a fixed legal term, or dismissal pronounced within the framework of a procedure such as envisaged at paragraph 5.1 hereof.

7.2. The occurence of one of the causes envisaged at paragraph 7.1 hereof, other than reaching the age limit or the expiry of a fixed term of office, must be verified by the authority referred to at paragraph 1.3 hereof.

EXPLANATORY MEMORANDUM
TO
THE EUROPEAN CHARTER
ON THE STATUTE FOR JUDGES

1. GENERAL PRINCIPLES

The provisions of the European Charter cover not only professional but also non-professional judges, because it is important that all judges should enjoy certain safeguards relating to their recruitment, incompatibilities, conduct outside, and the termination of their office.

However, the Charter also lays down specific provisions on professional judges, and in fact this specificity is inherent in certain concepts such as careers.

The provisions of the Charter concern the statute for judges of all jurisdictions to which people are called to submit their case or which are called upon to decide their case, be it a civil, criminal, administrative or other jurisdiction.

1.1 The Charter endeavours to define the content of the statute for judges on the basis of the objectives to be attained: ensuring the competence, independence and impartiality which all members of the public are entitled to expect of the courts and judges entrusted with protecting their rights. The Charter is therefore not an end in itself but rather a means of guaranteeing that the individuals whose rights are to be protected by the courts and judges have the requisite safeguards on the effectiveness of such protection.

These safeguards on individuals' rights are ensured by judicial competence, in the sense of ability, independence and impartiality. These are positive references because the judge's statute must strive to guarantee them; however, they are also negative because the statute must not include any element which might adversely affect public confidence in such competence, independence and impartiality.

The question arose whether the provisions of the Charter should be mandatory, ie whether it should be made compulsory to include them in national statutes regulating the judiciary, or whether they should have the force of recommendations, so that different provisions deemed capable of ensuring equivalent guarantees could be implemented instead.

The latter approach could be justified by a reluctance to criticise national systems in which a long-standing, well-established practice has ensured effective guarantees on statutory protection of the judiciary, even if the system barely mentions such protection.

However, it has also been argued that in a fair number of countries, including new Council of Europe member States, which do not regulate the exercise by political authorities of powers in the area of appointing, assigning, promoting or terminating the office of judges, the safeguards on competence, independence and impartiality are ineffective.

This is why, even though the Charter's provisions are not actually mandatory, they are presented as being the optimum means of ensuring that the aforementioned objectives are attained.

Many of the Charter's provisions are inapplicable in systems where judges are directly elected by the citizens. It would have been impossible to draw up a Charter exclusively comprising provisions compatible with such elective systems, as this would have reduced the text to the lowest common denominator. Nor is the Charter aimed at "invalidating" elective systems, because where they do exist they may be regarded by nationals of the countries concerned as "quintessentially democratic". We might consider that the provisions apply as far as possible to systems in which the judiciary is elected. For instance, the provisions set out in paragraphs 2.2 and 2.3 (first sentence) are certainly applicable to such systems, for which they provide highly appropriate safeguards.

The provisions of the Charter aim to raise the level of guarantees in the various European States. The importance of such raising will depend on the level already achieved in a country. But the provisions of the Charter must not in any way serve as the basis for modifying national statutes so as on the contrary to decrease the level of guarantees already achieved in any one country.

1.2 The fundamental principles constituting a statute for judges, determining the safeguard on the competence, independence and impartiality of the judges and courts, must be enacted in the normative rules at the highest level, that is to say in the Constitution, in the case of European States which have established such a basic text. The rules included in the statute will normally be enacted at the legislative level, which is also the highest level in States with flexible constitutions.

The requirement to enshrine the fundamental principles and rules in legislation or the Constitution protects the latter from being amended under a cursory procedure unsuited to the issues at stake. In particular, where the fundamental principles are enshrined in the Constitution, it prevents the enactment of legislation aimed at or having the effect of infringing them.

In stipulating that these principles must be included in domestic legal systems, the Charter is not prejudging the respect that is due under such systems for protective provisions set out in international instruments binding upon the European States. This is especially true because the Charter takes the foremost among these provisions as a source of inspiration, as stated in the preamble.

1.3 The Charter provides for the intervention of a body independent from the executive and the legislature where a decision is required on the selection, recruitment or appointment of judges, the development of their careers or the termination of their office.

The wording of this provision is intended to cover a variety of situations, ranging from the mere provision of advice for an executive or legislative body to actual decisions by the independent body.

Account had to be taken here of certain differences in the national systems. Some countries would find it difficult to accept an independent body replacing the political body responsible for appointments. However, the requirement in such cases to obtain at least the recommendation or the opinion of an independent body is bound to be a great incentive, if not an actual obligation, for the official appointments body. In the spirit of the Charter, recommendations and opinions of the independent body do not constitute guarantees that they will in a general way be followed in practice. The political or administrative authority which does not follow such recommendation or opinion should at the very least be obliged to make known its reasons for its refusal so to do.

The wording of this provision of the Charter also enables the independent body to intervene either with a straightforward opinion, an official opinion, a recommendation, a proposal or an actual decision.

The question arose of the membership of the independent body. The Charter at this point stipulates that at least one half of the body's members should be judges elected by their peers, which means that it wants neither to allow judges to be in a minority in the independent body nor to require them to be in the majority. In view of the variety of philosophical conceptions and debates in European States, a reference to a minimum of 50% judges emerged as capable of ensuring a fairly high level of safeguards while respecting any other considerations of principle prevailing in different national systems.

The Charter states that judges who are members of the independent body should be elected by their peers, on the grounds that the requisite independence of this body precludes the election or appointment of its members by a political authority belonging to the executive or the legislature.

There would be a risk of party-political bias in the appointment and role of judges under such a procedure. Judges sitting on the independent body are expected, precisely, to refrain from seeking the favour of political parties or bodies that are themselves appointed or elected by or through such parties.

Finally, without insisting on any particular voting system, the Charter indicates that the method of electing judges to this body must guarantee the widest representation of judges.

1.4 The Charter enshrines the "right of appeal" of any judge who considers that his or her rights under the statute or more generally independence, or that of the legal process, is threatened or infringed in any way, so that he or she can refer the matter to an independent body as described above.

This means that judges are not left defenceless against an infringement of their independence. The right of appeal is a necessary safeguard because it is mere wishful thinking to set out principles to protect the judiciary unless they are consistently backed with mechanisms to guarantee their effective implementation. The intervention of the independent body before any decision is taken on the judge's individual status does not necessarily cover all possible situations in which his or her independence is affected, and it is vital to ensure that judges can apply to this body on their own initiative.

The Charter stipulates that the body thus applied to must have the power to remedy the situation affecting the judge's independence of its own accord, or to propose that the competent authority remedy it. This formula takes account of the diversity of national systems, and even a straightforward recommendation from an independent body on a given situation provides a considerable incentive for the authority in question to remedy the situation complained of.

1.5 The Charter sets out the judge's main duties in the exercise of his or her functions. "Availability" refers both to the time required to judge cases properly and to the attention and alertness that are obviously required for such important duties, since it is the judge's decision that safeguards individual rights. Respect for individuals is particularly vital in positions of power such as that occupied by the judge, especially since individuals often feel very vulnerable when confronted with the judicial system. This paragraph also mentions the judge's obligation to respect the confidentiality of information which comes to his or her attention in the course of proceedings. It ends by pointing out that judges must ensure that they maintain the high level of

competence that the hearing of cases demands. This means that the high level of competence and of ability is a constant requirement for the judge in examining and adjudicating on cases, and also that he or she must maintain this high level, if necessary through further training. As is pointed out later in the text, judges must be granted access to training facilities.

1.6 The Charter makes it clear that the State has the duty of ensuring that judges have the means necessary to accomplish their tasks properly, and in particular to deal with cases within a reasonable period.

Without explicit indication of this obligation which is the responsibility of the State, the justifications of the propositions related to the responsibility of the judges would be deteriorated.

1.7 The Charter recognises the role of professional associations formed by judges, to which all judges are freely entitled to adhere, which precludes any form of legal discrimination vis-à-vis the right to join them. It also points out that such associations contribute in particular to the defence of judges' statutory rights before such authorities and bodies as may be involved in decisions affecting them. Judges may therefore not be prohibited from forming or adhering to professional associations.

Although the Charter does not assign these associations exclusive responsibility for defending judges' statutory rights, it does indicate that their contribution to such defence before the authorities and bodies involved in decisions affecting judges must be recognised and respected. This applies, inter alia, to the independent authority referred to in paragraph 1.3.

1.8 The Charter provides that judges should be associated through their representatives, particularly those that are members of the authority referred to in paragraph 1.3, and through their professional associations, with any decisions taken on the administration of the courts, the determination of the courts' budgetary resources and the implementation of such decisions at the local and national levels.

Without advocating any specific legal form or degree of constraint, this provision lays down that judges should be associated in the determination of the overall judicial budget and the resources earmarked for individual courts, which implies establishing consultation or representation procedures at the national and local levels. This also applies more broadly to the administration of justice and of the courts. The Charter does not stipulate that judges should be responsible for such administration, but it does require them not to be left out of administrative decisions.

Consultation of judges by their representatives or professional associations on any proposed change in their statute or any change proposed as to the basis on which they are remunerated, or as to their social welfare, including their retirement pension, should ensure that judges are not left out of the decision-making process in these fields. Nevertheless, the Charter does not authorise encroachment on the decision-making powers vested in the national bodies responsible for such matters under the Constitution.

2. SELECTION, RECRUITMENT AND INITIAL TRAINING

2.1 Judicial candidates must be selected and recruited by an independent body or panel. The Charter does not require that the latter be the independent authority referred to in paragraph 1.3, which means, for instance, that examination or selection panels can be used,

provided they are independent. In practice, the selection procedure is often separate from the actual appointment procedure. It is important to specify the particular safeguards accompanying the selection procedure.

The choice made by the selection body must be based on criteria relevant to the nature of the duties to be discharged.

The main aim must be to evaluate the candidate's ability to assess independently cases heard by judges, which implies independent thinking. The ability to show impartiality in the exercise of judicial functions is also an essential element. The ability to apply the law refers both to knowledge of the law and the capacity to put it into practice, which are two different things. The selection body must also ensure that the candidate's conduct as a judge will be based on respect for human dignity, which is vital in encounters between persons in positions of power and the litigants, who are often people in great difficulties.

Lastly, selection must not be based on discriminatory criteria relating to gender, ethnic or social origin, philosophical or political opinions or religious convictions.

2.2 In order to ensure the ability to carry out the duties involved in judicial office, the rules on selection and recruitment must set out requirements as to qualifications and previous experience. This applies, for instance, to systems in which recruitment is conditional upon a set number of years' legal or judicial experience.

2.3 The nature of judicial office, which requires the judge to intervene in complex situations that are often difficult in terms of respect for human dignity, is such that "abstract" verification of aptitude for such office is not enough.

Candidates selected to discharge judicial duties must therefore be prepared for the task by means of appropriate training, which must be financed by the State.

Certain precautions must be taken in preparing judges for the giving of independent and impartial decisions, whereby competence, impartiality and the requisite open-mindedness are guaranteed in both the content of the training programmes and the functioning of the bodies implementing them. This is why the Charter provides that the authority referred to in paragraph 1.3 must ensure the appropriateness of training programmes and of the organization which implements them, in the light of the requirements of open-mindedness, competence and impartiality which are bound up with the exercise of judicial duties. The said authority must have the resources so to ensure. Accordingly, the rules set out in the the statute must specify the procedure for supervision by this body in relation to the requirements in question concerning the programmes and their implementation by the training bodies.

3. APPOINTMENT AND IRREMOVABILITY

3.1 National systems may draw a distinction between the actual selection procedure and the procedures of appointing a judge and assigning him or her to a specific court. It should be noted that decisions to appoint or assign judges are taken by the independent authority referred to at paragraph 1.3 hereof or are reached upon its proposal or recommendation or with its agreement or following its opinion.

3.2 The Charter deals with the question of incompatibilities. It discarded the hypothesis of absolute incompatibilities as this would hamper judicial appointments on the grounds of

candidates' or their relatives' previous activities. On the other hand, it considers that when a judge is to be assigned to a specific court, regard must be had to the above-mentioned circumstances where they give rise to legitimate and objective doubts as to his or her impartiality and independence.

For example, a lawyer who has previously practised in a given town cannot possibly be immediately assigned as a judge to a court in the same town. It is also difficult to imagine a judge being assigned to a court in a town in which his or her spouse, father or mother, for instance, is mayor or member of parliament. Therefore, where judges are to be assigned to a given court, the relevant statute must take account of situations liable to give rise to legitimate and objective doubts as to their independence and impartiality.

3.3 The recruitment procedure in some national systems provides for a probationary period before a permanent judicial appointment is made, and others recruit judges on fixed-term renewable contracts.

In such cases the decision not to make a permanent appointment or not to renew an appointment can only be taken by the independent authority referred to at paragraph 1.3 hereof or upon its proposal, recommendation or following its opinion. Clearly, the existence of probationary periods or renewal requirements presents difficulties if not dangers from the angle of the independence and impartiality of the judge in question, who is hoping to be established in post or to have his or her contract renewed. Safeguards must therefore be provided through the intervention of the independent authority. In so far as the quality as a judge of an individual who is the subject of a trial period may be under discussion, the Charter lays down that the right to make a reference to an independent authority, as referred to in paragraph 1.4, is applicable to such an individual.

3.4 The Charter enshrines the irremovability of judges, which means that a judge cannot be assigned to another court or have his or her duties changed without his or her free consent. However, exceptions must be allowed where transfer is provided for within a disciplinary framework, when a lawful re-organization of the court system takes place involving for example the closing down of a court or a temporary transfer is required to assist a neighbouring court. In the latter case, the duration of the temporary transfer must be limited by the relevant statute. Nevertheless, since the problem of transferring a judge without his or her consent is highly sensitive, it is recalled that under the terms of paragraph 1.4 he or she has a general right of appeal before an independent authority, which can investigate the legitimacy of the transfer. In fact, this right of appeal can also remedy situations which have not been specifically catered for in the provisions of the Charter where a judge has such an excessive workload as to be unable in practice to carry out his or her responsibilities normally.

4. CAREER DEVELOPMENT

4.1 Apart from cases where judges are promoted strictly on the basis of length of service, a system which the Charter did not in any way exclude because it is deemed to provide very effective protection for independence, but which presupposes that high-quality recruitment will be absolutely guaranted in the countries concerned, it is important to ensure that the judge's independence and impartiality are not infringed in the area of promotion. It must be specified that there are two potential issues here: judges illegitimately barred from promotion, and judges unduly promoted.

This is why the Charter defines the criteria for promotion exclusively as the qualities and merits observed in the performance of judicial duties by means of objective assessments carried out by one or more judges and discussed with the judge assessed.

Decisions concerning promotion are then taken on the basis of these assessments in the light of the proposal by the independent authority referred to in paragraph 1.3 or upon its recommendation or with its agreement or following its opinion. It is expressly stipulated that a judge who is proposed with a view to promotion submitted for examination by the independent authority must be entitled to present his or her case before the said authority.

The provisions of paragraph 4.1 are obviously not intended to apply to systems in which judges are not promoted, and there is no judicial hierarchy, systems which are also in this regard highly protective of judicial independence.

4.2 The Charter deals here with activities conducted alongside judicial functions. It provides that judges may freely exercise activities outside their judicial mandate, including those which are the embodiment of their rights as citizens. This freedom, which constitutes the principle, may not know of limitation except only in so far as judges engage in outside activities incompatible either with public confidence in their impartiality and independence or with the availability required to consider the cases submitted to them with due care and within a reasonable time. The Charter does not specify any particular type of activity. The negative effects of outside activities on the conditions under which judicial duties are discharged must be pragmatically assessed. The Charter stipulates that judges should request authorisation to engage in activities other than literary or artistic when they are renumerated.

4.3 The Charter addresses the question of what is sometimes called "judicial discretion". It adopts a position which derives from Article 6 of the European Convention on Human Rights and the case-law of the European Court of Human Rights thereupon, laying down that judges must refrain from any behaviour, action or expression likely to affect public confidence in their impartiality and independence. The reference to the risk of such confidence being undermined obviates any excessive rigidity which would result in the judge becoming a social and civic outcast.

4.4 The Charter lays down "the judge's right to in-house training": he or she must have regular access to training courses organized at public expense, aimed at ensuring that judges can maintain and improve their technical, social and cultural skills. The State must ensure that such training programmes are so organised as to respect the conditions set out in paragraph 2.3, which relate to the role of the independent authority referred to in paragraph 1.3, in order to guarantee appropriateness in the content of training courses and in the functioning of the bodies implementing such courses, to the requirements of open-mindedness, competence and impartiality.

The definition of these guarantees set out in paragraphs 2.3 and 4.4 on training is very flexible, enabling them to be tailored to the various national training systems: training colleges administered by the Ministry of Justice, institutes operating under the higher council of judges, private law foundations, etc.

5. LIABILITY

5.1 The Charter deals here with the judge's disciplinary liability. It begins with a reference to the principle of the legality of disciplinary sanctions, stipulating that the only valid reason for

imposing sanctions is the failure to perform one of the duties explicitly defined in the Judges' Statute and that the scale of applicable sanctions must be set out in the judges' statute. Moreover, the Charter lays down guarantees on disciplinary hearings: disciplinary sanctions can only be imposed on the basis of a decision taken following a proposal or recommendation or with the agreement of a tribunal or authority, at least one half of whose members must be elected judges. The judge must be given a full hearing and be entitled to representation. If the sanction is actually imposed, it must be chosen from the scale of sanctions, having due regard to the principle of proportionality. Lastly, the Charter provides for a right of appeal to a higher judicial authority against any decision to impose a sanction taken by an executive authority, tribunal or body, at least half of whose membership are elected judges.

The current wording of this provision does not require the availability of such a right of appeal against a sanction imposed by Parliament.

5.2 Here the Charter relates to judges' civil and pecuniary liability. It posits the principle that State compensation shall be paid for damage sustained as a result of a judge's wrongful conduct or unlawful exercise of his or her functions whilst acting as a judge. This means that it is the State which is in every case the guarantor of compensation to the victim for such damage.

In specifying that such a State guarantee applies to damage sustained as a result of a judge's wrongful conduct or unlawful exercise of his or her functions, the Charter does not necessarily refer to the wrongful or unlawful nature of the conduct or of the exercise of functions, but rather emphasises the damage sustained as a result of that "wrongful" or "unlawful" nature. This is fully compatible with liability based not upon misconduct by the judge, but upon the abnormal, special and serious nature of the damage resulting from his or her wrongful conduct or unlawful exercise of functions. This is important in the light of concerns that judges' judicial independence should not be affected through a civil liability system.

The Charter also provides that, when the damage which the State had to guarantee is the result of a gross and inexcusable breach of the rules governing the performance of judicial duties, the statute may confer on the State the possibility of bringing legal proceedings with a view to requiring the judge to reimburse it for the compensation paid within a limit fixed by the statute. The requirement for gross and inexcusable negligence and the legal nature of the proceedings to obtain reimbursement must constitute significant guarantees that the procedure is not abused. An additional guarantee is provided by way of the prior agreement which the authority referred to at paragraph 1.3 must give before a claim may be submitted to the competent court.

5.3 Here the Charter looks at the issue of complaints by members of the public about miscarriages of justice.

States have organised their complaints procedures to varying degrees, and it is not always very well organised.

This is why the Charter provides for the possibility to be open to an individual to make a complaint of miscarriage of justice in a given case to an independent body, without having to observe specific formalities. Were full and careful consideration by such a body to reveal a clear prima facie disciplinary breach by a judge, the body concerned would have the power to refer the matter to the disciplinary authority having jurisdiction over judges, or at least to a body competent, under the rules of the national statute, to make such referral. Neither this body nor this authority will be constrained to adopt the same opinion as the body to which the complaint was made. In the outcome there are genuine guarantees against the risks of the complaints

procedure being led astray by those to be tried, desiring in reality to bring pressure to bear on the justice system.

The independent body concerned would not necessarily be designed specifically to verify whether judges have committed breaches. Judges have no monopoly on miscarriages of justice. It would therefore be conceivable for this same independent body similarly to refer matters, when it considers such referral justified, to the disciplinary authority having jurisdiction over, or to the body responsible for taking proceedings against lawyers, court officials, bailiffs, etc.

The Charter, however, relating to the judges' statute, has to cover in greater detail only the matter of referral relating to judges.

6. REMUNERATION AND SOCIAL WELFARE

The provisions under this heading relate only to professional judges.

6.1 The Charter provides that the level of the remuneration to which judges are entitled for performing their professional judicial duties must be set so as to shield them from pressures intended to influence their decisions or judicial conduct in general, impairing their independence and impartiality.

It seemed preferable to state that the level of the remuneration paid had to be such as to shield judges from pressures, rather than to provide for this level to be set by reference to the remuneration paid to holders of senior posts in the legislature or the executive, as the holders of such posts are far from being treated on a comparable basis in the different national systems.

6.2 The level of remuneration of one judge as compared to another may be subject to variations depending on length of service, the nature of the duties which they are assigned to discharge and the importance of the tasks which are imposed on them, such as weekend duties. However, such tasks justifying higher remuneration must be assessed on the basis of transparent criteria, so as to avoid differences in treatment unconnected with considerations relating to the work done or the availability required.

6.3 The Charter provides for judges to benefit from social security, ie protection against the usual social risks, namely illness, maternity, invalidity, old age and death.

6.4 It specifies in this context that judges who have reached the age of judicial retirement after the requisite time spent as judges must benefit from payment of a retirement pension, the level of which must be as close as possible to the level of their final salary as a judge.

7. TERMINATION OF OFFICE

7.1 Vigilance is necessary about the conditions in which judges' employment comes to be terminated. It is important to lay down an exhaustive list of the reasons for termination of employment. These are when a judge resigns, is medically certified as physically unfit for further judicial office, reaches the age limit, comes to the end of a fixed term of office or is dismissed in the context of disciplinary liability.

7.2 On occurrence of the events which are grounds for termination of employment other than the ones - ie the reaching of the age limit or the coming to an end of a fixed term of office - which may be ascertained without difficulty, they must be verified by the authority referred to in paragraph 1.3. This condition is easily realised when the termination of office results from a dismissal decided precisely by this authority, or on its proposal or recommendation, or with its agreement.

Strasbourg, 19 November 2002

CCJE (2002) Op. N° 3

Consultative Council of European Judges (CCJE)

Opinion no. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality

1. The Consultative Council of European Judges (CCJE) drafted this opinion on the basis of replies by the Member States to a questionnaire and texts drawn up by the CCJE Working Party and the specialist of the CCJE on this topic, Mr Denis SALAS (France).

2. The present opinion makes reference to CCJE Opinion No. 1 (2001) (www.coe.int/legalprof, CCJE(2001) 43) on standards concerning the independence of the judiciary and the irremovability of judges, particularly paragraphs 13, 59, 60 and 71.

3. In preparing this opinion, the CCJE took into account a number of other documents, in particular:

- the United Nations "Basic principles on the independence of the judiciary" (1985);

- Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and role of judges;

- the European Charter on the Statute for Judges (1998) (DAJ/DOC(98) 23);

- the Code of judicial conduct, the Bangalore draft[1].

4. The present opinion covers two main areas:

- the principles and rules governing judges' professional conduct, based on determination of ethical principles, which must meet very high standards and may be incorporated in a statement of standards of professional conduct drawn up by the judges themselves (A);

- the principles and procedures governing criminal, civil and disciplinary liability of judges (B).

5. The CCJE questioned, in this context, whether existing rules and principles were in all respects consistent with the independence and impartiality of tribunals required by the European Convention on Human Rights.

6. The CCJE therefore sought to answer the following questions:

- What standards of conduct should apply to judges?

- How should standards of conduct be formulated?

- What if any criminal, civil and disciplinary liability should apply to judges?

7. The CCJE believes that answers to these questions will contribute to the implementation of the framework global action plan for judges in Europe, especially the priorities relating to the rights and responsibilities of judges, professional conduct and ethics (see doc. CCJE (2001) 24, Appendix A, part III B), and refers in this context its conclusions in paragraphs 49, 50, 75, 76 and 77 below.

A. STANDARDS OF JUDICIAL CONDUCT

8. The ethical aspects of judges' conduct need to be discussed for various reasons. The methods used in the settlement of disputes should always inspire confidence. The powers entrusted to judges are strictly linked to the values of justice, truth and freedom. The standards of conduct applying to judges are the corollary of these values and a precondition for confidence in the administration of justice.

9. Confidence in the justice system is all the more important in view of the increasing globalisation of disputes and the wide circulation of judgments. Further, in a State governed by the rule of law, the public is entitled to expect general principles, compatible with the notion of a fair trial and guaranteeing fundamental rights, to be set out. The obligations incumbent on judges have been put in place in order to guarantee their impartiality and the effectiveness of their action.

1°) What standards of conduct should apply to judges?

10. Any analysis of the rules governing the professional demands applicable to judges should include consideration of the underlying principles and the objectives pursued.

11. Whatever methods are used to recruit and train them and however broad their mandate, judges are entrusted with powers and operate in spheres which affect the very fabric of people's lives. A recent research report points out that, of all the public authorities, it is probably the judiciary which has changed the most in the European countries[2]. In recent years, democratic societies have been placing increasing demands on their judicial systems. The increasing pluralism of our societies leads each group to seek recognition or protection which it does not always receive. Whilst

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impartiality.

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29. Judges should conduct themselves in a respectable way in their private life. In view of the cultural diversity of the member states of the Council of Europe and the constant evolution in moral values, the standards applying to judges' behaviour in their private lives cannot be laid down too precisely. The CCJE encourages the establishment within the judiciary of one or more bodies or persons having a consultative and advisory role and available to judges whenever they have some uncertainty as to whether a given activity in the private sphere is compatible with their status of judge. The presence of such bodies or persons could encourage discussion within the judiciary on the content and significance of ethical rules. To take just two possibilities, such bodies or persons could be established under the aegis of the Supreme Court or judges' associations. They should in any event be separate from and pursue different objectives to existing bodies responsible for imposing disciplinary sanctions.

30. Judges' participation in political activities poses some major problems. Of course, judges remain citizens and should be allowed to exercise the political rights enjoyed by all citizens. However, in view of the right to a fair trial and legitimate public expectations, judges should show restraint in the exercise of public political activity. Some States have included this principle in their disciplinary rules and sanction any conduct which conflicts with the obligation of judges to exercise reserve. They have also expressly stated that a judge's duties are incompatible with certain political mandates (in the national parliament, European Parliament or local council), sometimes even prohibiting judges' spouses from taking up such positions.

31. More generally, it is necessary to consider the participation of judges in public debates of a political nature. In order to preserve public confidence in the judicial system, judges should not expose themselves to political attacks that are incompatible with the neutrality required by the judiciary.

32. From reading the replies to the questionnaire, it seems that in some States a restrictive view is taken of judges' involvement in politics.

33. The discussions within the CCJE have shown the need to strike a balance between the judges' freedom of opinion and expression and the requirement of neutrality. It is therefore necessary for judges, even though their membership of a political party or their participation in public debate on the major problems of society cannot be proscribed, to refrain at least from any political activity liable to compromise their independence or jeopardise the appearance of impartiality.

34. However, judges should be allowed to participate in certain debates concerning national judicial policy. They should be able to be consulted and play an active part in the preparation of legislation concerning their statute and, more generally, the functioning of the judicial system. This subject also raises the question of whether judges should be allowed to join trade unions. Under their freedom of expression and opinion, judges may exercise the right to join trade unions (freedom of association), although restrictions may be placed on the right to strike.

35. Working in a different field offers judges an opportunity to broaden their horizons and gives them an awareness of problems in society which supplements the knowledge acquired from the exercise of their profession. In contrast, it entails some not inconsiderable risks: it could be viewed as contrary to the separation of powers, and could also weaken the public view of the independence and impartiality of judges.

36. The question of judges' involvement in a certain governmental activities, such as service in the private offices of a minister (*cabinet ministériel*), poses particular problems. There is nothing to prevent a judge from exercising functions in an administrative department of a ministry (for example a civil or criminal legislation department in the Ministry of Justice); however, the matter is more delicate with regard to a judge who becomes part of the staff of a minister's private office. Ministers are perfectly entitled to appoint whomsoever they wish to work in their private office but, as the minister's close collaborators, such staff participate to a certain extent in the minister's political activities. In such circumstances, before a judge enters into service in a minister's private office, an opinion should ideally be obtained from the independent organ responsible for the appointment of judges, so that this body could set out the rules of conduct applicable in each individual case.

c. Impartiality and other professional activities of judges [1]

37. The specific nature of the judicial function and the need to maintain the dignity of the office and protect judges from all kinds of pressures mean that judges should behave in such a way as to avoid conflicts of interest or abuses of power. This requires judges to refrain from any professional activity that might divert them from their judicial responsibilities or cause them to exercise those responsibilities in a partial manner. In some States, incompatibilities with the function of judge are clearly defined by the judges' statute and members of the judiciary are forbidden from carrying out any professional or paid activity. Exceptions are made for educational, research, scientific, literary or artistic activities.

38. Different countries have dealt with incompatible activities to varying effects (a brief summary is annexed) and by various procedures, though in each case with the general objective of avoiding erecting any insurmountable barrier between judges and society.

39. The CCJE considers that rules of professional conduct should require judges to avoid any activities liable to compromise the dignity of their office and to maintain public confidence in the judicial system by minimising the risk of conflicts of interest. To this end, they should refrain from any supplementary professional activity that would restrict their independence and jeopardise their impartiality. In this context, the CCJE endorses the provision of the European Charter on the Statute for Judges under which judges' freedom to carry out activities outside their judicial mandate "may not be limited except in so far as such outside activities are incompatible with confidence in, or the impartiality or the independence of a judge, or his or her required availability to deal attentively and within a reasonable period with the matters put before him or her" (para. 4.2). The European Charter also recognises the right of judges to join professional organisations and a right of expression (para. 1.7) in order to avoid "excessive rigidity" which might set up barriers between society and the judges themselves (para. 4.3). It is however essential that judges continue to devote the most of their working time to their role as judges, including associated activities, and not be tempted to devote excessive attention to extra-judicial activities. There is obviously a heightened risk of excessive attention being devoted to such activities, if they are permitted for reward. The precise line between what is permitted and not permitted has however to be drawn on a country by country basis, and there is a role here also for such a body or person as recommended in paragraph 29 above.

d. Impartiality and judges' relations with the media

40. There has been a general trend towards greater media attention focused on judicial matters, especially in the criminal law field, and in particular in certain west European countries. Bearing in mind the links which may be forged between judges and the media, there is a danger that the way judges conduct themselves could be influenced by journalists. The CCJE points out in this connection that in its Opinion No. 1 (2001) it stated that, while the freedom of the press was a pre-eminent principle, the judicial process had to be protected from undue external influence. Accordingly, judges have to show circumspection in their relations with the press and be able to maintain their independence and impartiality, refraining from any personal exploitation of any relations with journalists and any

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Mt. Scopus Approved Revised International Standards of Judicial Independence

Approved March 19, 2008

Preamble

These Revised standards are approved in recognition of the need for the revision of the guidelines of general application to contribute to the independence and impartiality of the judiciary, with a view to ensuring the legitimacy and effectiveness of the judicial process;

In formulating these standards due regard has been given to the IBA Minimum Standards on Judicial independence 1982 and the UN Basic Principles of Judicial Independence 1985 and the long series of sets of other international rules and standards relating to judicial independence and the right to a fair trial; and *The Burgh House Principles of Judicial Independence in International Law* (for the international judiciary). Inspiration has also been drawn from the *Tokyo Law Asia Principles*; the *Montréal Universal Declaration on the Independence of Justice*; *Council of Europe Staetements on judicial independence* particularly Recommendation of the Committee of Ministers to Member States on the independence, efficiency and role of judges. Council of Europe *1998*[1] *,The Bangalore Principles of Judicial Conduct* November 2002,[2] and the *American Bar Association*'s revision of its ethical standards for judges

The Standards were drafted bearing in mind the special challenges facing the judiciary in view of the challenges and problems in both the national and international spheres.

An updated comprehensive revision of minimum standards for judicial independence is called for in order to give appropriate response to the developments and challenges regarding the position of courts and judges in contemporary society. This revision is important to enable the judiciary to play a role in the adequate protection of human rights and in the operation of an efficient and fair market economy with a human face in the era of globalisation.

The standards give due consideration particularly to the fact that that each jurisdiction and legal tradition has own characteristics that must be recognised .It is also recognized that in the international judiciary each court or tribunal has its unique features and functions and that in certain instances judges serve on a part-time basis or as *ad hoc* or *ad litem* judges.

A. NATIONAL JUDGES

1. THE SIGNIFICANCE OF THE INDEPENDENCE OF THE JUDICIARY

1.1. An independent and impartial[3] judiciary is an institution of the highest value in every society[4] and an essential pillar of liberty[5] and the rule of law.

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[1] http://www.coe.int

[2] adopted by *Judicial Group on Strengthening Judicial Integrity*, AJA, http://www.ajs.org

[3] Stating this in the body of the standards themselves in addition to the preamble helps stress the section's importance and ensures that it is more easily referred to.

→This is preferred to the first version as it describes exactly what elements are required in the Judiciary

→Tokyo Law Asia Principles. Stating this in the body of the standards themselves rather than in a preamble helps stress the section's importance and ensures that it is more easily referred to.

1.2. The objectives and functions of the judiciary shall include:

1.2.1.1. To resolve disputes and to administer the law impartially between persons and between persons and public authorities;

1.2.1.2. To promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and

1.2.1.3. To ensure that all people are able to live securely under the rule of law.[6]

2. THE JUDICIARY[7] AND THE EXECUTIVE

2.1. The Judiciary as a whole shall be independent.

2.2. Each judge shall enjoy both personal independence and substantive independence:[8]

2.2.1. Personal independence means that the terms and conditions of judicial service are adequately secured by law[9] so as to ensure that individual judges are not subject to executive control; and

2.2.2. Substantive independence means that in the discharge of his judicial function, a judge is subject to nothing but the law and the commands of his conscience.

2.3. The Judiciary as a whole shall[10] enjoy collective independence and autonomy vis-à-vis the Executive.

2.4. Judicial appointments and promotions by the Executive are not inconsistent with judicial independence as long as they are in accordance with Principles 4.

2.5. No executive decree shall reverse specific court decisions, or change the composition of the court in order to affect its decision-making.[11]

2.6. The Executive may only participate in the discipline of judges by referring complaints against judges, or by the initiation of disciplinary proceedings, but not by the adjudication of such matters.

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[5] Preamble, Montréal Declaration.

[6] Montréal Declaration.

→Recall competing values of judicial independence and judicial accountability: "As phrased by a Canadian judge, Mr. Justice Riddell, commenting on an arrangement of divisions of labour among the judges, 'Judges are the servants, not the masters of the people.' Servants are accountable, so are judges." From Shetreet, *Judicial Independence: The Contemporary Debate*, at 593, referring to *Davis Acetylene Gas Co. v. Morrison*, (1915) 34 O.L.R. 155, 23 D.L.R. 871 (C.A.).

[7] The focus is really on the relationship with the judiciary as a whole, rather than with individual judges.

[8] Although substantive independence warrants wide protection, it is not without boundaries. Judges must exercise their powers subject to the general limit of mutual respect between the various branches of the government and accepted lines of demarcation of their respective responsibilities. The mutual respect is expressed in judge-made rules, including the rule that courts will not engage in the adjudication of unjusticiable issues, such as political questions: Shetreet, Judicial Independence :New Conceptual Dimensions and Contemporary Challenges , in Shetreet and Descenes *Judicial Independence: The Contemporary Debate* at 635.(1985)

[9] To clarify that these important conditions must be legally entrenched.

[10] Adds mandatory language.

[11] Montréal Declaration section 2.08.

2.7. The power to discipline or remove a judge must be vested in an institution which is independent of the Executive.

2.8. The power of removal of a judge shall preferably be vested in a judicial tribunal.

2.9. The Executive shall not have control over judicial functions.

2.10. Rules of procedure and practice shall be made by legislation or by the Judiciary in cooperation with the legal profession, subject to parliamentary approval.

2.11. The state shall have a duty to provide for the execution of judgments of the Court. The Judiciary shall exercise supervision over the execution process.

2.12. Judicial matters are exclusively within the responsibility of the Judiciary, both in central judicial administration and in court level judicial administration.

2.13. The central responsibility for judicial administration shall preferably be vested in the Judiciary or jointly in the Judiciary and the Executive.

2.14. The principle of democratic accountability should be respected and therefore it is legitimate for the legislature to play a role in judicial appointments and central administration of justice provided that due consideration is given to the principle of judicial independence.

2.15. The process and standards of judicial selection shall give due consideration to the principle of fair reflection by the judiciary of the society in all its aspects.[12]

2.15.1. Taking into consideration the principle of fair reflection by the judiciary of the society in all its aspects, in the selection of judges, there shall be no discrimination on the grounds of race, colour, gender, language, religion, national or social origin, property, birth or status, subject however to citizenship requirements.[13].

2.16. Candidates for judicial office shall be individuals of integrity[14] and ability, well- trained in the law. They shall have equality of access to judicial office.[15]

2.17. It is the duty of the state to provide adequate financial resources to allow for the due administration of justice.

2.18. Division of work among judges should ordinarily be done under a predetermined plan, which can be changed in certain clearly defined circumstances.

2.18.1. In countries where the power of division of judicial work is vested in the chief justice, it is not considered inconsistent with judicial independence to accord to

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[12] Montréal Declaration section 2.13. See also Shetreet, *Judicial Independence: The Contemporary Debate*, at 401.

[13] Montréal Declaration

→"Political opinion" is also taken from PH Lane, *Fragile Bastion: Constitutional Aspects of Judicial Independence* (judicial independence is composed of at least five aspects: (1) non-political appointments to a court; (2) guaranteed tenure and salary; (3) executive and legislative interference with court proceedings or office holders; (4) budgetary autonomy; (5) administrative autonomy.

[14] Montréal Declaration section 2.11.

[15] Exact wording of the Montréal Declaration, section 2.11.

the chief justice the power to change the predetermined plan for sound reasons, preferably in consultation with the senior judges when practicable.

2.18.2. Subject to 2.18.1, the exclusive responsibility for case assignment should be vested in a responsible judge, preferably the President of the Court.

2.19. The power to transfer a judge from one court to another shall be vested in a judicial authority according to grounds provided by law and preferably shall be subject to the judge's consent, such consent not to be unreasonably withheld.

2.20. Judicial salaries and pensions shall be adequate at all times, fixed by law, and should be periodically reviewed independently of Executive control

2.21. The position of the judges, their independence, their security of tenure, and their adequate remuneration shall be entrenched constitutionally[16] or secured by law.

2.22. Judicial salaries, pensions, and benefits[17] cannot be decreased during judges' service except as a coherent part of an overall public economic measure.

2.23. The Ministers of the government shall not exercise any form of pressure on judges, whether overt or covert, and shall not make statements which adversely affect the independence of individual judges, or of the Judiciary as a whole.

2.24. The power of pardon shall be exercised cautiously so as to avoid its use as an interference with judicial decision.

2.25. The Executive shall refrain from any act or omission which pre-empts the judicial resolution of a dispute, or frustrates the proper execution of a court judgment.

2.26. The Executive shall not have the power to close down, or suspend, or delay, the operation of the court system at any level.

3. THE JUDICIARY[18] AND THE LEGISLATURE

3.1. The Legislature shall not pass legislation which reverses specific court decisions.

3.2. Legislation introducing changes in the terms and conditions of judicial service shall not be applied to judges holding office at the time of passing the legislation unless the changes improve the terms of service and are generally applied.[19]

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[16] UN Basic Principles.

→Change suggested in order to provide additional flexibility, and also to stress how this is an important enough issue to be constitutionally entrenched.

[17] In the interests of completeness

[18] The focus is really on the relationship with the judiciary as a whole, rather than with individual judges.

[19] In order to prevent "rewarding" specific judges.

→The US Constitution's Compensation Clause guarantees federal judges a "Compensation, which shall not be diminished during their Continuance in Office." *U.S. Const.*, Art. III, §1.

→See *US v. Hatter* (99-1978) 532 U.S. 557 (2001) 203 F.3d 795: Congress is prohibited from singling out judges for specially unfavourable taxation treatment, although it is permitted to impose a "non-discriminatory tax laid generally" upon judges and other citizens.

3.3. In case of legislation reorganising or abolishing courts, judges serving in these courts shall not be affected, except for their transfer to another court of the same or materially comparable[20] status.

3.4. Everyone shall have the right to be tried expeditiously by the established ordinary courts or judicial tribunals under law, subject to review by the courts.[21]

3.5. Part-time judges should be appointed only with proper safeguards secured by law.

3.6. The Legislature may be vested with the powers of removal of judges, upon a recommendation of a judicial commission or pursuant to constitutional provisions or validly enacted legislation.[22]

4. TERMS AND NATURE OF JUDICIAL APPOINTMENTS

4.1. The method of judicial selection shall safeguard against judicial appointments for improper motives[23] and shall not threaten judicial independence.

4.2. a) The principle of democratic accountability should be respected and therefore it is legitimate for the Executive and the Legislature to play a role in judicial appointments provided that due consideration is given to the principle of Judicial Independence.

b) The recent trend of establishing judicial selection boards or commissions in which members or representatives of the Legislature ,the Executive ,the Judiciary and the legal profession take part ,should be viewed favourably, provided that a proper balance is maintained in the composition of such boards or commissions of each of the branches of government

4.3. Judicial appointments should generally be for life, subject to removal for cause and compulsory retirement at an age fixed by law at the date of appointment.

4.3.1. Retirement age shall not be reduced for existing judges.[24]

→See *United States v. Will*, 449 U.S. 200, 220-21 (1980): though Congress may not rescind a salary increase for judges once it has gone into effect - that would be a diminishment of compensation - Congress is under no constitutional obligation to grant salary increases.

→See *Evans v. Gore*, 253 U.S. 245, 253 (1920): The imposition of a new federal tax that has the effect of reducing the judicial compensation of judges already in office is unconstitutional.

→But see *O'Malley v. Woodrough*, 307 U.S. 277 (1939): an income tax levied against the judicial salary of judges who took office after the levy is in effect is constitutional, when the taxing measure is of general, non-discriminatory application to all earners of income.

[20] To provide for situations such as those that occurred in Ontario when the entire court structure was reorganized.

[21] For a discussion of this issue, see Shetreet, *Judicial Independence: The Contemporary Debate*, at 616.

[22] In order to try to prevent situations such as those that occurred in Ecuador in April 2007 when Congress removed all nine judges of the Constitutional Court in a retaliatory measure, contrary to the Ecuadorian constitution which provides that judges of the Constitutional Court can only be removed by impeachment: Human Rights Watch, *Ecuador: Removal of Judges Undermines Judicial Independence* (May 11, 2007).

[23] Montréal Declaration.

[24] See Shetreet, Judicial Independence :New Conceptual Dimensions and Contemporary Challenges , in Shetreet and Descenes *Judicial Independence: The Contemporary Debate*, at 607 (1985) reporting that in Bangladesh, in 1977 an ordinance was passed bringing down the retirement age from 65 to 62 years with immediate effect. This resulted in

4.4. Promotion of judges shall[25] be based on objective factors, in particular merit,[26] integrity and experience.[27]

4.5. Judicial appointments and promotions shall be based on transparency of the procedures and standards and shall be based on professional qualifications, integrity, ability and efficiency.

4.6. Judges should not be appointed for probationary periods except in legal systems in which appointments of judges do not depend on having practical experience in the profession as a condition of appointment, and provided that permanent appointment will be granted on merit.[28]

4.7. The institution of temporary judges should be avoided as far as possible except where there exists a long historic democratic tradition.

4.8. Part-time judges should be appointed only with proper safeguards secured by law.

4.9. The number of the members of the highest court should be fixed, with the exception of courts modeled after the courts of cassion, and in the case of all courts, should not be altered for improper motives.

5. JUDICIAL REMOVAL AND DISCIPLINE

5.1. The proceedings for discipline and removal of judges[29] shall be processed expeditiously and fairly[30] and shall ensure fairness to the judge including adequate opportunity for hearing.

5.2. With the exception of proceedings before the Legislature[31], the procedure for discipline should be held *in camera*. The judge may however request that the hearing be held in public[32] and such request should be respected, subject to expeditious, final and reasoned disposition of this request by the disciplinary tribunal. Judgments in disciplinary proceedings, whether held in camera or in public, may be published.[33]

5.3. All of the grounds for the discipline, suspension and removal of judges shall be entrenched constitutionally or fixed by law and shall be clearly defined.

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the retirement of two distinguished judges. This was in fact a legislative removal of these two judges though it was in theory a general statute.

[25] In order to make this mandatory.

[26] "Merit" is broader than "ability".

[27] UN Basic Principles.

→Montréal Declaration provides: "Promotion of a judge shall be based on an objective assessment of the candidate's integrity and independence of judgment, professional competence, experience, humanity and commitment to uphold the rule of law."

[28] Scottish temporary judges cases Starrs and Chalmers v .D. F. Linlithgow 2000 S. L. 2 ; Clancy v. Caird 2000 Scottish Law Times ,The Bailiff Judicial Appointments (Scotland) Act 2000

[29] The UN Basic Principles adds "in his/her judicial and professional capacity." This wording was not added here to prevent personal suits being lodged against judges as a back-door method of interfering with their independence.

[30] UN Basic Principles.

[31] Montréal Declaration section 2.36.

[32] Montréal Declaration section 2.36.

[33] Montréal Declaration section 2.36.

5.4. All disciplinary, suspension and removal[34] actions shall be based upon established standards of judicial conduct.[35]

5.5. A judge shall not be subject to removal, unless by reason of a criminal act or through gross or repeated neglect or serious infringements of disciplinary rules or physical or mental incapacity he has shown himself manifestly unfit to hold the position of judge. The grounds for removal shall be limited to reasons of medical incapacity or behaviour that renders the judge unfit to discharge their duties.[36]

5.6. In systems where the power to discipline and remove judges is vested in an institution other than the Legislature, the tribunal for discipline and removal of judges shall be permanent, and be composed predominantly of members of the Judiciary.

5.7. The head of the court may legitimately have supervisory powers to control judges on administrative matters.

6. THE MEDIA AND THE JUDICIARY

6.1. It should be recognized that judicial independence does not render judges free from public accountability, however, the media and other institutions should show respect for judicial independence and exercise restrain in criticism of judicial decisions.[37]

6.2. While recognising the general right of freedom of expression of all citizens, a judge should not interview directly with the general media. If a judge needs to respond to the media in regard to a media report or inquiry, it shall be done via a spokesperson assigned by the court or a judge specifically assigned by the court for this purpose. In exceptional circumstances a judge may respond directly to the media if that judge's direct response will prevent an irreparable damage.

6.3. The media should show responsibility and restraint in publications on pending cases where such publication may influence the outcome of the case.

6.4. A judge shall not knowingly, while a proceeding is, or could come before the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue. [38]

7. STANDARDS OF CONDUCT[39]

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[34] Inclusive.
[35] Montréal Declaration section 2.34. Broad.
[36] UN Basic Principles.
[37] See discussion by Julie Debeljak, *Judicial Conference of Australia, Uluru, April 2001: Judicial Independence: A Collection of Material for the Judicial Conference of Australia* regarding the consequences of inappropriate public criticism (it leaves judges having to choose between being silent leading to a potential decrease in public confidence in the judiciary, or else inappropriately being drawn into public criticism).
[38] Bangalore Principles
[39] Human Rights Watch, *Rigging the Rule of Law: Judicial Independence Under Siege in Venezuela*, Volume 16, No. 3(B) (June 2004) reporting some of allegations of judicial bias in Venezuela. For instance, Attorney General Isaías Rodríguez in May 2004 allegedly described how the country's top administrative court in the past established set fees for resolving different kinds of cases.

7.1. Judges may not serve in Executive or Legislative functions, including as:

7.1.1. Ministers of the government; or as

7.1.2. Members of the Legislature or of municipal councils.

7.2. Judges shall not hold positions in political parties.

7.3. A judge, other than a temporary or part-time judge, may not practice law.

7.4. A judge should refrain from business activities and should avoid from engaging in other remunerative activity,[40] that can affect the exercise of judicial functions or the image of the judge, except in respect of that judge's personal investments, ownership of property, the business activities or ownership of property of family members[41], or that judge's teaching at a university or a college.

7.5. A judge should always behave in such a manner as to preserve the dignity of the office and the impartiality, integrity and independence of the Judiciary.

7.6. Judges may be organized in associations designed for judges, for furthering their rights and interests as judges.

7.7. Judges may take appropriate action to protect their judicial independence.[42]

7.8. A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially.

7.9. Such proceedings include, but are not limited to, instances where

a) the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

b) the judge previously served as a lawyer or was a material witness in the matter in controversy; or

c) the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy:

Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice [43]

7.10. A case should not be withdrawn from a particular judge without valid reasons, such as cases of serious illness or conflict of interest. Any such reasons and the procedures for such withdrawal should be provided for by law and may not be influenced by any interest of the government or administration. A decision to withdraw a case from a

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[40] ABA Model Code of Judicial Conduct (February 2007), Canon 4, Article D(2).
[41] ABA Model Code of Judicial Conduct (February 2007), Canon 4, Article D(2) discusses family.
[42] This is how the section appears in the Montréal Declaration, section 2.09.
[43] Bangalore Principles

judge should be taken by an authority which enjoys the same judicial independence as judges.[44]

7.11. Judges shall discourage *ex parte* communications from parties and except as provided by the rules of the court such communications shall be disclosed to the court and to the other party.

8. SECURING IMPARTIALITY AND INDEPENDENCE[45]

8.1. A judge[46]shall enjoy immunity from legal actions in the exercise of ~~his~~ official functions.[47]

8.2. A judge shall not sit in a case where there is a reasonable suspicion of bias or potential bias.[48]

8.3. A judge shall avoid any course of conduct which might give rise to an appearance of partiality.

8.4. The state shall ensure that in the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats[49] or interferences, direct or indirect, from any quarter or for any reason. The law should provide for sanctions against persons seeking to influence judges in any such manner. Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law. Judges should not be obliged to report on the merits of their cases to anyone outside the judiciary [50]

9. THE INTERNAL INDEPENDENCE OF THE JUDICIARY

9.1 In the decision-making process, a judge must be independent vis-à-vis his judicial colleagues and superiors.

9.2 Any hierarchical organization of the judiciary and any difference in grade or rank shall in no way interfere with the right of judges to pronounce their judgments freely.[51]

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[44] Recommendation No.R(94)12). of the committee of Ministers of the Council of Europe to Memner States

[45] See Cyrus Das and K. Chandra, Editors, *Judges and Judicial Accountability*, Universal Law Publishing Company Ltd., Delhi.

[46] This does not exclude the possibility that the state may be liable for the gross negligence of a judicial officer.

[47] Consider a 1988 Italian law which was designed to, within certain limit, render judges accountable for damages caused by serious fault in the exercise of their functions: see Giovanni E. Longo, "The Human Right to an Independent Judiciary: International Norms and Denied application before a Domestic Jurisdiction," *St. John's Law Review* (Winter 1996).

[48] "It is most important that the judiciary be independent and be so perceived by the public. The judges must not have cause to fear that they will be prejudiced by their decisions or that the public would reasonably apprehend this to be the case": Howland, CJ, *R. v. Valente* 2 C.C.C. (3d) 417, at 423 (1983).

[49] Including physical threats to injure or to kill .

[50] Recommendation No.R(94)12 of the committee of Ministers of the Council of Europe to Memner States

[51] Montréal Declaration section 2.03.

B. INTERNATIONAL JUDGES

The following text on minimum standards for the independence of the international judiciary is based, with minor amendments, on the Burgh House Principles on the Independence of the International Judiciary which were formulated by the Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals

10. INDEPENDENCE

10.1 The international courts and the judges shall exercise their functions free from direct or indirect interference or influence by any person or entity.

10.2 This freedom of the judges and courts shall apply both to the judicial process in pending cases, including the assignment of cases to particular judges, and to the operation of the court and its registry.

10.3 The court shall be free to determine the conditions for its international administration, including staff recruitment policy, information systems and allocation of budgetary expenditure.

10.4 Deliberations of the court shall remain confidential.

10.5 All Judges of international courts and tribunals shall adhere to the principle that a judges who are nationals of a member state of the organisation establishing the court or tribunal when exercising judicial discretion and function shall engage in fair and independent adjudication of the case and by no means in representation of the member state.

11 NOMINATION, ELECTION AND APPOINTMENT

11.1 In accordance with the governing instruments, judges shall be chosen from among persons of high moral character, integrity and conscientiousness who possess the appropriate professional qualifications, competence and experience required for the court concerned.

11.2 While procedures for nomination, election and appointment should consider fair representation of different geographic regions and the principal legal systems, as appropriate, as well as of female and male judges, appropriate personal and professional qualifications must be the overriding consideration in the nomination, election and appointment of judges.

11.3 Procedures for the nomination, election, and appointment of judges should be transparent and provide appropriate safeguards against nominations, elections and appointments motivated by improper considerations.

11.4 Information regarding the nomination, election and appointment process and information about candidates for judicial office should be made public, in due time and in an effective manner, by the international organisation or other body responsible for the nomination, election and appointment process.

11.5 For the promotion of the independence of judges it is preferable that appointment of judges to the international courts and tribunals shall be for one long term and shall not be open for re-election.

12 SECURITY OF TENURE

12.1 Judges shall have security of tenure in relations to their term of office. They may only be removed from office upon specified grounds and in accordance with appropriate procedures specified in advance.

12.2 The governing instruments of each court should provide for judges to be appointed for a minimum term to enable them to exercise their judicial functions in an independent manner.

13 SERVICE AND REMUNERATION

13.1 Judges' essential conditions of service shall be enumerated in legally binding instruments.

13.2 No adverse changes shall be introduced with regard to judges' remuneration and other essential conditions of service during their terms of office.

13.3 Judges should receive adequate remuneration which should be periodically adjusted in line with any increases in the cost of living at the seat of the court.

13.4 Conditions of service should include adequate pension arrangements.

14 PRIVILEGES AND IMMUNITIES

14.1 Judges shall enjoy immunities equivalent to full diplomatic immunities, and in particular shall enjoy immunities from all claims arising from the exercise of their judicial functions.

14.2 The court alone shall be competent to waive the immunity of judges; it should waive immunity in any case where, in its opinion, the immunity would impede the course of justice and can be waived without prejudice to the exercise of the judicial function.

14.3 Documents and papers of the courts, judges and registry, in so far as they relate to the business of the court, shall be inviolable.

14.4 The state in which an international court has its seat shall take the necessary measures to protect the security of the judges and their families, and to protect them from adverse measures related to the exercise of their judicial function.

15 BUDGET

15.1 States, parties and international organisations shall provide adequate resources, including facilities and levels of staffing, to enable courts and the judges to perform their functions effectively.

16 FREEDOM OF EXPRESSION AND ASSOCIATION

16.1 Judges shall enjoy freedom of expression and association. These freedoms must be exercised in a manner that is compatible with the judicial function and that may not affect or reasonably appear to affect judicial independence or impartiality.

16.2 Judges shall maintain the confidentiality of deliberations, and shall not comment extra-judicially upon pending cases.

16.3 Judges shall exercise appropriate restrain in commenting extra-judicially upon judgements and procedures of their own and other courts and may upon any legislation, drafts, proposals or subject-matter likely to come before their court.

17 EXTRA-JUDICIAL ACTIVITY

17.1 Judges shall not engage in any extra-judicial activity that is incompatible with their judicial function or the efficient and timely functioning of the court of which they are members, or that may affect or may reasonably appear to affect their independence or impartiality.

17.2 Judges shall not exercise any political function.

17.3 Each court should establish an appropriate mechanism to give guidance to judges in relation to extra-judicial activities, and to ensure that appropriate means exist for parties to proceedings to raise any concerns.

18 PAST LINKS TO A CASE

18.1 Judges shall not serve in a case in which they have previously served as agent, counsel, advisor, advocate, expert or in any other capacity for one of the parties, or as a member of a national or international court or other dispute settlement body which has considered the subject matter of the dispute or in a case where they had previously commented or expressed an opinion concerning the subject matter in a manner that is likely to affect or may reasonably appear to affect their independence or impartiality.

18.2 Judges shall not serve in a case with the subject matter of which they had other forms of association that may affect or may reasonably appear to affect their independence or impartiality.

19 PAST LINKS TO A PARTY

19.1 Judges shall not sit in any case involving a party for whom they have served as agent, counsel, advisor, advocate or expert within the previous three years or such other period as the court may establish within its rules; or with whom they have had any other significant professional or personal link within the previous three years or such other period as the court may establish within its rules.

20 INTEREST IN THE OUTCOME OF A CASE

20.1 Judges shall not sit in any case in the outcome of which they hold any material personal, professional or financial interest.

20.2 Judges shall not sit in any case in the outcome of which other persons or entities closely related to them hold a material, personal, professional or financial interest.

20.3 Judges must not accept any undisclosed payment from a party to the proceedings or any payment whatsoever on account of a judge's participation in the proceedings.

21 CONTACT WITH A PARTY

21.1 Judges shall exercise appropriate caution in their personal contacts with parties, agents, counsel, advocates, advisors, and other persons and entities associated with a pending case. Any such contacts should be conducted in a manner that is compatible with the judicial function and that may not affect or reasonably appear to affect the judge's independence and impartiality.

21.2 Judges shall discourage *ex parte* communications from parties and except as provided by the rules of the court such communications shall be disclosed to the court and to the other party.

22 POST-SERVICE LIMITATIONS

22.1 Judges shall not serve in a case with the subject-matter of which they have had any other form of association that may affect or may reasonably appear to affect their independence or impartiality.

22.2 Judges shall not seek or accept, while they are in office, any future employment, appointment or benefit, from a party to a case on which they sat or from any entity related to such a party that may affect or may reasonably appear to affect their independence or impartiality.

22.3 Former judges shall not, except as permitted by rules of the court, act in any capacity in relations to any case on which they sat during their judicial term of office.

22.4 Former judges shall not act as agent, counsel, advisor or advocate in any proceedings before the court on which they previously served for a period of three years after they have left office or such other period as the court may establish and publish.

22.5 Former judges should exercise appropriate caution as regards the acceptance of any employment, appointment or benefit, in particular from a party to a case on which they sat or from any entity related to such a party.

23 DISCLOSURE

23.1 Judges shall disclose to the court and, as appropriate, to the parties of the proceedings any circumstances which come to their notice at any time by virtue of which any of Principles 16 to 22 apply.

23.2 Each court shall establish appropriate procedures to enable judges to disclose to the court and, as appropriate, to the parties to the proceedings matters that may affect or may reasonably appear to affect their independence or impartiality in relations to any particular case.

24 WAIVER

24.1 Notwithstanding Principles 16 to 22, judges shall not be prevented from sitting in a case where they have made appropriate disclosure of any facts bringing any of those Principles into operation, where the court expresses no objections and the parties give their express and informed consent to the judge acting.

25 WITHDRAWAL OR DISQUALIFICATION

25.1 Each court shall establish rules of procedure to enable the determination whether judges are prevented from sitting in a particular case as a result of the application of these Principles or for reasons of incapacity. Such procedures shall be available to a judge, the court, or any party to the proceedings.

26 MISCONDUCT

26.1 Each court shall establish rules of procedure to address a specific complaint of misconduct or breach of duty on the party of a judge that may affect independence or impartiality.

26.2 Such a complaint may, if clearly unfounded, be resolved on a summary basis. IN any case where the court determines that more detailed investigation is required, the rules shall establish adequate safeguards to protect the judges' rights and interests and to ensure appropriate confidentiality of the proceedings.

26.3 The governing instruments of the court shall provide for appropriate measures, including the removal from office of a judge.

26.4 The outcome of any complaint shall be communicated to the complainant.

27 AD HOC JUDGES

27.1 An *ad hoc* judge in an international court or tribunal must act conscientiously and independently in the adjudication of the case to which that judge was assigned to sit.

27.2 The restrictions and provisions applicable to full-time international judges regarding past links, extra-judicial activities, post-service limitations, and security of tenure shall not apply to *ad hoc* judges.

Appendix 1

Officers and Conferences of the International project on judicial independence

I General Coordinator, International Project on Judicial Independence

Professor Shimon Shetreet ,Director, Sacher Institute of Comparative Law , and Greenblatt Professor of Public and International Law . Hebrew University of Jerusalem,

II Co Chairs of the international conference on Judicial Independence in International Law Jerusalem 26-27 June 2007

Professor Shimon Shetreet , Director, Sacher Institute of Comparative Law , and Greenblatt Professor of Public and International Law , Hebrew University of Jerusalem,
Professor James R. Crawford , Faculty of Law, University of Cambridge

III Officers of the international conference on Judicial Independence for the Drafting of the International Standards of Judicial Independence Zurich Area Conference 30 November -1st of December 2007

Professor Shimon Shetreet , Co Chair of the Conference .Director, Sacher Institute of Comparative Law , and Greenblatt Professor of Public and International Law , Hebrew University of Jerusalem,
Professor Christopher F Forsyth, Co Chair of the Conference Director Centre of Public Law, Faculty of Law, University of Cambridge
Professor Marcel Storme , Emeritus Professor , Ghent University, Past President of the World Association of Procedural Law , Leader of the Discussions
HE Markus Buechel ,Chair of the Local Organising Committee

IV Co Chairs of the international conference on Judicial Independence and the Constitutional Position of the Judiciary Jerusalem 18-20 2008

Professor Shimon Shetreet , Co Chair of the Conference .Director, Sacher Institute of Comparative Law , and Greenblatt Professor of Public and International Law , Hebrew University of Jerusalem,
Professor Christopher F Forsyth, Co Chair of the Conference Director Centre of Public Law, Faculty of Law
University of Cambridge

V. Co Chairs of the international conference on Judicial Independence and the Constitutional Position of the Judiciary Krakow November 2008

Professor Shimon Shetreet , Co Chair of the Conference .Director, Sacher Institute of Comparative Law , and Greenblatt Professor of Public and International Law , Hebrew University of Jerusalem,
Prof. Dr. Fryderyk Zoll, Faculty of Law ,Jagelonian University ,Krakow

VI. Co Chairs of the international conference on the Challenges of the Standards of Judicial Independence , Switzerland August 2009

Professor Shimon Shetreet , Co Chair of the Conference .Director, Sacher Institute of Comparative Law , and Greenblatt Professor of Public and International Law , Hebrew University of Jerusalem,
Professor Bernhard Ehrenzeller , Co Chair of the Conference ,Universität St.Gallen,
Professor Daniel Thurer, Co Chair of the Conference ,Universität Zürich

VII. Members of the Consultation Group of the International Project of Judicial Independence

Dr Cyrus Das, Former President of the Bar of Malaysia
Dr. Anat Scolnicov, Deputy Director, Centere of Public Law, University of Cambridge
Prof. Dr. Fryderyk Zoll, Faculty of Law ,Jagelonian University ,Krakow
Prof. Yuval Shany, Faculty of Law, Hebrew University of Jerusalem
H.E. Advocate Markus Buechel, Senior Lawyer, Liechtenstein
Justice Tassaduq Hussain Jillani, Judge of the Supreme Court of Pakistan
Prof. Yitzhak Hadari, Tel Aviv University, Natanya College Law
Professor Maimon Schwarzschild, Faculty of Law, University of San Diego
Professor Ada Pellegrini Grinover, Brazil
Professor Albert Chen, Professor of Law ,Hong Kong University
Professor Andreyj J. Zoll, Former President of Constitutional Court of Poland
Professor Anton Cooray, The School of Law, City University of Hong Kong
Professor Bernhard Ehrenzeller , Universität St.Gallen
Professor Bryant G. Garth, American Bar Foundation
Professor Chandra R De Silva, Dean, College of Arts and Letters at Old Dominion University
Professor Christopher F Forsyth, Director Centre of Public Law, Faculty of Law
University of Cambridge
Professor Daniel Thurer, Universität Zürich
Professor David Feldman, Chairman of the Faculty Board of Law, Faculty of Law
University of Cambridge
Professor Asher Maoz, Tel-Aviv University, Faculty of Law
Professor Dr. Burkhardt Hess , University of Heidelberg
Prof Yoav Dotan , Dean Faculty of Law Hebrew University
Dr. Tomer Braude, Faculty of Law Hebrew University
Professor Dr. Francisco Ramos Mendez , Univ of Barcelona
Professor Dr. Paul Oberhammer , Universität Zürich
Professor Dr. Winfried Brugger , Universitat Heidelberg
Professor Frank Bates, School of Law, University of Newcastle Australia
Paul Morris, Barrister York UK
Prof. Sir Louis Blom Cooper, UK
Professor Federico Carpi , President of the World -Association of Procedural Law
Professor Garry D. Watson, Osgoode Hall Law School, York University
Professor Gary J Simson, Dean, Case Western Reserve University
Prof Joseph Weiler , New York University
Professor Walter Habscheid, Prof Emeritus, University of Zurich
Professor Hans Walter Fasching , Austria

Professor Hiram Chodosh, Dean, S.J. College of Law, the University of Utah
Professor Hoong Phun ('HP') LEE, Deputy Dean, Faculty of Law, Monash University
Professor James Nemeth, Eotvos Lorand University , Hungary
Professor James R Crawford, Faculty of Law, University of Cambridge
Professor John Anthony Jolowicz, Trinity College, University of Cambridge
Professor John Bell, Faculty of Law, University of Cambridge
Professor Jonathan Entin, Case Western Reserve University School of Law
Professor Keith Uff, Executive Secretary General, International Association of Procedural Law, Professor, Faculty of Law, University of Birmingham
Professor KK Venogopal, Senior Advocate of the Supreme Court India
Professor Konstantinos D. Kerameus, University of Athens Greece
Professor Marcel Storme, Ghent University, Past President of the World -Association of Procedural Law
Professor Martin Friedland, Faculty of Law, University of Toronto
Professor Masahisa Deguchi, Faculty of Law, Ritsumeikan University
Professor Michel Rosenfeld ,Benjamin N. Cardozo School of Law, Yeshiva University
Professor Moshe Hirsh, Faculty of Law, Hebrew University of Jerusalem
Professor Neil H. Andrews, University of Cambridge, Clare College,
Professor Neil James Williams, University of Melbourne,
Professor Nikolas Klamaris, University of Athens
Professor Oscar G. Chase, New York University School of Law
Professor Pelayia Yessiou-Faltsi, Faculty of Law, Aristotle University of Thessaloniki
Professor Per Henrick Lindblom, Faculty of Law, Uppsala University Juridicum
Professor Peter Gilles , Institut fur Rechtsvergleichung Johann Wolfgang Goethe Universitat
Professor Peter Gottwald , Universitat Regensburg, Secretary General World association of procedural Law
Prof John Anthony Jolowicz University of Cambridge
Professor Roger Perrot , Université de Paris
Professor Ruth Lapidot, Faculty of Law Hebrew University of Jerusalem
Professor Sean McConville, Professor of Law and Professorial Research Fellow School of Law Queen Mary College , University of London
Professor Shimon Shetreet, Director, Sacher Institute of Comparative Law Hebrew University of Jerusalem
Professor Stephen Goldstein, Emeritus Professor, Hebrew University of Jerusalem
Professor Stephen Marks , Francois-Xavier Bagnoud Professor of Health and Human Rights Department of Population and International Health Harvard School of Public Health.
Professor Vernon Bogdanor, Oxford University
Professor Walter H. Rechberger, University of Vienna
Professor Walther J. Habscheid ,Emeritus Professor ,University of Geneva and University of Zurich
Professor Yasuhei Taniguchi Tokyo Japan
Professor Yoav Dotan, Dean Faculty of Law Hebrew University of Jerusalem
Professor Zhivko Stalev, Bulgaria

Appendix 2

International Law Association Study Group on the Practice and Procedure of International Courts and Tribunals on the Independence of International Judges

Co-Chairs

Philippe Sands, Professor of Law, University College London; Co-Director, Project on International Courts and Tribunals

Campbell McLachlan, Professor, Deputy Dean, School of Law, Victoria University of Wellington

Members

Laurence Boisson de Chazournes, Professor of International Law, University of Geneva
Rodman Bundy, Frere Cholmeley Eversheds, Paris ,
James Crawford, Whewell Professor of International Law, Cambridge University,
Hans van Houtte, Professor of International Law, Katholieke Universiteit Leuven,
Mojtaba Kazazi, United Nations Compensation Commission ,
Francisco Orrego Vicuna, Professor of International Law, University of Chile ,
Alain Pellet, Professor of International Law, Université Paris X Nanterre
Davis Robinson, LeBoeuf, Lamb, Greene & MacRae,
Soli Sorabjee, Attorney General of India,
Margrete Stevens, Senior Counsel, International Centre for Settlement of Investment Disputes

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International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994

Security Council
Sixty-sixth year

Identical letters dated 20 May 2011 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council

I have the honour to transmit to you the attached letter dated 5 May 2011 that I have received from Judge Dennis Byron, President of the International Criminal Tribunal for Rwanda (see annex).

The letter contains two requests. The first relates to filling the position of President of the Tribunal. President Byron's term of office expires at the end of this month. The Statute of the Tribunal requires that the President be elected from among the permanent judges and be a member of one of the Trial Chambers. However, two permanent judges will resign and four will be redeployed to the Appeals Chamber in The Hague upon the completion of their remaining cases this year or early next year, leaving the Tribunal without any Arusha-based permanent judges. President Byron therefore requests amendments to the Statute of the Tribunal in order to allow the President to be a member of the Appeals Chamber and to be based in The Hague.

As an alternative, if it is decided that the President should continue to be a member of one of the Trial Chambers and to be based in Arusha, President Byron proposes that the Statute be amended to allow an ad litem judge to be eligible for election as President.

The second request is that President Byron be permitted to work part-time at the Tribunal and simultaneously to engage in another occupation from 1 September 2011. This is because President Byron has been appointed as President of the Caribbean Court of Justice and will be sworn in on 1 September 2011. He intends to resign from the Tribunal upon the delivery of the judgement in the *Karemera et al.* case around December 2011.

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As a result of President Byron's intended resignation from the Tribunal upon the completion of his remaining case, Judge Bakhtiyar Tuzmukhamedov will be redeployed to the Appeals Chamber instead of him.

It falls to the General Assembly and the Security Council to consider and decide on these requests. Accordingly, I would be grateful if you would bring the letter from President Byron to the attention of the members of the General Assembly and the members of the Security Council.

(*Signed*) **BAN** Ki-moon

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Annex

Letter dated 5 May 2011 from the President of the International Criminal Tribunal for Rwanda addressed to the Secretary-General

I would be grateful if you could bring these three urgent matters to the attention of the Security Council.

1. The Offices of President and Vice-President of the International Criminal Tribunal for Rwanda

I hereby request that the Security Council remove the requirement in article 13 (2) of the Statute that the President be a trial judge and the requirement pursuant to article 12 bis (3) with reference to article 13 bis (3) of the Statute of the International Criminal Tribunal for the Former Yugoslavia with reference to article 22 (2) of the Statute of the International Court of Justice that the President be resident at the seat of the Court to enable the President to be redeployed to the Appeals Chamber and reside in The Hague, if need be, and authorize and make provision for an ad litem judge to be elected Vice-President, to act as President in the absence of the President and, if required, to become President by election or otherwise.

Background

On 1 April 2011, the Tribunal held a plenary, which all permanent appeals and trial judges, except Judge de Silva, and most ad litem judges attended, at which it was discussed how to fill the managerial posts of the Tribunal in order to accomplish the Tribunal's completion strategy. I was authorized by all judges to request the assistance of the Office of Legal Affairs to obtain the approval and the necessary action of the Secretary-General and the Security Council with respect to what needs to be done for the Tribunal to fill its managerial posts after the expiry in May 2011 of my second term as President and of Judge Khan's second term as Vice-President.

Rationale

The discussion at the plenary was caused by the fact that by March 2012, all permanent judges, after completion of their judgements, will either have resigned (Judge De Silva and I) or be redeployed to the Appeals Chamber (Judges Khan, Sekule, Ramaroson and Tuzmukhamedov). It is expected that there will be trial activities until June 2012. The enclosure to this letter shows the residual tasks of the Tribunal for which provision is being made in the budget for service until the end of 2012.

The plenary was in agreement that the Tribunal's completion strategy requires that the Tribunal, at least until the completion of all trial activities, retain a President and a Vice-President who both must be resident in Arusha as required by the Statute with respect to the President, and that all appeals judges reside in The Hague. Furthermore, there was agreement that the Rules should not be amended to allow an extension of my term as President. To this end, no intervention of the Security Council will be required, as a permanent judge should be elected as the new President. During discussions, Judge Sekule agreed to consider whether to accept election as President, but underscored that he will not forgo his redeployment to the

Appeals Chamber after the delivery of the judgement in *Ngirabatware*, currently scheduled for March 2012. The Security Council could consider that it may facilitate the Tribunal in case the President to be elected is redeployed to the Appeals Chamber, if article 13 (2) of the Statute were amended to remove the provision that the President must be a trial judge and if article 13 bis (3) were modified to allow the President, after redeployment to the Appeals Chamber, to reside in The Hague.

With respect to the Vice-President, the majority of the permanent judges and all ad litem judges agreed that the unavailability of any permanent judges made it necessary that an experienced ad litem judge could be elected Vice-President and act as President during the absence of the President. Should the Security Council consider that it cannot provide for the President to be redeployed to the Appeals Chamber and reside in The Hague, we would request, as an alternate solution, that if for any reason the President/permanent judge ceased to be President and no other permanent judge was available to serve in Arusha, the ad litem judge/Vice-President could become President, by election or otherwise.

2. Part-time service of Judge Dennis Byron

Leave is requested for Judge Dennis Byron (myself) to demit office as a permanent judge of the Tribunal on the delivery of the judgement in the *Karemera et al.* case and to work on a part-time basis from 1 September 2011 until the date of that judgement while engaged in another judicial occupation.

Background

I have been at the Tribunal since June 2004, and have sat as a judge in the *Simba* case and as Presiding Judge in the *Rwamakuba*, *Nchamihigo*, *GAA*, *Kalimanzira*, *Muvunyi* (retrial) and *Karemera et al.* cases. In addition, I presided over the pretrial of several cases and performed many other judicial functions. Since May 2007, I have been President of the Tribunal, and I am due to conclude my tour of duty in that Office on 27 May 2011. At that time, my main remaining duty will be the delivery of the judgement in the *Karemera et al.* case. The case is very advanced. The evidence phase is completed; the closing arguments are scheduled for 22 August 2011 and judgement delivery for December 2011. This workplan takes into account my work on a part-time basis from September until judgement delivery.

The Caribbean Community Heads of Government appointed me to be the next President of the Caribbean Court of Justice and to succeed the current President when he retires later this year. The action plan is for me to be sworn in on 1 September 2011 and to work part-time at the Tribunal until I have completed my obligations to the Tribunal.

I would like to assure you of my commitment to the work of the Tribunal and the complete and honourable discharge of my obligations. This arrangement will not give rise to any conflict of interest and will not delay the judgement delivery in this case. I should point out, however, that we have prepared a very aggressive deliberation schedule as part of our determination to meet the completion strategy targets and reduce delay in the judicial process.

In these exceptional circumstances, and considering the importance of the timely completion of the *Karemera et al.* case, I request that the Security Council

authorize me to work part-time from September 2011 until the delivery of the judgement in the *Karemera et al.* case and to engage in another judicial occupation in my home region during that period.

3. Assignment of Judge Tuzmukhamedov to the Appeals Chamber

I would like to refer to my letter of 29 May 2009, in which I discussed the expansion of the Appeals Chamber and redeployment of trial judges. I now confirm that I have decided not to join the Appeals Chamber. After consultation with the permanent judges, I have decided to assign Judge Tuzmukhamedov (Russian Federation) to the Appeals Chamber upon the completion of his current cases.

Judge Tuzmukhamedov joined the Tribunal as a permanent judge in September 2009. Since then, he has been assigned to the *Bagaragaza*, *Ndahimana* and *Nzabonimana* cases. Judgement delivery in the last of these cases is scheduled for December 2011.

(*Signed*) Dennis **Byron**
President

Enclosure

Initial projections for the remaining caseload of the International Criminal Tribunal for Rwanda

Second half of 2011:

(i) Completion of three current trial cases (*Karemera*, *Nzabonimana* and *Ndahimana*)

(ii) Completion of Prosecution evidence preservation in *Bizimana* and *Mpiranya* and of any defence evidence preservation in *Kabuga*

(iii) Completion of referral applications concerning *Sikubwabo* and *Kayishema*

(iv) Pretrial proceedings in cases against fugitive accused arrested before 1 July 2011 and in *Uwinkindi*, if not referred

(v) Possible revocation proceedings in cases against *Bucyibaruta* and *Munyeshyaka*, referred to France in November 2007

(vi) Review of witness protection orders concerning 508 witnesses

First half of 2012:

(vii) Continuation into early 2012 of *Ngirabatware* and *Nizeyimana*

(viii) Preservation of defence evidence in *Bizimana* and *Mpiranya*

(ix) Three genocide trials, cf. (iv), if *Uwinkindi* is not referred

(x) Two more genocide trials, cf. (v), if revocation is decided

(xi) Three contempt/false testimony trials

(xii) Pretrial proceedings in cases of fugitive accused arrested after 30 June 2011

(xiii) Pretrial proceedings in a number of contempt/false testimony cases, where an indictment is confirmed before 1 July 2012

(xiv) Indictment amendment decisions in the cases of seven fugitives

(xv) Ongoing review of witness protection orders, cf. (vi)

Second half of 2012:

(xvi) Spillover of trials, cf. (ix)-(xi)

(xvii) A number of contempt/false testimony trials, cf. (xii)

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United Nations S/RES/1995 (2011)

Security Council

Distr.: General

6 July 2011

Resolution 1995 (2011)

Adopted by the Security Council at its 6573rd meeting, on 6 July 2011

The Security Council,

Taking note of the letter to the President of the Council from the Secretary-General dated 20 May 2011 (S/2011/329), attaching a letter from the President of the International Criminal Tribunal for Rwanda ("the International Tribunal") dated 5 May 2011,

Recalling its resolution 955 (1994) of 8 November 1994, 1503 (2003) of 28 August 2003 and 1534 (2004) of 26 March 2004, and its previous resolutions concerning the International Tribunal,

Recalling also its resolution 1966 (2010) of 22 December 2010, establishing the International Residual Mechanism for Criminal Tribunals ("the Mechanism") and requesting the International Tribunal to take all possible measures to expeditiously complete all its remaining work no later than 31 December 2014, prepare its closure and ensure a smooth transition to the Mechanism,

Recalling further that the branch of the Mechanism for the International Criminal Tribunal for Rwanda shall commence functioning on 1 July 2012,

Taking note of the assessments by the International Tribunal in its Completion Strategy Report (S/2011/317),

Noting that, upon the completion of the cases to which they are assigned, four permanent judges will be redeployed from the Trial Chambers to the Appeals Chamber and two permanent judges will leave the International Tribunal,

Noting the concerns expressed by the President and Prosecutor of the International Tribunal about staffing, and *reaffirming* that staff retention is essential for the timely completion of the International Tribunal's work,

Urging the International Tribunal to take all possible measures to complete its work expeditiously as requested in resolution 1966 (2010),

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

1. *Decides* that, notwithstanding article 13, paragraph 1, and article 12 *quater*, paragraph 2 (a), of the Statute of the International Tribunal, *ad litem* judges may be eligible for election as, and may vote in the election of, the President of the International Tribunal;

11-40230 (E)

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2. *Decides* in this regard that, notwithstanding article 12 *quater*, paragraph 2, of the Statute of the International Tribunal, an *ad litem* judge elected as President of the International Tribunal may exercise the same powers as a permanent judge, which will not alter his or her status or give rise to any additional allowances or benefits other than those which already exist, and will effect no changes of the current terms and conditions of service as an *ad litem* judge;

3. *Decides* that, notwithstanding article 12 *quater*, paragraph 2, of the Statute of the International Tribunal, an *ad litem* judge elected as Vice President of the International Tribunal may act as President when required to do so by under the Statute or the Rules of Procedure and Evidence, which will not alter his or her status or give rise to any additional allowances or benefits other than those which already exist, and will effect no changes of the current terms and conditions of service as an *ad litem* judge;

4. Decides, in light of the exceptional circumstances, that notwithstanding article 12 *bis*, paragraph 3, of the Statute of the International Tribunal, Judge Dennis Byron may work part-time and engage in another judicial occupation from 1 September 2011 until the completion of the case to which he is assigned; *takes note* of the intention of the International Tribunal to complete the case by December 2011; and *underscores* that this exceptional authorization shall not be considered as establishing a precedent. The President of the International Tribunal shall have the responsibility to ensure that this arrangement is compatible with the independence and impartiality of the judge, does not give rise to conflicts of interest and does not delay the delivery of the judgment;

5. *Reaffirms* the necessity of trial of persons indicted by the International Tribunal and reiterates its call on all States, especially the States of the Great Lakes region, to intensify cooperation with and render all necessary assistance to the International Tribunal, and in particular *calls upon* relevant States to increase their efforts to bring Felicien Kabuga, Augustin Bizimana, Protais Mpiranya and other indictees of the International Tribunal to justice;

6. *Reiterates* the importance of the International Tribunal being adequately staffed to complete its work expeditiously and *calls upon* relevant United Nations bodies to intensify cooperation with the Secretariat and the Registrar of the International Tribunal and to take a flexible approach in order to find practicable solutions to address this issue as the International Tribunal approaches the completion of its work, and at the same time *calls upon* the International Tribunal to renew its efforts to focus on its core functions;

7. *Commends* States that have accepted the relocation of acquitted persons or convicted persons who have completed serving their sentences to their territories, and *calls upon* other States in a position to do so to cooperate with and render all necessary assistance to the International Tribunal in the relocation of acquitted persons and convicted persons who have completed serving their sentences;

8. *Decides* to remain seized of the matter.

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Model Rules of Professional Conduct: Table of Contents

MODEL RULES OF PROFESSIONAL CONDUCT

Nothing contained in this book is to be considered as the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel.

- Russian Translation (2009)
- Other Model Rules Resources
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Rule 3.4: Fairness to Opposing Party & Counsel

Advocate

Rule 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

(a) unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

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ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY

The Model Code of Professional Responsibility was adopted by the House of Delegates of the American Bar Association on August 12, 1969 and was amended by the House of Delegates in February 1970, February 1974, February 1975, August 1976, August 1977, August 1978, February 1979, February 1980, and August 1980.

(2) -A lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.

(C) -DR 7-108(A) and (B) do not prohibit a lawyer from communicating with veniremen or jurors in the course of official proceedings.

(D) -After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.[88]

(E) -A lawyer shall not conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a venireman or a juror.

(F) -All restrictions imposed by DR 7-108 upon a lawyer also apply to communications with or investigations of members of a family of a venireman or a juror.

(G) -A lawyer shall reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of his family, of which the lawyer has knowledge.

DR 7-109 Contact with Witnesses.

(A) -A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce.[89]

(B) -A lawyer shall not advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.[90]

(C) -A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case.[91] But a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) -Expenses reasonably incurred by a witness in attending or testifying.

(2) -Reasonable compensation to a witness for his loss of time in attending or testifying.

(3) -A reasonable fee for the professional services of an expert witness.

DR 7-110 Contact with Officials.[92]

(A) -A lawyer shall not give or lend any thing of value to a judge, official, or employee of a tribunal except as permitted by Section C(4) of Canon 5 of the Code of Judicial Conduct, but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with Section B(2) under Canon 7 of the Code of Judicial Conduct.[93]

(B) -In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:

(1) -In the course of official proceedings in the cause.

(2) -In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.

(3) -Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.

(4) -As otherwise authorized by law, or by Section A(4) under Canon 3 of the Code of Judicial Conduct.[94,95]

NOTES

1. "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law." Powell v. Alabama, 287 U.S. 45, 68-69, 77 L. Ed. 158, 170, 53 S. Ct. 55, 64 (1932).

2. *Cf.* ABA CANONS OF PROFESSIONAL ETHICS, CANON 4 (1908).

"At times . . . . [the tax lawyer] will be wise to discard some argument and he should exercise discretion to emphasize the arguments which in his judgment are most likely to be persuasive. But this process involves legal judgment rather than moral attitudes. The tax lawyer should put aside private disagreements with Congressional and Treasury policies. His own notions of policy, and his personal view of what the law should be, are irrelevant. The job entrusted to him by his client is to use all his learning and ability to protect his client's rights, not to help in the process of promoting a better tax system. The tax lawyer need not accept his client's economic and social opinions, but the client is paying for the technical attention and undivided concentration upon his affairs. He is equally entitled to performance unfettered by his attorney's economic and social predilections." Paul, *The Lawyer as a Tax Adviser*, 25 ROCKY MT. L. REV. 412, 418 (1953).

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OFFICE OF THE HIGH COMMISSIONER
FOR HUMAN RIGHTS

General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14) : . 13/04/1984. CCPR General Comment No. 13. (General Comments)

Convention Abbreviation: CCPR

GENERAL COMMENT 13

Equality before the courts and the right to a fair and public hearing
by an independent court established by law

(Article 14)

(Twenty-first session, 1984)

1. The Committee notes that article 14 of the Covenant is of a complex nature and that different aspects of its provisions will need specific comments. All of these provisions are aimed at ensuring the proper administration of justice, and to this end uphold a series of individual rights such as equality before the courts and tribunals and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. Not all reports provided details on the legislative or other measures adopted specifically to implement each of the provisions of article 14.

2. In general, the reports of States parties fail to recognize that article 14 applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit at law. Laws and practices dealing with these matters vary widely from State to State. This diversity makes it all the more necessary for States parties to provide all relevant information and to explain in greater detail how the concepts of "criminal charge" and "rights and obligations in a suit at law" are interpreted in relation to their respective legal systems.

3. The Committee would find it useful if, in their future reports, States parties could provide more detailed information on the steps taken to ensure that equality before the courts, including equal access to courts, fair and public hearings and competence, impartiality and independence of the judiciary are established by law and guaranteed in practice. In particular, States parties should specify the relevant constitutional and legislative texts which provide for the establishment of the courts and ensure that they are independent, impartial and competent, in particular with regard to the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the condition governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislative.

4. The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent

administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14. The Committee has noted a serious lack of information in this regard in the reports of some States parties whose judicial institutions include such courts for the trying of civilians. In some countries such military and special courts do not afford the strict guarantees of the proper administration of justice in accordance with the requirements of article 14 which are essential for the effective protection of human rights. If States parties decide in circumstances of a public emergency as contemplated by article 4 to derogate from normal procedures required under article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of article 14.

5. The second sentence of article 14, paragraph 1, provides that "everyone shall be entitled to a fair and public hearing". Paragraph 3 of the article elaborates on the requirements of a "fair hearing" in regard to the determination of criminal charges. However, the requirements of paragraph 3 are minimum guarantees, the observance of which is not always sufficient to ensure the fairness of a hearing as required by paragraph 1.

6. The publicity of hearings is an important safeguard in the interest of the individual and of society at large. At the same time article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons spelt out in that paragraph. It should be noted that, apart from such exceptional circumstances, the Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons. It should be noted that, even in cases in which the public is excluded from the trial, the judgement must, with certain strictly defined exceptions, be made public.

7. The Committee has noted a lack of information regarding article 14, paragraph 2 and, in some cases, has even observed that the presumption of innocence, which is fundamental to the protection of human rights, is expressed in very ambiguous terms or entails conditions which render it ineffective. By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial.

8. Among the minimum guarantees in criminal proceedings prescribed by paragraph 3, the first concerns the right of everyone to be informed in a language which he understands of the charge against him (subpara. (a)). The Committee notes that State reports often do not explain how this right is respected and ensured. Article 14 (3) (a) applies to all cases of criminal charges, including those of persons not in detention. The Committee notes further that the right to be informed of the charge "promptly" requires that information is given in the manner described as soon as the charge is first made by a competent authority. In the opinion of the Committee this right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such. The specific requirements of subparagraph 3 (a) may be met by stating the charge either orally or in writing, provided that the information indicates both the law and the alleged facts on which it is based.

9. Subparagraph 3 (b) provides that the accused must have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing. What is "adequate time" depends on the circumstances of each case, but the facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel.

When the accused does not want to defend himself in person or request a person or an association of his choice, he should be able to have recourse to a lawyer. Furthermore, this subparagraph requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications. Lawyers should be able to counsel and to represent their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures or undue interference from any quarter.

10. Subparagraph 3 (c) provides that the accused shall be tried without undue delay. This guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered; all stages must take place "without undue delay". To make this right effective, a procedure must be available in order to ensure that the trial will proceed "without undue delay", both in first instance and on appeal.

11. Not all reports have dealt with all aspects of the right of defence as defined in subparagraph 3 (d). The Committee has not always received sufficient information concerning the protection of the right of the accused to be present during the determination of any charge against him nor how the legal system assures his right either to defend himself in person or to be assisted by counsel of his own choosing, or what arrangements are made if a person does not have sufficient means to pay for legal assistance. The accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defences and the right to challenge the conduct of the case if they believe it to be unfair. When exceptionally for justified reasons trials in absentia are held, strict observance of the rights of the defence is all the more necessary.

12. Subparagraph 3 (e) states that the accused shall be entitled to examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. This provision is designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.

13. Subparagraph 3 (f) provides that if the accused cannot understand or speak the language used in court he is entitled to the assistance of an interpreter free of any charge. This right is independent of the outcome of the proceedings and applies to aliens as well as to nationals. It is of basic importance in cases in which ignorance of the language used by a court or difficulty in understanding may constitute a major obstacle to the right of defence.

14. Subparagraph 3 (g) provides that the accused may not be compelled to testify against himself or to confess guilt. In considering this safeguard the provisions of article 7 and article 10, paragraph 1, should be borne in mind. In order to compel the accused to confess or to testify against himself, frequently methods which violate these provisions are used. The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable.

15. In order to safeguard the rights of the accused under paragraphs 1 and 3 of article 14, judges should have authority to consider any allegations made of violations of the rights of the accused during any stage of the prosecution.

16. Article 14, paragraph 4, provides that in the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. Not many reports have furnished sufficient information concerning such relevant matters as the minimum age at which a juvenile may be charged with a criminal offence, the maximum age at which a person is still considered to be a juvenile, the existence of special courts and procedures, the laws governing procedures against juveniles and how all these

special arrangements for juveniles take account of "the desirability of promoting their rehabilitation". Juveniles are to enjoy at least the same guarantees and protection as are accorded to adults under article 14.

17. Article 14, paragraph 5, provides that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. Particular attention is drawn to the other language versions of the word "crime" ("infraction", "delito", "prestuplenie") which show that the guarantee is not confined only to the most serious offences. In this connection, not enough information has been provided concerning the procedures of appeal, in particular the access to and the powers of reviewing tribunals, what requirements must be satisfied to appeal against a judgement, and the way in which the procedures before review tribunals take account of the fair and public hearing requirements of paragraph 1 of article 14.

18. Article 14, paragraph 6, provides for compensation according to law in certain cases of a miscarriage of justice as described therein. It seems from many State reports that this right is often not observed or insufficiently guaranteed by domestic legislation. States should, where necessary, supplement their legislation in this area in order to bring it into line with the provisions of the Covenant.

19. In considering State reports differing views have often been expressed as to the scope of paragraph 7 of article 14. Some States parties have even felt the need to make reservations in relation to procedures for the resumption of criminal cases. It seems to the Committee that most States parties make a clear distinction between a resumption of a trial justified by exceptional circumstances and a re-trial prohibited pursuant to the principle of ne bis in idem as contained in paragraph 7. This understanding of the meaning of ne bis in idem may encourage States parties to reconsider their reservations to article 14, paragraph 7.

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Marshall v. Canada, Communication No. 205/1986, U.N. Doc. CCPR/C/43/D/205/1986 (1991).Peart v. Jamaica, Communications Nos. 464/1991 & 482/1991, U.N. Doc.CCPR/C/54/D/464/1991 & 482/1991 (1995).

Distr. RESTRICTED */
CCPR/C/54/D/464/1991 & 482/1991
24 July 1995
Original: ENGLISH

HUMAN RIGHTS COMMITTEE

Fifty-fourth session

VIEWS

Communications Nos. 464/1991 & 482/1991

Submitted by: Garfield Peart and Andrew Peart [represented by counsel]

Victims: The authors

State party: Jamaica

Date of communications: 17 July 1991 and 12 November 1991 (initial submissions)

Documentation references:

Prior decisions

- Special Rapporteur's combined rule 86/rule 91 decisions transmitted to the State party on 21 January 1992 and 14 February 1992 (not issued in document form)

- CCPR/C/47/D/482/1991 (Decision on admissibility, dated 19 March 1993)

- CCPR/C/50/D/464/1991 (Decision on admissibility, dated 17 March 1994)

Date of adoption of Views: 19 July 1995

On 19 July 1995, the Human Rights Committee joined the consideration of communications Nos. 464/1991 and 482/1991 and adopted its Views thereon under article 5, paragraph 4, of the Optional Protocol.

[ANNEX]

ANNEX

A. **Decision to deal jointly with two communications**

The Human Rights Committee,

Considering that communications Nos. 464/1991 and 482/1991 refer to closely related events affecting the authors,

Considering further that the two communications can appropriately be dealt with together,

1. **Decides**, pursuant to rule 88, paragraph 2, of its rules of procedure, to deal jointly with these communications;

2. **Further decides** that this decision shall be communicated to the State party and the authors of the communications.

B. **Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights**

- Fifty-fourth session -

concerning

Communications Nos. 464/1991 & 482/1991

Submitted by: Garfield Peart and Andrew Peart [represented by counsel]

Victims: The authors

State party: Jamaica

Date of communications: 17 July 1991 and 12 November 1991

(initial submissions)

Date of decisions on admissibility: 17 March 1994 and 19 March 1993

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 July 1995,

Having concluded its consideration of communications Nos. 464/1991 and 482/1991, submitted to the Human Rights Committee by Messrs. Garfield Peart and Andrew Peart under the Optional Protocol to the International Covenant on Civil and Political Rights, **Having taken into account** all written information made available to it by the authors of the communications, their counsel and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

1. The authors of the communications are Garfield and Andrew Peart, Jamaican citizens, at the time of submission of the communications awaiting execution at St. Catherine District Prison, Jamaica [On 18 April 1995, the authors' death sentences were commuted.] . They claim to be victims of a violation by Jamaica of

articles 2, 6, 7, 9, 10 and 14 of the International Covenant on Civil and Political Rights. They are represented by counsel.

The facts as submitted by the authors:

2.1 Andrew Peart was arrested on 14 July 1986 and charged with the murder, on 24 June 1986, of one Derrick Griffiths. Garfield Peart was arrested on 5 March 1987, in connection with the same murder. On 26 January 1988, after a trial lasting six days, the two brothers were convicted and sentenced to death in the Home Circuit Court of Kingston. The Court of Appeal dismissed their appeal on 18 October 1988. On 6 June 1991, the Judicial Committee of the Privy Council dismissed their petition for special leave to appeal. In December 1992, the authors' offence was classified as capital murder under section 7 of the Offences Against the Person (Amendment) Act 1992.

2.2 During the trial, the principal witness for the prosecution, Lowell Walsh, who at the time of the trial was 15 years old, testified that he had been watching a bingo game, around 9 p.m. on 24 June 1986. Among those present was the deceased. According to Walsh, Andrew came up to the group and called Griffiths. Griffiths, Walsh and another person, Horace Walker, together with Andrew then went to the latter's house. On arrival there, Walsh testified that he saw Garfield, whom he had known since childhood, sitting outside in the yard. It was night, and there was no lighting. He then witnessed what appeared to be an ambush; an armed man told Griffiths not to move, Andrew wrestled Griffiths to the ground, while Garfield threatened him with a gun. Walsh and Horace ran indoors to hide. Walsh testified that he heard gunshots and a voice saying "make sure he is dead". Walsh was then discovered by Andrew, who tied him up and threatened him. During a further incident between the two brothers and a newcomer, Walsh managed to escape.

2.3 The authors' defence was based on alibi. Upon his arrest, Garfield had immediately denied involvement and said that he had been at the cinema with friends when the incident took place. At the trial, he made an unsworn statement from the dock, repeating what he had told the arresting officer. He added that, while at the cinema, he had received a message from his child'smother that a shooting had taken place at his house. His alibi was supported by the sworn evidence of Claudette Brown, who said that she had been with the author at the cinema, and by Pamela Walker, who confirmed having given the message to the author at the cinema. In an unsworn statement from the dock, Andrew contended that, on the night of the murder, he was in the company of his girlfriend until 11 p.m., and that he had been framed.

The complaint:

3.1 The authors claim that the trial against them was unfair. They point out that they were convicted upon the uncorroborated evidence given by Walsh. They submit that the trial transcript contains a suggestion that the other eyewitness, Walker, was not called because his evidence would not have supported that of Walsh. It is submitted that Walsh made a written statement to the police on the night of the incident which contained material discrepancies from the evidence which he gave at the trial. This statement was not released to the defence, even though under Jamaican law the prosecutor is obliged to provide the defence with a copy of any such statement. During the trial, the authors' lawyer applied to see the original statement, but the judge refused the application. A copy of the statement first came into the possession of the authors' counsel in February 1991. In the statement, Walsh does not identify Garfield as one of the attackers, and mentions another person as the one who shot Griffiths. It is submitted that without hearing evidence as to the contents of the statement the jury was not in a position to give a fair and proper verdict.

3.2 The authors further claim that they were not put on an identification parade, although they had asked for one, and that the judge should therefore have disallowed the dock identification made by Walsh. It is stated that Walsh may have been mistaken in his identification of Garfield as being present because he knew that he

lived at the premises.

3.3 The authors further claim that the judge was not impartial, but biased in favour of the prosecution. In this context, it is said that the judge allowed the jury to remain in Court during a submission by Garfield's lawyer of "no case to answer", and the judge then dismissed that submission in the presence of the jury. It is submitted that the jury thereby heard weaknesses and inconsistencies in the arguments which should have been heard by the judge alone, thus prejudicing the jury against the authors.

3.4 The authors also claim that the judge's instructions to the jury were inadequate. In particular, it is alleged that the judge did not give proper instructions with regard to the evaluation of the identification evidence. It is stated that the judge failed to draw the jury's attention to the evidence, given during the trial by the investigating policeman, that it was dark that night, that he needed a lamp to see at the premises, and that, in order to make out a man holding a gun in his hand, he would have had to have been very close. In this connection, it is stated that the jury could atfirst not agree upon a verdict in respect of Garfield and asked for a further direction from the judge as to whether, if they believed that Garfield was present at the premises, they were obliged to come back with a guilty verdict. The judge then simply reminded them of the evidence given by Walsh, without pointing out its weaknesses.

3.5 The authors further claim that they did not have adequate time and facilities for the preparation of their defence and that they did not have the opportunity to examine or have examined the witnesses against them. It is further contended that the failure to obtain the attendance of an expert witness from the Meteorological Office to give evidence rendered the trial unfair. It is submitted that evidence as to the state of the moon on the night of the incident would have assisted the court in deciding how clearly Walsh could have seen the incident.

3.6 Andrew Peart complains that prison officers were present during an interview with his lawyer. This is said to be a breach of the right to unimpeded access to a lawyer.

3.7 Garfield Peart claims that he has been arbitrarily deprived of his liberty, in violation of article 9 of the Covenant, because he was not given a fair trial and has been kept in custody without release on bail.

3.8 Andrew Peart alleges violations of articles 9 and 14, paragraph 3(c), of the Covenant, on account of the delays in the judicial proceedings in his case. Thus, he was arrested on 14 July 1986, was not brought before an examining magistrate until 5 March 1987, and was not tried until the end of January 1988. It is submitted that a delay of 18 months between arrest and trial is unreasonable. It is submitted that similar delays occurred between the dismissal of the authors' appeal and the refusal of leave to appeal by the Judicial Committee, which is mainly attributable to the Jamaican judicial authorities; counsel explains that it was difficult to obtain copies of the deposition and the original statement of Walsh.

3.9 The authors also claim that they are victims of a violation of article 6 of the Covenant, since they have been sentenced to death following a trial which was not in accordance with the provisions of the Covenant. In this connection, reference is made to the United Nations Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty contained in the annex to Economic and Social Council resolution 1984/50.

3.10 Garfield Peart further claims that his prolonged detention on death row, under degrading conditions, is in violation of articles 7 and 10 of the Covenant. Both authors submit that the conditions in St. Catherine District Prison are hard and inhuman and that they are not being offered treatment aimed at reformation and rehabilitation. It appears from a report prepared by a non-governmental organization that Andrew was injured by prison warders during the riots of May 1990. Garfield refers to an incident on 4 May 1993 when he was badly beaten during the course of an extensive search of theprison, allegedly because his brother

Andrew was a witness in a murder case involving some senior warders. All his personal belongings were destroyed. Upon indication of a prison warder, a soldier beat him with a metal detector on his testicle. Later he was taken to the sick bay and given pain killers, but no doctor came to see him. He reported the incident to the acting Superintendent, who, however, disclaimed responsibility. His counsel, in September 1993, wrote to the Jamaican Commissioner of Police, also to no avail. The author states that he has exhausted all domestic remedies in this respect and claims that the remedies of filing a complaint with the Superintendent, the Ombudsman or the Prison Visiting Committee are not effective.

The State party's observations on admissibility and authors' comments thereon:

4.1 The State party argued that the communications were inadmissible on the grounds of failure to exhaust domestic remedies. The State party argued that it was open to the authors to seek redress for the alleged violations of their rights by way of a constitutional motion.

4.2 As regards the authors' claims under article 10 of the Covenant, the State party noted that the authors had not given any explanation for their contention that the available remedies are not effective and it submitted that the authors had not shown that they had attempted to exhaust domestic remedies in this respect. In addition, the State party argued that the authors also could bring a civil action in order to obtain damages for assault and battery and destruction of property. Moreover, the State party indicated that it was in the process of investigating the incident during which Andrew Peart was injured.

5.1 In their comments on the State party's submission, the authors further stated that they had no means to retain counsel and that legal aid is not made available either for constitutional motions or for civil actions, and that for this reason said remedies were not available to them. As regards the constitutional motion, the authors further referred to the Committee's jurisprudence that a constitutional motion is not an effective remedy. [Reference is made to the Committee's decisions in communications No. 283/1988 (Aston Little v. Jamaica), Views adopted on 1 November 1991, and No. 230/1987 (Raphael Henry v. Jamaica), Views adopted on 1 November 1991.] Moreover, the authors claimed that, even if the constitutional motion were an available remedy, it would entail an unreasonable prolongation of the application of domestic remedies.

5.2 Garfield Peart explained that in May 1993, he filed a further petition for leave to appeal on the grounds that his continued detention on death row, where he had already been for over five years, constituted cruel and inhuman treatment, and that therefore the death sentence against him should not be executed.**The Committee's admissibility decisions**:

6.1 During its 47th and 50th sessions, the Committee considered the admissibility of the communications.

6.2 As regards the State party's argument that a constitutional remedy was still open to the authors, the Committee recalled its jurisprudence that for purposes of article 5, paragraph 2(b), of the Optional Protocol, domestic remedies must be both effective and available. The Committee considered that, in the absence of legal aid, a constitutional motion did not, in the circumstances of the instant cases, constitute an available remedy which needed to be exhausted for purposes of the Optional Protocol.

6.3 The Committee considered inadmissible the part of the authors' claims which related to the instructions given by the judge to the jury with regard to the evaluation of the identification evidence. The Committee reiterated that it was, in principle, for the appellate courts of States parties, and not for the Committee, to review specific instructions to the jury by the judge, unless it was clear that the instructions were arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligations of impartiality. The material before the Committee did not show that the judge's instructions to the jury in the instant case suffered from such defects.

6.4 The Committee further considered that the authors had failed to substantiate, for purposes of admissibility, their claim that the judge was not impartial and their claim that they did not have adequate time and facilities for the preparation of the defence and no opportunity to cross-examine the witnesses against him. In this context, the Committee noted from the trial transcript that the authors' counsel who represented them during the trial and at the appeal, had at no time raised objections and had in fact extensively cross-examined the main prosecution witness.

6.5 The Committee considered that Garfield Peart had not exhausted domestic remedies with regard to his claim that his prolonged detention on death row violated articles 7 and 10 of the Covenant. That part of the communication was therefore inadmissible under article 5, paragraph 2(b), of the Covenant.

6.6 With regard to Garfield Peart's claim that his continued detention was arbitrary and in violation of article 9 of the Covenant, the Committee noted that he was arrested and charged with the offence of murder, and subsequently was brought to trial, convicted and sentenced. It considered that the author could not claim that he was a victim of a violation of article 9 of the Covenant, and this part of the communication was therefore inadmissible under article 2 of the Optional Protocol.

6.7 The Committee considered that the failure to make available to the defence the content of Walsh's original statement, as well as the unavailability of a material defence witness at the trial might raise issues under article 14, paragraphs 1 and 3(e), and that the circumstances indetention might raise issues under articles 7 and 10, which should be examined on the merits. The Committee further considered that Andrew Peart's communication might raise issues under article 9, paragraph 3, and that his claim that he did not have unimpeded access to his lawyer should be examined on the merits.

7. Consequently, the Human Rights Committee decided that the communications were admissible in as much as they appeared to raise issues under articles 7, 10 and 14, paragraphs 1 and 3(e), of the Covenant, in relation to both authors, and under article 9, paragraph 3, in relation to Andrew Peart.

Post admissibility submissions from the parties:

8. By submission of 20 January 1994, counsel for Andrew Peart states that warders had beaten Andrew with a metal detector on 4 May 1993. Afterwards he was passing blood in his urine and suffering from shoulder injuries, but he did not receive medical treatment. He further states that he was locked in his cell without water until Friday 7 May 1993. Counsel also submits that Andrew has been receiving death threats from warders, allegedly because he testified against one of them before the Court after the death of an inmate in 1989. Counsel provides copies of letters sent to the Parliamentary Ombudsman, the Solicitor General, the Director of Correctional Services and the Minister of Justice and National Security. In reply, counsel received information that the complaint was being investigated by the Inspectorate General of the Ministry of National Security and Justice.

9.1 By submission of 11 November 1994 concerning Garfield Peart's communication, the State party reiterates its opinion that the communication is inadmissible for failure to exhaust domestic remedies. In this context, the State party notes that the author complained about his ill-treatment in prison to the Commissioner of Police, who would have little or no jurisdiction in a matter of this kind. It is submitted that the author should have sought the assistance of the Office of the Ombudsman or should have made a formal complaint to the prison authorities. The State party further states that it has asked the Inspectorate General to investigate the allegations.

9.2 With regard to the claim that article 14, paragraph 1, has been violated because counsel was not allowed to see the original statement of Walsh, the State party submits that there is a duty on the part of Crown

Counsel under Jamaican law to inform the defence if there is a material discrepancy between the content of a statement given by a witness to the police and the evidence given by a witness to the defence. The duty to show the statement to the defence depends on the circumstances. The State party submits that under article 17 of the Evidence Act, defence counsel may invite a trial judge to exercise his discretion to require the production of the statement.

9.3 In the present case, the trial judge declined to exercise his discretion. In the opinion of the State party this does not involve a breach of article 14 of the Covenant. Furthermore, the State party submits that theappropriate body for reviewing the exercise of the judge's discretion is the Court of Appeal, which in the present case did not take the view that the judge's discretion was wrongly exercised, and neither did the Privy Council.

9.4 With regard to the alleged breach of article 14, paragraph 3(e), the State party argues that, unless the State by act or omission was responsible for the witness not being available, the State cannot be held accountable for the non-availability of a defence witness.

10.1 In his comments, dated 20 February 1995, counsel for Garfield Peart argues that the Office of the Ombudsman is not a competent authority within the terms of article 2, paragraph 3(b), of the Covenant. Furthermore, counsel points out that in reply to the complaint made by the author about his treatment in prison, the Commissioner of Police acknowledged receipt of the complaints and advised him that the matter was being referred to the Commissioner of Correctional Services for appropriate action. On 27 June 1994, counsel sent a further letter to the Commissioner of Corrections, but no response has been received to date.

10.2 Counsel maintains that there was a material discrepancy between the original statement of Walsh and his evidence in court of which the defence was not advised and that the failure to produce the original statement resulted in a miscarriage of justice.

Issues and proceedings before the Committee:

11.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

11.2 The Committee has noted the State party's argument that the claim with regard to the treatment suffered by Garfield Peart in prison is inadmissible because of failure to exhaust domestic remedies. The Committee has also noted that the author had complained to the acting Superintendent, and that his counsel had made a complaint to the Commissioner of Police and was subsequently informed that the complaint was referred to the Commissioner of Correctional Services for appropriate action. In the circumstances, the Committee considers that the author and his counsel have shown due diligence in the pursuit of domestic remedies and that there is no reason to review the Committee's decision on admissibility.

11.3 With regard to the authors' claim that the unavailability of the expert witness from the Meteorological Office constitutes a violation of article 14 of the Covenant, the Committee notes that it appears from the trial transcript that the defence had contacted the witness but had not secured his presence in court, and that, following a brief adjournment, the judge then ordered the Registrar to issue a subpoena for the witness and adjourned the trial. When the trial was resumed and the witness did not appear, counsel informed the judge that he would go ahead without the witness. In the circumstances, theCommittee finds that the State party cannot be held accountable for the failure of the defence expert witness to appear.

11.4 With regard to the evidence given by the main witness for the prosecution, the Committee notes that it appears from the trial transcript that, during cross-examination by the defence, the witness admitted that he

had made a written statement to the police on the night of the incident. Counsel then requested a copy of this statement, which the prosecution refused to give; the trial judge subsequently held that defence counsel had failed to put forward any reason why a copy of the statement should be provided. The trial proceeded without a copy of the statement being made available to the defence.

11.5 From the copy of the statement, which came into counsel's possession only after the Court of Appeal had rejected the appeal and after the initial petition for special leave to appeal to the Judicial Committee of the Privy Council had been submitted, it appears that the witness named another man as the one who shot the deceased, that he implicated Andrew Peart as having had a gun in his hand, and that he did not mention Garfield Peart's participation or presence during the killing. The Committee notes that the evidence of the only eye-witness produced at the trial was of primary importance in the absence of any corroborating evidence. The Committee considers that the failure to make the police statement of the witness available to the defence seriously obstructed the defence in its cross-examination of the witness, thereby precluding a fair trial of the defendants. The Committee finds therefore that the facts before it disclose a violation of article 14, paragraph 3(e), of the Covenant.

11.6 With regard to the authors' allegations about maltreatment on death row, the Committee notes that the State party has indicated that it would investigate the allegations, but that the results of the investigations have not been transmitted to the Committee. Due weight must therefore be given to the authors' allegations, to the extent that they are substantiated. The Committee notes that the authors have mentioned specific incidents, in May 1990 and May 1993, during which they were assaulted by prison warders or soldiers and, moreover, that Andrew Peart has been receiving death threats. In the Committee's view this amounts to cruel treatment within the meaning of article 7 of the Covenant and also entails a violation of article 10, paragraph 1.

11.7 Andrew Peart has further alleged that he did not have unimpeded access to his lawyer because prison officials were present during an interview. The Committee considers that the author has not substantiated in what way the mere presence of the officers hindered him in preparing his defence and notes in this context that no such claim was advanced before the local courts. The Committee concludes therefore that the facts before it do not disclose a violation of article 14 of the Covenant in this respect. The Committee further considers that the facts of the case do not disclose a violation of article 9.

11.8 The Committee is of the opinion that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant. As the Committee noted in its General Comment 6(16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review of conviction and sentence by a higher tribunal." [See CCPR/C/21/Rev.1, page 7, paragraph 7.] In the present case, since the final sentence of death was passed without due respect for the requirement of fair trial, there has consequently also been a violation of article 6 of the Covenant.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 7, 10, paragraph 1, and 14, paragraph 3(e), and consequently article 6, of the International Covenant on Civil and Political Rights.

13. In capital punishment cases, the obligation of States parties to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant admits of no exception. The failure to make the prosecution witness' police statement available to the defence obstructed the defence in its cross-examination of the

witness, in violation of article 14, paragraph 3(e), of the Covenant; thus, Garfield and Andrew Peart did not receive a fair trial within the meaning of the Covenant. Consequently, they are entitled, under article 2, paragraph 3(a), of the Covenant, to an effective remedy. The Committee has taken note of the commutation of the authors' death sentence, but it is of the view that in the circumstances of the case, the remedy should be the authors' release. The State party is under an obligation to ensure that similar violations do not occur in the future.

14. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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footnotes

*/ Made public by decision of the Human Rights Committee.

Criminal Code (R.S.C., 1985, c. C-46)
Act current to 2012-09-19 and last amended on 2012-08-20. Previous Versions

Compulsion of spouse

18. No presumption arises that a married person who commits an offence does so under compulsion by reason only that the offence is committed in the presence of the spouse of that married person.

R.S., c. C-34, s. 18; 1980-81-82-83, c. 125, s. 4.

Ignorance of the law

19. Ignorance of the law by a person who commits an offence is not an excuse for committing that offence.

R.S., c. C-34, s. 19.

Certain acts on holidays valid

20. A warrant or summons that is authorized by this Act or an appearance notice, promise to appear, undertaking or recognizance issued, given or entered into in accordance with Part XVI, XXI or XXVII may be issued, executed, given or entered into, as the case may be, on a holiday.

R.S., c. C-34, s. 20; R.S., c. 2(2nd Supp.), s. 2.

Parties to Offences

Parties to offence

21. (1) Every one is a party to an offence who

(*a*) actually commits it;

(*b*) does or omits to do anything for the purpose of aiding any person to commit it; or

(*c*) abets any person in committing it.

Common intention

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

R.S., c. C-34, s. 21.

Person counselling offence

22. (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.

Idem

(2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.

Definition of "counsel"

(3) For the purposes of this Act, "counsel" includes procure, solicit or incite.

R.S., 1985, c. C-46, s. 22; R.S., 1985, c. 27 (1st Supp.), s. 7.

ESTES v. TEXAS

No. 256

SUPREME COURT OF THE UNITED STATES

381 U.S. 532; 85 S. Ct. 1628; 14 L. Ed. 2d 543; 1965 U.S. LEXIS 2339; 6 Rad. Reg. 2d (P & F) 2104; 1 Media L. Rep. 1187

April 1, 1965, Argued
June 7, 1965, Decided

PRIOR HISTORY: CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

DISPOSITION: Reversed.

SUMMARY:

A much publicized financier was convicted in the District Court for the Seventh Judicial District of Texas at Tyler of the offense of swindling, after a trial of great notoriety which was televised and broadcast over his objection. The Texas Court of Criminal Appeals affirmed.

On certiorari, the Supreme Court of the United States reversed. In an opinion by Clark, J., expressing the views of five members of the Court, it was held that in view of the great notoriety of the trial, due process of law was denied the accused by the televising and broadcasting of the proceedings.

Warren, Ch. J., with Douglas and Goldberg, JJ., joined in the Court's opinion but filed a separate opinion stating that it violates the *Sixth Amendment* for federal courts and the *Fourteenth Amendment* for state courts to allow criminal trials to be televised to the public at large.

Harlan, J., concurred in the Court's opinion subject to the reservation that the case dealt with a criminal trial of great notoriety and not with one of a more or less routine nature.

Stewart, J., joined by Black, Brennan, and White, JJ., dissented on the ground that the televising of the accused's trial did not violate his constitutional rights.

White, J., joined by Brennan, J., filed a separate dissenting opinion stating that it was premature to promulgate a flat ban on the use of cameras in the courtroom.

Brennan, J., emphasized in a separate memorandum that only four of the majority viewed televised criminal trials as constitutionally infirm, whatever the circumstances.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

CONSTITUTIONAL LAW §839.5

due process -- televising criminal trial --

Headnote:[1]

A much publicized financier, tried before a state court in criminal proceedings of great notoriety, is denied due process of law by the televising and broadcasting of such proceedings over his objection.

[***LEdHN2]

ATTORNEYS §2

bar association canons -- effect --

Headnote:[2]

Neither Canon 35 of the Judicial Canons of the American Bar Association nor Judicial Canon 28 of the Integrated State Bar of Texas, both of which deal with the televising and broadcasting of court proceedings, is of itself law.

[***LEdHN3]

CONSTITUTIONAL LAW §839.5

due process -- pretrial hearing --

Headnote:[3]

The events of a 2-day pretrial hearing on motions to prohibit television coverage and to postpone the trial are relevant on the issue whether an accused in a state criminal proceeding was denied due process by the television coverage of his trial.

[***LEdHN4]

CRIMINAL LAW §47.5

public trial -- purpose --

Headnote:[4]

The purpose of the *Sixth Amendment's* requirement of a public trial is to guarantee that the accused will be fairly dealt with and not unjustly condemned.

[***LEdHN5]

CONSTITUTIONAL LAW §925.7

freedom of speech and press -- televising trials --

Headnote:[5]

First Amendment freedoms do not extend a right to the news media to televise from the courtroom.

[***LEdHN6]

CONSTITUTIONAL LAW §925

freedom of press -- judicial proceedings --

Headnote:[6]

While maximum freedom must be allowed the press in carrying out its important function in a democratic society of informing the public, its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process.

[***LEdHN7]

COMMUNICATIONS §1

televising trials --

Headnote:[7]

The courts do not discriminate against radio and television media by forbidding the broadcasting or televising of a trial while permitting the newspaper reporter access to the courtroom, since the television and radio reporter has the same privilege and the news reporter is not permitted to bring his typewriter or printing press into the courtroom.

[***LEdHN8]

TRIAL §2

news media -- rights --

Headnote:[8]

In covering trials, all news media are entitled to the same rights as the general public.

[***LEdHN9]

TRIAL §2

purpose -- ascertaining truth --

Headnote:[9A][9B]

Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth, which is the sine qua non of a fair trial.

[***LEdHN10]

TRIAL §2

proper atmosphere --

Headnote:[10]

The atmosphere essential to the preservation of a fair trial, which is the most fundamental of all freedoms, must be maintained at all costs.

[***LEdHN11]

TRIAL §2

court proceedings -- reportorial privilege --

Headnote:[11]

The public has the right to be informed as to what occurs in its courts; reporters of all media, including television, have a right to be present and to report through their respective media whatever occurs in open court.

[***LEdHN12]

APPEAL §1618

televising criminal trial -- showing of prejudice --

Headnote:[12]

A showing of actual prejudice by the broadcasting and televising of a state criminal trial over the accused's objection is not a prerequisite to the reversal of the conviction where the accused was much publicized and the proceedings were of great notoriety.

[***LEdHN13]

CONSTITUTIONAL LAW §746

fair trial --

Headnote:[13]

A fair trial in a fair tribunal is a basic requirement of due process.

[***LEdHN14]

CONSTITUTIONAL LAW §746

justice --

Headnote:[14]

To perform its high function in the best way, justice must satisfy the appearance of justice.

[***LEdHN15]

CONSTITUTIONAL LAW §47.5

public trial --

Headnote:[15]

A defendant on trial for a specific crime is entitled to his day in court, not in a stadium, or a city or nationwide arena.Points from Separate Opinions

[***LEdHN16]

CRIMINAL LAW §47.5

televising trial --

Headnote:[16]

It violates the *Sixth Amendment* for federal courts to allow criminal trials to be televised to the public at large. [From separate opinion by Warren, Ch. J., Douglas and Goldberg, JJ.]

[***LEdHN17]

EVIDENCE §80.5

judicial notice -- effect of television --

Headnote:[17]

It is common knowledge that television can work profound changes in the behavior of the people it focuses on. [From separate opinion by Warren, Ch. J., Douglas and Goldberg, JJ.]

[***LEdHN18]

CRIMINAL LAW §47.5

public trial -- size of courtroom -- behavior of observers --

Headnote:[18]

To satisfy the constitutional requirement that trials be public it is not necessary to provide facilities large enough for all who might like to attend a particular trial, or to permit observers to act as they please in the courtroom. [From separate opinion by Warren, Ch. J., Douglas and Goldberg, JJ.]

[***LEdHN19]

CRIMINAL LAW §47.5

public trial -- meaning --

Headnote:[19]

A trial is public, in the constitutional sense, when a courtroom has facilities for a reasonable number of the public to observe the proceedings, which facilities not not so small as to render the openness negligible and not so large as to distract the trial participants from their proper function, when the public is free to use those facilities, and when all those who attend the trial are free to report what they observed at the proceedings. [From separate opinion by Warren, Ch. J., Douglas and Goldberg, JJ.]

[***LEdHN20]

CRIMINAL LAW §47.5

public trial -- television --

Headnote:[20]

The public trial guaranty of the *Sixth Amendment* does not require that television be admitted to the courtroom. [From separate opinion by Harlan, J.]

SYLLABUS

Petitioner had been indicted by a Texas county grand jury for swindling. Massive pretrial publicity had given the case national notoriety. On the trial date, following a change of venue, a hearing commenced on petitioner's motion to prevent telecasting, radio broadcasting, and news photography. The hearing, conducted in the presence of some trial witnesses and veniremen later released, was carried live on television and radio, and news photography was permitted. The original jury panel, petitioner, counsel, and the trial judge were highly publicized during the two days the pretrial hearing lasted, emphasizing throughout the community the notorious character that the trial would take. Four of the jurors selected later at the trial had seen or heard all or part of the broadcasts. The profusion of cameramen with their equipment in various parts of the crowded courtroom caused considerable disruption. The trial court denied petitioner's motion but granted a continuance of almost a month. During the interim a booth was erected in the rear of the courtroom to which television cameramen and equipment were restricted. Live telecasting was prohibited during most of the actual trial. The State's opening and closing arguments were carried live with sound (though because of mechanical difficulty there was no picture of the former), as were the return of the jury's verdict and its receipt by the judge. The court's order allowed videotapes without sound of the whole proceeding and the cameras operated intermittently during the three-day trial, which ended with petitioner's conviction. Film clips of the trial were shown largely on regularly scheduled news programs. Both the trial court and the appellate court rejected petitioner's claim of denial of due process in violation of the *Fourteenth Amendment* by the televising and broadcasting of the trial. *Held*: The televising over petitioner's objections of the courtroom proceedings of petitioner's criminal trial, in which there was widespread public interest, was inherently invalid as infringing the fundamental right to a fair trial guaranteed by the *Due Process Clause of the Fourteenth Amendment*. Pp. 536-552.

(a) The high degree of publicity given to the two-day hearing, which could only have impressed those present and the community at large with the notorious character of the petitioner and the proceeding, made what occurred at the pretrial relevant to determining whether petitioner was accorded due process at his trial. Pp. 536-537.

(b) The constitutional guarantee of a public trial is to ensure that the accused is fairly dealt with and not unjustly condemned. Pp. 538-539.

(c) The freedom granted to the press under the *First Amendment* must be subject to the maintenance of absolute fairness in the judicial process; and in the present state of television techniques such freedom does not confer the right to use equipment in the courtroom which might jeopardize a fair trial, the atmosphere for which must be preserved at all costs. Pp. 539-540.

(d) The public's right to be informed about court proceedings is satisfied if reporters are free to attend and to report on the proceedings through their respective media. Pp. 541-542.

(e) Where, as here, the procedure employed by the State involves the probability that prejudice to the accused will result, that procedure, in line with the principle established in such cases as *Rideau v. Louisiana, 373 U.S. 723,* will be deemed lacking in due process whether or not isolatable prejudice can be demonstrated. Pp. 542-544.

(f) There are numerous respects in which televising court proceedings may alone, and in combination almost certainly will, cause unfairness, such as: (1) improperly influencing jurors by emphasizing the notoriety of the trial and affecting their impartial judgment, distracting their attention, facilitating (in States which do not sequester jurors) their viewing of selected parts of the proceedings, and improperly influencing potential jurors and thus jeopardizing the fairness of new trials; (2) impairing the testimony of witnesses, as by causing some to be frightened and others to overstate their testimony, and generally influencing the testimony of witnesses, thus frustrating invocation of the "rule" against witnesses; (3) distracting judges generally and exercising an adverse psychological effect particularly upon those who are elected; and (4) imposing pressures upon the defendant and intruding into the confidential attorney-client relationship. Pp. 544-550.

(g) The foregoing factors are not merely "hypothetical," as is evidenced by the bar on television in federal criminal trials imposed by the Federal Rules of Criminal Procedure and by such a bar in all but two States. P. 550.

(h) Application of the rule of the *Rideau* case, *supra*, is clearly warranted by the facts of this case. Pp. 550-552.

COUNSEL: John D. Cofer and Hume Cofer argued the cause and filed a brief for petitioner.

Waggoner Carr, Attorney General of Texas, and Leon Jaworski, Special Assistant Attorney General, argued the cause for respondent. With them on the brief were Hawthorne Phillips, Stanton Stone, Howard M. Fender and Gilbert J. Pena, Assistant Attorneys General, and Alton F. Curry, Special Assistant Attorney General.

Briefs of amici curiae, urging reversal, were filed by Whitney North Seymour, Richmond C. Coburn and John H. Yauch for the American Bar Association, and by Norman Dorsen and Melvin L. Wulf for the American Civil Liberties Union et al.

Briefs of amici curiae, urging affirmance, were filed by Davis Grant for the State Bar of Texas, joined by Duke W. Dunbar, Attorney General of Colorado; and by Douglas A. Anello, W. Theodore Pierson and Harold David Cohen for the National Association of Broadcasters et al.

JUDGES: Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Goldberg

OPINION BY: CLARK

OPINION

[*534] [***545] [**1628] MR. JUSTICE CLARK delivered the opinion of the Court. *

* MR. JUSTICE HARLAN concurs in this opinion subject to the reservations and to the extent indicated in his concurring opinion, *post*, p. 587.

[***LEdHR1] [1]The question presented here is whether the petitioner, who stands convicted in the District Court for the Seventh Judicial District of Texas at Tyler for swindling, [1] was [*535] deprived of his [**1629] right under the *Fourteenth Amendment* to due process by the televising and broadcasting of his trial. Both the trial court and the Texas Court of Criminal Appeals found against the petitioner. We hold to the contrary and reverse his conviction.

1 The evidence indicated that petitioner, through false pretenses and fraudulent representations, induced certain farmers to purchase fertilizer tanks and accompanying equipment, which in fact did not exist, and to sign and deliver to him chattel mortgages on the fictitious property.

I.

[***546] [***LEdHR2] [2]While petitioner recites his claim in the framework of Canon 35 of the Judicial Canons of the American Bar Association he does not contend that we should enshrine Canon 35 in the *Fourteenth Amendment*, but only that the time-honored principles of a fair trial were not followed in his case and that he was thus convicted without due process of law. Canon 35, of course, has of itself no binding effect on the courts but merely expresses the view of the Association in opposition to the broadcasting, televising and photographing of court proceedings. Likewise, Judicial Canon 28 of the Integrated State Bar of Texas, 27 Tex. B. J. 102 (1964), which leaves to the trial judge's sound discretion the telecasting and photographing of court proceedings, is of itself not law. In short, the question here is not the validity of either Canon 35 of the American Bar Association or Canon 28 of the State Bar

of Texas, but only whether petitioner was tried in a manner which comports with the due process requirement of the *Fourteenth Amendment.*

Petitioner's case was originally called for trial on September 24, 1962, in Smith County after a change of venue from Reeves County, some 500 miles west. Massive pretrial publicity totaling 11 volumes of press clippings, which are on file with the Clerk, had given it national notoriety. All available seats in the courtroom were taken and some 30 persons stood in the aisles. However, at that time a defense motion to prevent telecasting, broadcasting by radio and news photography and a defense motion for continuance were presented, and after a two-day hearing the former was denied and the latter granted.

[*536] [***LEdHR3] [3]These initial hearings were carried live by both radio and television, and news photography was permitted throughout. The videotapes of these hearings clearly illustrate that the picture presented was not one of that judicial serenity and calm to which petitioner was entitled. Cf. *Wood v. Georgia, 370 U.S. 375, 383 (1962);Turner v. Louisiana, 379 U.S. 466, 472 (1965);Cox v. Louisiana, 379 U.S. 559, 562 (1965).*Indeed, at least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and the counsel table. It is conceded that the activities of the television crews and news photographers led to considerable disruption of the hearings. Moreover, veniremen had been summoned and were present in the courtroom during the entire hearing but were later released after petitioner's motion for continuance had been granted. The court also had the names of the witnesses called; some answered but the absence of others led to a continuance of the case until October 22, 1962. It is contended that this two-day pretrial hearing cannot be considered in determining the question before us. We cannot agree. Pretrial can create a major problem for the defendant in a criminal case. Indeed, it may be more harmful than publicity during the trial for it may well set the community opinion as to guilt or innocence. Though the September hearings dealt with motions to prohibit television coverage [***547] and to postpone the trial, they are unquestionably relevant to the issue before us. All of this two-day affair was highly publicized and could only have impressed those present, and also the community [**1630] at large, with the notorious character of the petitioner as well as the proceeding. The trial witnesses present at the hearing, as well as the original jury panel, were undoubtedly [*537] made aware of the peculiar public importance of the case by the press and television coverage being provided, and by the fact that they themselves were televised live and their pictures rebroadcast on the evening show.

When the case was called for trial on October 22 the scene had been altered. A booth had been constructed at the back of the courtroom which was painted to blend with the permanent structure of the room. It had an aperture to allow the lens of the cameras an unrestricted view of the courtroom. All television cameras and newsreel photographers were restricted to the area of the booth when shooting film or telecasting.

Because of continual objection, the rules governing live telecasting, as well as radio and still photos, were changed as the exigencies of the situation seemed to require. As a result, live telecasting was prohibited during a great portion of the actual trial. Only the opening [2] and closing arguments of the State, the return of the jury's verdict and its receipt by the trial judge were carried live with sound. Although the order allowed videotapes of the entire proceeding without sound, the cameras operated only intermittently, recording various portions of the trial for broadcast on regularly scheduled newscasts later in the day and evening. At the request of the petitioner, the trial judge prohibited coverage of any kind, still or television, of the defense counsel during their summations to the jury.

2 Due to mechanical difficulty there was no picture during the opening argument.

Because of the varying restrictions placed on sound and live telecasting the telecasts of the trial were confined largely to film clips shown on the stations' regularly scheduled news programs. The news commentators would use the film of a particular part of the day's trial activities as a backdrop for their reports. Their commentary [*538] included excerpts from testimony and the usual reportorial remarks. On one occasion the videotapes of the September hearings were rebroadcast in place of the "late movie."

II.

In *Rideau v. Louisiana, 373 U.S. 723 (1963)*, this Court constructed a rule that the televising of a defendant in the act of confessing to a crime was inherently invalid under the *Due Process Clause of the Fourteenth Amendment* even without a showing of prejudice or a demonstration of the nexus between the televised confession and the trial. See *id., at 729* (dissenting opinion of CLARK, J.). Here, although there was nothing so dramatic as a home-viewed confession, there had been a bombardment of the community with the sights and sounds of a two-day hearing during which the original jury panel, the petitioner, the lawyers and the judge were highly publicized. The petitioner was subjected to characterization and minute electronic scrutiny to such an extent that at one point the photographers were found attempting to picture [***548] the page of the paper from which he was reading while sitting at the counsel table. The two-day hearing and the order permitting television at the actual trial were widely known throughout the community. This emphasized the notorious character that the trial would take and, therefore, set it apart in the public mind as an extraordinary case or, as Shaw would say, something "not conventionally unconventional." When the new jury was empaneled at the trial four of the jurors selected had seen and heard all or part of the broadcasts of the earlier proceedings.

[**1631] III.

[***LEdHR4] [4]We start with the proposition that it is a "public trial" that the *Sixth Amendment* guarantees to the "accused." The purpose of the requirement of a public trial was to guarantee that the accused would be fairly dealt with and [*539] not unjustly condemned. History had proven that secret tribunals were effective instruments of oppression. As our Brother BLACK so well said in *In re Oliver, 333 U.S. 257 (1948)*:

"The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *lettre de cachet*. . . . Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution." At 268-270. (Footnotes omitted.)

[***LEdHR5] [5]It is said, however, that the freedoms granted in the *First Amendment* extend a right to the news media to televise from the courtroom, and that to refuse to honor this privilege is to discriminate between the newspapers and television. This is a misconception of the rights of the press.

[***LEdHR6] [6]The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences, including court proceedings. While maximum freedom must be allowed the press in carrying on this important function in a democratic society its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process. While the state and federal courts have differed over what spectators may be excluded from a criminal trial, 6 Wigmore, Evidence § 1834 (3d ed. 1940), the *amici curiae* brief of the National Association of Broadcasters and the Radio Television News Directors Association, says, as indeed it must, that "neither of these two amendments [First and Sixth] speaks of an unlimited [*540] right of access to the courtroom on the part of the broadcasting media . . . ." At 7. Moreover, they recognize that the "primary concern of all must be the proper administration of justice"; that "the life or liberty of any individual in this land should not be put in jeopardy because of actions of any news media"; and that "the due process requirements in both the *Fifth* and *Fourteenth Amendments* and the provisions of the *Sixth Amendment* require a procedure that will assure a fair trial . . . ." At 3-4.

[***LEdHR7] [7] [***LEdHR8] [8] Nor can the courts be said [***549] to discriminate where they permit the newspaper reporter access to the courtroom. The television and radio reporter has the same privilege. All are entitled to the same rights as the general public. The news reporter is not permitted to bring his typewriter or printing press. When the advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial we will have another case.

IV.

[***LEdHR9A] [9A] [***LEdHR10] [10]Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial. Over the centuries Anglo-American courts have devised careful safeguards by rule and

otherwise to protect and facilitate the performance of this high function. As a result, at this time those safeguards do not permit the televising and photographing of a criminal trial, save in two States and there only under restrictions. The federal courts prohibit it by specific rule. This is weighty evidence that our concepts of a [**1632] fair trial do not tolerate such an indulgence. We have always held that the atmosphere essential to the preservation of a fair trial -- the most fundamental of all freedoms -- must be maintained at all costs. Our approach has been through rules, contempt proceedings and reversal of convictions obtained under unfair conditions. Here the remedy is [*541] clear and certain of application and it is our duty to continue to enforce the principles that from time immemorial have proven efficacious and necessary to a fair trial.

V.

The State contends that the televising of portions of a criminal trial does not constitute a denial of due process. Its position is that because no prejudice has been shown by the petitioner as resulting from the televising, it is permissible; that claims of "distractions" during the trial due to the physical presence of television are wholly unfounded; and that psychological considerations are for psychologists, not courts, because they are purely hypothetical. It argues further that the public has a right to know what goes on in the courts; that the court has no power to "suppress, edit, or censor events which transpire in proceedings before it," citing *Craig v. Harney, 331 U.S. 367, 374 (1947)*; and that the televising of criminal trials would be enlightening to the public and would promote greater respect for the courts.

At the outset the notion should be dispelled that telecasting is dangerous because it is new. It is true that our empirical knowledge of its full effect on the public, the jury or the participants in a trial, including the judge, witnesses and lawyers, is limited. However, the nub of the question is not its newness but, as MR. JUSTICE DOUGLAS says, "the insidious influences which it puts to work in the administration of justice." Douglas, The Public Trial and the Free Press, 33 Rocky Mt. L. Rev. 1 (1960). These influences will be detailed below, but before turning to them the State's argument that the public has a right to know what goes on in the courtroom should be dealt with.

[***LEdHR11] [11]It is true that the public has the right to be informed as to what occurs in its courts, but reporters of all media, including television, are always present if they wish to be [*542] and are plainly free to report [***550] whatever occurs in open court through their respective media. This was settled in *Bridges v. California, 314 U.S. 252 (1941)*, and *Pennekamp v. Florida, 328 U.S. 331 (1946)*, which we reaffirm. These reportorial privileges of the press were stated years ago:

"The law, however, favors publicity in legal proceedings, so far as that object can be attained without injustice to the persons immediately concerned. The public are permitted to attend nearly all judicial inquiries, and there appears to be no sufficient reason why they should not also be allowed to see in print the reports of trials, if they can thus have them presented as fully as they are exhibited in court, or at least all the material portion of the proceedings impartially stated, so that one shall not, by means of them, derive erroneous impressions, which he would not have been likely to receive from hearing the trial itself." 2 Cooley's Constitutional Limitations 931-932 (Carrington ed. 1927).

[***LEdHR12] [12]The State, however, says that the use of television in the instant case was "without injustice to the person immediately concerned," basing its position on the fact that the petitioner has established no isolatable prejudice and that this must be shown in order to invalidate a conviction in these circumstances. The State paints too broadly in this contention, for this Court itself has found instances in which a showing of actual prejudice is not a prerequisite to reversal. This is such a case. It is true that in [**1633] most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due [*543] process. Such a case was *In re Murchison, 349 U.S. 133 (1955)*, where MR. JUSTICE BLACK for the Court pointed up with his usual clarity and force:

[***LEdHR13] [13]>

[***LEdHR14] [14]"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the *probability* of unfairness. . . . To perform its

high function in the best way 'justice must satisfy the appearance of justice.' *Offutt v. United States, 348 U.S. 11, 14.*" At 136. (Emphasis supplied.)

And, as Chief Justice Taft said in *Tumey v. Ohio, 273 U.S. 510*, almost 30 years before:

"the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a *possible* temptation to the average man . . . to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." At 532. (Emphasis supplied.)

This rule was followed in *Rideau, supra*, and in *Turner v. Louisiana, 379 U.S. 466 (1965)*. In each of these cases the Court departed from the approach it charted in *Stroble v. California, 343 U.S. 181 (1952)*, and in *Irvin v. Dowd, 366 U.S. 717* [***551] *(1961)*, where we made a careful examination of the facts in order to determine whether prejudice resulted. In *Rideau* and *Turner* the Court did not stop to consider the actual effect of the practice but struck down the conviction on the ground that prejudice was inherent in it. Likewise in *Gideon v. Wainwright,* [*544] *372 U.S. 335 (1963)*, and *White v. Maryland, 373 U.S. 59 (1963)*, we applied the same rule, although in different contexts.

In this case it is even clearer that such a rule must be applied. In *Rideau, Irvin* and *Stroble*, the pretrial publicity occurred outside the courtroom and could not be effectively curtailed. The only recourse other than reversal was by contempt proceedings. In *Turner* the probability of prejudice was present through the use of deputy sheriffs, who were also witnesses in the case, as shepherds for the jury. No prejudice was shown but the circumstances were held to be inherently suspect, and, therefore, such a showing was not held to be a requisite to reversal. Likewise in this case the application of this principle is especially appropriate. Television in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice to an accused. Still one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced. This was found true in *Murchison, Tumey, Rideau* and *Turner*. Such untoward circumstances as were found in those cases are inherently bad and prejudice to the accused was presumed. Forty-eight of our States and the Federal Rules have deemed the use of television improper in the courtroom. This fact is most telling in buttressing our conclusion that any change in procedure which would permit its use would [**1634] be inconsistent with our concepts of due process in this field.

VI.

[***LEdHR9B] [9B]

As has been said, the chief function of our judicial machinery is to ascertain the truth. The use of television, however, cannot be said to contribute materially to this objective. Rather its use amounts to the injection of an irrelevant factor into court proceedings. In addition experience teaches that there are numerous situations [*545] in which it might cause actual unfairness -- some so subtle as to defy detection by the accused or control by the judge. We enumerate some in summary:

1. The potential impact of television on the jurors is perhaps of the greatest significance. They are the nerve center of the fact-finding process. It is true that in States like Texas where they are required to be sequestered in trials of this nature the jurors will probably not see any of the proceedings as televised from the courtroom. But the inquiry cannot end there. From the moment the trial judge announces that a case will be televised it becomes a *cause celebre*. The whole community, including prospective jurors, becomes interested in all the morbid details surrounding it. The approaching trial immediately assumes an important status in the public press and the accused is highly publicized along with the offense with which he is charged. Every juror carries with him into the jury box these solemn facts and thus increases the chance of prejudice that is present [***552] in every criminal case. And we must remember that realistically it is only the notorious trial which will be broadcast, because of the necessity for paid sponsorship. The conscious or unconscious effect that this may have on the juror's judgment cannot be evaluated, but experience indicates that it is not only possible but highly probable that it will have a direct bearing on his vote as to guilt or innocence. Where pretrial publicity of all kinds has created intense public feeling which is aggravated by the telecasting or picturing of the trial the televised jurors cannot help but feel the pressures of knowing that friends and neighbors have their eyes upon them. If the community be hostile to an accused a televised juror,

realizing that he must return to neighbors who saw the trial themselves, may well be led "not to hold the balance nice, clear and true between the State and the accused . . . ."

[*546] Moreover, while it is practically impossible to assess the effect of television on jury attentiveness, those of us who know juries realize the problem of jury "distraction." The State argues this is *de minimis* since the physical disturbances have been eliminated. But we know that distractions are not caused solely by the physical presence of the camera and its telltale red lights. It is the awareness of the fact of telecasting that is felt by the juror throughout the trial. We are all self-conscious and uneasy when being televised. Human nature being what it is, not only will a juror's eyes be fixed on the camera, but also his mind will be preoccupied with the telecasting rather than with the testimony.

Furthermore, in many States the jurors serving in the trial may see the broadcasts of the trial proceedings. Admittedly, the Texas sequestration rule would prevent this occurring there. [3] In other States following no such practice jurors would return home and turn on the TV if only to see how they appeared upon it. They would also be subjected to re-enactment and emphasis of the selected parts of the proceedings which the requirements of the broadcasters determined would be telecast and would be subconsciously influenced the more by [**1635] that testimony. Moreover, they would be subjected to the broadest commentary and criticism and perhaps the well-meant advice of friends, relatives and inquiring strangers who recognized them on the streets.

> 3 Only six States, in addition to Texas, require sequestration of the jury prior to its deliberations in a non-capital felony trial. The great majority of jurisdictions leave the matter to the trial judge's discretion, while in at least one State the jury will be kept together in such circumstances only upon a showing of cause by the defendant.

Finally, new trials plainly would be jeopardized in that potential jurors will often have seen and heard the original trial when it was telecast. Yet viewers may later [*547] be called upon to sit in the jury box during the new trial. These very dangers are illustrated in this case where the court, due to the defendant's objections, permitted only the State's opening and closing arguments to be broadcast with sound to the public.

2. The quality of the testimony in criminal trials will often be impaired. The impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable. Some may be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publicly, and accuracy of statement [***553] may be severely undermined. Embarrassment may impede the search for the truth, as may a natural tendency toward overdramatization. Furthermore, inquisitive strangers and "cranks" might approach witnesses on the street with jibes, advice or demands for explanation of testimony. There is little wonder that the defendant cannot "prove" the existence of such factors. Yet we all know from experience that they exist.

In addition the invocation of the rule against witnesses is frustrated. In most instances witnesses would be able to go to their homes and view broadcasts of the day's trial proceedings, notwithstanding the fact that they had been admonished not to do so. They could view and hear the testimony of preceding witnesses, and so shape their own testimony as to make its impact crucial. And even in the absence of sound, the influences of such viewing on the attitude of the witness toward testifying, his frame of mind upon taking the stand or his apprehension of withering cross-examination defy objective assessment. Indeed, the mere fact that the trial is to be televised might render witnesses reluctant to appear and thereby impede the trial as well as the discovery of the truth.

[*548] While some of the dangers mentioned above are present as well in newspaper coverage of any important trial, the circumstances and extraneous influences intruding upon the solemn decorum of court procedure in the televised trial are far more serious than in cases involving only newspaper coverage.

3. A major aspect of the problem is the additional responsibilities the presence of television places on the trial judge. His job is to make certain that the accused receives a fair trial. This most difficult task requires his undivided attention. Still when television comes into the courtroom he must also supervise it. In this trial, for example, the judge on several different occasions -- aside from the two days of pretrial -- was obliged to have a hearing or enter an order made necessary solely because of the presence of television. Thus, where telecasting is restricted as it was here, and as even the State concedes it

must be, his task is made much more difficult and exacting. And, as happened here, such rulings may unfortunately militate against the fairness of the trial. In addition, laying physical interruptions aside, there is the everpresent distraction that the mere awareness of television's presence prompts. Judges are human beings also and are subject to the same psychological reactions as laymen. Telecasting is particularly bad where the judge is elected, as is the case in all save a half dozen of our States. The telecasting of a trial becomes a political weapon, which, along with other distractions inherent in broadcasting, diverts his attention from the task at hand -- the fair trial of the accused.

But this is not all. There is the initial decision that must be made as to whether the use of television will be permitted. [**1636] This is perhaps an even more crucial consideration. Our judges are high-minded men and women. But it is difficult to remain oblivious to the pressures that the news media can bring to bear on them both directly [*549] and through the shaping of public opinion. Moreover, where one judge in a district or even in a State permits telecasting, the requirement that the others do the same is almost mandatory. [***554] Especially is this true where the judge is selected at the ballot box.

[***LEdHR15] [15]4. Finally, we cannot ignore the impact of courtroom television on the defendant. Its presence is a form of mental -- if not physical -- harassment, resembling a police line-up or the third degree. The inevitable close-ups of his gestures and expressions during the ordeal of his trial might well transgress his personal sensibilities, his dignity, and his ability to concentrate on the proceedings before him -- sometimes the difference between life and death -- dispassionately, freely and without the distraction of wide public surveillance. A defendant on trial for a specific crime is entitled to his day in court, not in a stadium, or a city or nationwide arena. The heightened public clamor resulting from radio and television coverage will inevitably result in prejudice. Trial by television is, therefore, foreign to our system. Furthermore, telecasting may also deprive an accused of effective counsel. The distractions, intrusions into confidential attorney-client relationships and the temptation offered by television to play to the public audience might often have a direct effect not only upon the lawyers, but the judge, the jury and the witnesses. See Pye, The Lessons of Dallas -- Threats to Fair Trial and Free Press, National Civil Liberties Clearing House, 16th Annual Conference.

The television camera is a powerful weapon. Intentionally or inadvertently it can destroy an accused and his case in the eyes of the public. While our telecasters are honorable men, they too are human. The necessity for sponsorship weighs heavily in favor of the televising of only notorious cases, such as this one, and invariably focuses the lens upon the unpopular or infamous [*550] accused. Such a selection is necessary in order to obtain a sponsor willing to pay a sufficient fee to cover the costs and return a profit. We have already examined the ways in which public sentiment can affect the trial participants. To the extent that television shapes that sentiment, it can strip the accused of a fair trial.

The State would dispose of all these observations with the simple statement that they are for psychologists because they are purely hypothetical. But we cannot afford the luxury of saying that, because these factors are difficult of ascertainment in particular cases, they must be ignored. Nor are they "purely hypothetical." They are no more hypothetical than were the considerations deemed controlling in *Tumey, Murchison, Rideau* and *Turner.* They are real enough to have convinced the Judicial Conference of the United States, this Court and the Congress that television should be barred in federal trials by the Federal Rules of Criminal Procedure; in addition they have persuaded all but two of our States to prohibit television in the courtroom. They are effects that may, and in some combination almost certainly will, exist in any case in which television is injected into the trial process.

VII.

The facts in this case demonstrate clearly the necessity for the application of the rule announced in *Rideau.* The sole issue before the court for two days of pretrial hearing was the question now before us. The hearing was televised live and repeated on tape in the same evening, reaching approximately 100,000 viewers. In addition, the courtroom was a mass of wires, television cameras, [***555] microphones and photographers. The petitioner, the panel of prospective jurors, who were sworn the second day, the witnesses [**1637] and the lawyers were all exposed to this untoward situation. The judge decided that the trial [*551] proceedings would be telecast. He announced no restrictions at the time. This emphasized the notorious nature of the coming trial, increased the intensity of the publicity on the petitioner

and together with the subsequent televising of the trial beginning 30 days later inherently prevented a sober search for the truth. This is underscored by the fact that the selection of the jury took an entire week. As might be expected, a substantial amount of that time was devoted to ascertaining the impact of the pretrial televising on the prospective jurors. As we have noted, four of the jurors selected had seen all or part of those broadcasts. The trial, on the other hand, lasted only three days.

Moreover, the trial judge was himself harassed. After the initial decision to permit telecasting he apparently decided that a booth should be built at the broadcasters' expense to confine its operations; he then decided to limit the parts of the trial that might be televised live; then he decided to film the testimony of the witnesses without sound in an attempt to protect those under the rule; and finally he ordered that defense counsel and their argument not be televised, in the light of their objection. Plagued by his original error -- recurring each day of the trial -- his day-to-day orders made the trial more confusing to the jury, the participants and to the viewers. Indeed, it resulted in a public presentation of only the State's side of the case.

As Mr. Justice Holmes said in *Patterson v. Colorado, 205 U.S. 454, 462 (1907)*:

"The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."

It is said that the ever-advancing techniques of public communication and the adjustment of the public to its [*552] presence may bring about a change in the effect of telecasting upon the fairness of criminal trials. But we are not dealing here with future developments in the field of electronics. Our judgment cannot be rested on the hypothesis of tomorrow but must take the facts as they are presented today.

The judgment is therefore

Reversed.

CONCUR BY: WARREN; HARLAN

CONCUR

MR. CHIEF JUSTICE WARREN, whom MR. JUSTICE DOUGLAS and MR. JUSTICE GOLDBERG join, concurring.

While I join the Court's opinion and agree that the televising of criminal trials is inherently a denial of due process, I desire to express additional views on why this is so. In doing this, I wish to emphasize that our condemnation of televised criminal trials is not based on generalities or abstract fears. The record in this case presents a vivid illustration of the inherent prejudice of televised criminal trials and supports our conclusion that this is the appropriate time to make a definitive appraisal of television in the courtroom.

[***556] I.

Petitioner, a much-publicized financier, was indicted by a Reeves County, Texas, grand jury for obtaining property through false pretenses. The case was transferred to the City of Tyler, in Smith County, Texas, and was set for trial on September 24, 1962. Prior to that date petitioner's counsel informed the trial judge that he would make a motion on September 24 to exclude all cameras from the courtroom during the trial.

On September 24, a hearing was held to consider petitioner's motion to prohibit television, motion pictures, and still photography at the trial. The courtroom was filled with newspaper reporters and [**1638] cameramen, television cameramen, and spectators. At least 12 cameramen with [*553] their equipment were seen by one observer, and there were 30 or more people standing in the aisles. An article appearing in the New York Times the next day stated:

"A television motor van, big as an intercontinental bus, was parked outside the courthouse and the second-floor courtroom was a forest of equipment. Two television cameras had been set up inside the bar and four more marked cameras were aligned just outside the gates. . . . Cables and wires snaked over the floor." [1]

With photographers roaming at will through the courtroom, petitioner's counsel made his motion that all cameras be excluded. As he spoke, a cameraman wandered behind the judge's bench and snapped his picture. Counsel argued that the presence of cameras would make it difficult for him to consult with his client, make his client ill at ease, and make it impossible to obtain a fair trial since the cameras would distract the jury, witnesses and lawyers. He also expressed the view

that televising selected cases tends to give the jury an impression that the particular trial is different from ordinary criminal trials. The court, however, ruled that the taking of pictures and televising would be allowed so long as the cameramen stood outside the railing that separates the trial participants from the spectators. The court also ruled that if a complaint was made that any camera was too noisy, the cameramen would have to stop taking pictures; that no pictures could be taken in the corridors outside the courtroom; and that those with microphones were not to pick up conversations between petitioner and his lawyers. Subsequent to the court's ruling petitioner arrived in the courtroom, [2] and the defense introduced testimony [*554] concerning the atmosphere in the court on that day. At the conclusion of the day's hearing the judge reasserted his earlier ruling. He then ordered a roll call of the prosecution witnesses, at least some of whom had been in the courtroom during the proceedings.

1 N. Y. Times, Sept. 25, 1962, p. 46, col. 4. See Appendix, Photographs 1, 2, 3.

2 Counsel explained to the trial court that he desired to protect petitioner from the cameras until the court had made its ruling.

The entire hearing on September 24 was televised live by station KLTV of Tyler, Texas, and station WFAA-TV of Dallas, Texas. Commercials were inserted when there was a pause in the proceedings. On the evening of Monday, September 24, both stations ran an edited tape of the day's proceedings and interrupted the tape to play the commercials ordinarily seen in the particular time slot. In addition to the [***557] live television coverage there was also a live radio pickup of the proceedings by at least one station.

The proceedings continued on September 25. There was again a significant number of cameramen taking motion pictures, still pictures and television pictures. The judge once more ordered cameramen to stay on the other side of the railing and stated that this order was to be observed even during court recesses. The panel from which the petit jury was to be selected was then sworn in the presence of the cameramen. The panel was excused to permit counsel to renew his motion to prohibit photography in the courtroom. The court denied the motion, but granted a continuance of trial until October 22 and dismissed the jury panel. At the suggestion of petitioner's counsel the trial judge warned the prosecution witnesses who were present not to discuss the case during the continuance. The proceedings were televised live and portions of the television tape were shown on the regularly scheduled evening news programs. Live radio transmission apparently occurred as on the day before.

[**1639] On October 1, 1962, the trial judge issued an order explaining what coverage he would permit during the trial. The judge delivered the order in his chambers for the [*555] benefit of television cameramen so that they could film him. The judge ruled that although he would permit television cameras to be present during the trial, they would not be permitted to present live coverage of the interrogation of prospective jurors or the testimony of witnesses. He ruled that each of the three major television networks, NBC, CBS, ABC, and the local television station KLTV could install one camera not equipped to pick up sound and the film would be available to other television stations on a pooled basis. In addition, he ruled that with respect to news photographers only cameramen for the local press, Associated Press, and United Press would be permitted in the courtroom. Photographs taken were also to be made available to others on a pooled basis. The judge did not explain how he decided which television cameramen and which still photographers were to be permitted in the courtroom and which were to be excluded.

For the proceedings beginning on October 22, station KLTV, at its own expense, and with the permission of the court, had constructed a booth in the rear of the courtroom painted the same or near the same color as the courtroom. An opening running lengthwise across the booth permitted the four television cameras to photograph the proceedings. The courtroom was small and the cameras were clearly visible to all in the courtroom. [3] The cameras were equipped with "electronic sound on camera" which permitted them to take both film and sound. Upon entering the courtroom the judge told all those with television cameras to go back to the booth; asked the press photographers not to move around any more than necessary; ordered that no flashbulbs or floodlights be used; and again told cameramen that they could not go inside the railing. Defense counsel renewed his motion [*556] to ban all "sound equipment . . . still cameras, movie cameras and television; and all radio facilities" from the courtroom. Witnesses were again called on this issue, but at the conclusion of the hearing the trial [***558] judge reaffirmed his prior ruling to permit cameramen in the courtroom. In response to

petitioner's argument that his rights under the Constitution of the United States were being violated, the judge remarked that the "case [was] not being tried under the Federal Constitution."

3 See Appendix, Photograph 6.

None of the proceedings on October 22 was televised live. Television cameras, however, recorded the day's entire proceedings with sound for later showings. Apparently none of the October 22 proceedings was carried live on radio, although the proceedings were recorded on tape. The still photographers admitted by the court were free to take photographs from outside the railing.

On October 23 the selection of the jury began. Overnight an additional strip had been placed across the television booth so that the opening for the television cameras was reduced, but the cameras and their operators were still quite visible. [4] A panel of 86 prospective jurors was ready for the *voir dire*. The judge excused the jurors from the courtroom and made still another ruling on news coverage at the trial. He ordered the television recording to proceed from that point on without an audio pickup, and, in addition, forbade radio tapes of any further proceedings until all the evidence had been introduced. During the course of the trial the television cameras recorded without sound whatever matters appeared interesting to them for use on later newscasts; radio broadcasts in the form of spot reports were made from a room next to the courtroom. There was no live television or radio coverage until November 7 when the trial judge permitted live [**1640] coverage of the prosecution's [*557] arguments to the jury, the return of the jury's verdict and its acceptance by the court. Since the defense objected to being photographed during the summation, the judge prohibited television cameramen or still photographers from taking any pictures of the defense during its argument. But the show went on, and while the defense was speaking the cameras were directed at the judge and the arguments were monitored by audio equipment and relayed to the television audience by an announcer. On November 7 the judge, for the first time, directed news photographers desiring to take pictures to take them only from the back of the room. Up until this time the trial judge's orders merely limited news photographers to the spectator section.

4 See Appendix, Photograph 7.

II.

The decision below affirming petitioner's conviction runs counter to the evolution of Anglo-American criminal procedure over a period of centuries. During that time the criminal trial has developed from a ritual practically devoid of rational justification [5] to a fact-finding process, the acknowledged purpose of which is to provide a fair and reliable determination of guilt. [6]

5 Jenks, A Short History of English Law 46-47 (6th ed. 1949); I Stephen, A History of the Criminal Law of England 51-74 (1883).

6 See, *e. g., Craig v. Harney, 331 U.S. 367, 378*; *Irvin v. Dowd, 366 U.S. 717, 728*; *Brady v. Maryland, 373 U.S. 83, 87*; *Jackson v. Denno, 378 U.S. 368, 391.*

An element of rationality was introduced into the guilt-determining [***559] process in England over 600 years ago when a rudimentary trial by jury became "the principal institution for criminal cases." [7] Initially members of the jury were expected to make their own examinations of the cases they were to try and come to court already familiar [*558] with the facts, [8] which made it impossible to limit the jury's determination to legally relevant evidence. Gradually, however, the jury was transformed from a panel of witnesses to a panel of triers passing on evidence given by others in the courtroom. [9] The next step was to insure the independence of the jury, and this was accomplished by the decision in the case of *Edward Bushell*, 6 How. St. Tr. 999 (1670), which put an end to the practice of fining or otherwise punishing jury members who failed to reach the decision directed by the court. As the purpose of trial as a vehicle for discovering the truth became clearer, it was recognized that the defendant should have the right to call witnesses and to place them under oath, [10] to be informed of the charges against him before the trial, [11] and to have counsel assist him with his defense. [12] All these protections, and others which could be cited, were part of a development by which "the administration of criminal justice was set upon a firm and dignified basis." [13]

7 See *Singer v. United States, 380 U.S. 24, 27.*

8 II Pollock and Maitland, The History of English Law 621-622 (2d ed. 1909).

9 I Stephen, *supra*, note 5, at 260.

10 See 7 Will. 3, c. 3 (1695).

11 *Ibid.*

12 *Ibid.*; 6 & 7 Will. 4, c. 114 (1836).
13 I Stephen, *supra*, note 5, at 427.

When the colonists undertook the responsibility of governing themselves, one of their prime concerns was the establishment of trial procedures which would be consistent with the purpose of trial. The Continental Congress passed measures designed to safeguard the right to a fair trial, [14] and the various States adopted constitutional provisions [*559] directed to the [**1641] same end. [15] Eventually the *Sixth Amendment* incorporated into the Constitution certain provisions dealing with the conduct of trials:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Significantly, in the *Sixth Amendment* the words "speedy and public" qualify the term *trial* and the rest of the Amendment defines specific protections the accused is to have at his *trial*. Thus, the *Sixth Amendment*, by its own terms, not only requires that the accused have certain specific rights but also that he enjoy them at a *trial* -- a word with a meaning of its own, see *Bridges v. California, 314 U.S. 252, 271*.

14 I Journals of the Continental Congress 1774-1789, 69 (Ford ed. 1904).
15 Radin, The Right to a Public Trial, 6 Temple L. Q. 381, 383, n. 5a (1932).

The *Fourteenth Amendment* which places limitations on the States' administration of their criminal laws also gives content to the term *trial*. Whether the *Sixth Amendment* as a whole applies to [***560] the States through the Fourteenth, [16] or the *Fourteenth Amendment* embraces only those portions of the *Sixth Amendment* that are "fundamental," [17] or the *Fourteenth Amendment* incorporates a standard of "ordered liberty" apart from the [*560] specific guarantees of the *Bill of Rights*, [18] it has been recognized that state prosecutions must, at the least, comport with "the fundamental conception" of a fair *trial*. [19]

16 *Adamson v. California, 332 U.S. 46, 71-72* (dissenting opinion of MR. JUSTICE BLACK).
17 *Gideon v. Wainwright, 372 U.S. 335, 342.*
18 *Pointer v. Texas, 380 U.S. 400, 408* (opinion of MR. JUSTICE HARLAN, concurring in the result).
19 *Cox v. Louisiana, 379 U.S. 559, 562*; *Frank v. Mangum, 237 U.S. 309, 347* (dissenting opinion of Justice Holmes). See *Adamson v. California, 332 U.S. 46, 53*; *In re Murchison, 349 U.S. 133, 136*; *Irvin v. Dowd, 366 U.S. 717, 722*; *Jackson v. Denno, 378 U.S. 368, 377* (Court opinion), 424 (dissenting opinion of MR. JUSTICE CLARK), 428 (dissenting opinion of MR. JUSTICE HARLAN).

It has been held on one or another of these theories that the fundamental conception of a fair trial includes many of the specific provisions of the *Sixth Amendment*, such as the right to have the proceedings open to the public, *In re Oliver, 333 U.S. 257*; the right to notice of specific charges, *Cole v. Arkansas, 333 U.S. 196*; the right to confrontation, *Pointer v. Texas, 380 U.S. 400*; *Douglas v. Alabama, 380 U.S. 415*; and the right to counsel, *Gideon v. Wainwright, 372 U.S. 335*. But it also has been agreed that neither the Sixth nor the *Fourteenth Amendment* is to be read formalistically, for the clear intent of the amendments is that these specific rights be enjoyed at a constitutional trial. In the words of Justice Holmes, even though "every form [be] preserved," the forms may amount to no "more than an empty shell" when considered in the context or setting in which they were actually applied. [20]

20 *Frank v. Mangum, 237 U.S. 309, 346* (dissenting opinion).

In [**1642] cases arising from state prosecutions this Court has acted to prevent the right to a constitutional trial from being reduced to a formality by the intrusion of factors into the trial process that tend to subvert its purpose. The Court recognized in *Pennekamp v. Florida, 328 U.S. 331, 334*, [*561] that the "orderly operation of courts" is "the primary and dominant requirement in the administration of justice." And, in *Moore v. Dempsey, 261 U.S. 86, 90-91*, it was held that the atmosphere in and around the courtroom might be so hostile as to interfere with the trial process, even though an examination of the record disclosed that all the forms of trial conformed to the requirements of law: the

defendant had counsel, the jury members stated they were impartial, the jury was correctly charged, and the evidence was legally sufficient to convict. Moreover, in *Irvin v. Dowd, 366 U.S. 717*, a conviction was reversed where extensive pretrial publicity rendered a fair trial unlikely despite the observance [***561] of the formal requisites of a legal trial. We commented in that case:

"No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father." *Id., at 728.*

To recognize that disorder can convert a trial into a ritual without meaning is not to pay homage to order as an end in itself. Rather, it recognizes that the courtroom in Anglo-American jurisprudence is more than a location with seats for a judge, jury, witnesses, defendant, prosecutor, defense counsel and public observers; the setting that the courtroom provides is itself an important element in the constitutional conception of trial, contributing a dignity essential to "the integrity of the trial" process. *Craig v. Harney, 331 U.S. 367, 377.* As MR. JUSTICE BLACK said, in another context: "The very purpose of a court system is to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures." [21] In light of this fundamental conception of what the term *trial* [*562] means, this Court has recognized that often, despite widespread, hostile publicity about a case, it is possible to conduct a trial meeting constitutional standards. Significantly, in each of these cases, the basic premise behind the Court's conclusion has been the notion that judicial proceedings can be conducted with dignity and integrity so as to shield the trial process itself from these irrelevant, external factors, rather than to aggravate them as here. Thus, in reversing contempt convictions for out-of-court statements, this Court referred to "the power of courts to protect themselves from disturbances and disorder *in the court room," Bridges v. California, 314 U.S. 252, 266* (emphasis added); "the necessity for fair adjudication, free from interruption of its processes," *Pennekamp v. Florida, 328 U.S. 331, 336*; "the integrity of the trial," *Craig v. Harney, 331 U.S. 367, 377.* And, in upholding a conviction against a claim of unfavorable publicity, this Court commented "that petitioner's trial was conducted in a calm judicial manner," *Darcy v. Handy, 351 U.S. 454, 463.*

21 *Cox v. Louisiana, 379 U.S. 559, 583* (dissenting opinion).

Similarly, when state procedures have been found to thwart the purpose of trial this Court has declared those procedures to be unconstitutional. In *Tumey v. Ohio, 273 U.S. 510*, the Court considered a state procedure under which judges were paid for presiding over a case only if the defendant was found guilty and costs assessed against him. An argument was [**1643] made that the practice should not be condemned broadly, since some judges undoubtedly would not let their judgment be affected by such an arrangement. However, the Court found the procedure so inconsistent with the conception of what a trial should be and so likely to produce prejudice that it declared the practice unconstitutional even though no specific prejudice was shown.

In *Lyons v. Oklahoma, 322 U.S. 596*, this [***562] Court stated that if an involuntary confession is introduced into evidence [*563] at a state trial the conviction must be reversed, even though there is other evidence in the record to justify a verdict of guilty. We explained the rationale behind this judgment in *Payne v. Arkansas, 356 U.S. 560, 568*:

"Where . . . a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession."

Similar reasoning led to the decision last Term in *Jackson v. Denno, 378 U.S. 368.* We held there that when the voluntariness of a confession is at issue there must be a procedure adopted which provides "a reliable and clearcut determination of . . . voluntariness." *Id., at 391.* We found insufficient a procedure whereby the jury heard the confession but was instructed to disregard it if the jury found the confession involuntary:

"The New York procedure poses substantial threats to a defendant's constitutional rights to have an involuntary confession entirely disregarded and to have the coercion issue fairly and reliably determined. These hazards we cannot ignore." *Id., at 389.*

Earlier this Term, in *Turner v. Louisiana, 379 U.S. 466*, we considered a case in which deputy sheriffs, who were the prosecution's principal witnesses, were in charge of a sequestered jury during the trial. The Supreme Court of Louisiana criticized the practice but said that in the absence of a showing of prejudice there was no ground for reversal. We reversed because the "extreme prejudice inherent" in the practice required its condemnation on constitutional grounds.

Finally, the Court has on numerous other occasions reversed convictions, where the formalities of trial were [*564] observed, because of practices that negate the fundamental conception of trial. [22]

> 22 See *Mooney v. Holohan, 294 U.S. 103*; *Alcorta v. Texas, 355 U.S. 28*; *Napue v. Illinois, 360 U.S. 264*; and *Brady v. Maryland, 373 U.S. 83*.

This line of cases does not indicate a disregard for the position of the States in our federal system. Rather, it stands for the proposition that the criminal trial under our Constitution has a clearly defined purpose, to provide a fair and reliable determination of guilt, and no procedure or occurrence which seriously threatens to divert it from that purpose can be tolerated.

III.

For the Constitution to have vitality, this Court must be able to apply its principles to situations that may not have been foreseen at the time those principles were adopted. As was said in *Weems v. United States, 217 U.S. 349, 373*, and reaffirmed in *Brown v. Board of Education, 347 U.S. 483, 492-493*:

"Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore [***563] taken. [**1644] Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. . . . In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent [*565] into impotent and lifeless formulas. Rights declared in words might be lost in reality."

[***LEdHR16] [16]I believe that it violates the *Sixth Amendment* for federal courts and the *Fourteenth Amendment* for state courts to allow criminal trials to be televised to the public at large. I base this conclusion on three grounds: (1) that the televising of trials diverts the trial from its proper purpose in that it has an inevitable impact on all the trial participants; (2) that it gives the public the wrong impression about the purpose of trials, thereby detracting from the dignity of court proceedings and lessening the reliability of trials; and (3) that it singles out certain defendants and subjects them to trials under prejudicial conditions not experienced by others.

I have attempted to show that our common-law heritage, our Constitution, and our experience in applying that Constitution have committed us irrevocably to the position that the criminal trial has one well-defined purpose -- to provide a fair and reliable determination of guilt. In *Tumey v. Ohio, supra, at 532*, this Court condemned the procedure there employed for compensating judges because it offered a "possible temptation" to judges "not to hold the balance nice, clear and true between the State and the accused." How much more harmful is a procedure which not only offers the temptation to judges to use the bench as a vehicle for their own ends, but offers the same temptation to every participant in the trial, be he defense counsel, prosecutor, witness or juror! It is not necessary to speak in the abstract on this point. In the present case, on October 1, the trial judge invited the television cameras into his chambers so they could take films of him reading one of his pretrial orders. On this occasion, at least, the trial judge clearly took the initiative in placing himself before the television audience and in giving his order, and himself, the maximum possible publicity. Moreover, on October 22, when trial counsel renewed [*566] his motion to exclude television from the courtroom on the ground that it violated petitioner's rights under the Federal Constitution, the trial judge made the following speech:

"This case is not being tried under the Federal Constitution. This Defendant has been brought into this Court under the state laws, under the State Constitution.

. . . .

"I took an oath to uphold this Constitution; not the

Federal Constitution but the State Constitution; and I am going to do my best to do that as long as I preside on this Court, and if it is distasteful in following my oath and upholding the constitution, it will just have to be distasteful."

One is entitled to wonder if such a statement would be made in a court of justice by any state trial judge except as an appeal calculated to gain the favor of his viewing [***564] audience. I find it difficult to believe that this trial judge, with over 20 years' experience on the bench, was unfamiliar with the fundamental duty imposed on him by Article VI of the Constitution of the United States:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be [**1645] made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

This is not to say that all participants in the trial would distort it by deliberately playing to the television audience, but some undoubtedly would. The even more serious danger is that neither the judge, prosecutor, defense counsel, jurors or witnesses would be able to go [*567] through trial without considering the effect of their conduct on the viewing public. It is admitted in dissent that "if the scene at the September hearing had been repeated in the courtroom during this jury trial, it is difficult to conceive how a fair trial in the constitutional sense could have been afforded the defendant." *Post*, p. 612. But it is contended that what went on at the September hearing is irrelevant to the issue before us. With this I cannot agree. We granted certiorari to consider whether petitioner was denied due process when he was required to submit to a televised trial. In this, as in other cases involving rights under the Due Process Clause, we have an obligation to make an independent examination of the record, *e. g., Watts v. Indiana, 338 U.S. 49, 51*; *Norris v. Alabama, 294 U.S. 587, 590*; and the limited grant of certiorari does not prohibit us from considering all the facts in this record relevant to the question before us. The parties to this case, and those who filed briefs as *amici curiae*, recognize this, since they treat the televising of the September proceedings as a factor relevant to our consideration. Our decisions in *White v. Maryland, 373 U.S. 59*, and *Hamilton v. Alabama, 368 U.S. 52*, clearly hold that an accused is entitled to procedural protections at pretrial hearings as well as at actual trial and his conviction will be reversed if he is not accorded these protections. In addition, in *Pointer v. Texas, 380 U.S. 400*, we held that a pretrial hearing can have a profound effect on the trial itself and effectively prevent an accused from having a fair trial. Petitioner clearly did not have a fair determination of his motion to exclude cameras from the courtroom. The very presence of the cameras at the September hearing tended to impress upon the trial judge the power of the communications media and the criticism to which he would have been subjected if he had ruled that the presence of the cameras was inconsistent with petitioner's right to a fair trial. The prejudice to petitioner [*568] did not end here. Most of the trial participants were present at the September hearing -- the judge, defense counsel, prosecutor, prosecution witnesses and defendant himself -- and they saw for themselves the desecration of the courtroom. After undergoing this experience it is unrealistic to suppose that they would come to the October trial unaware that court procedures were being [***565] sacrificed in this case for the convenience of television. The manner in which the October proceedings were conducted only intensified this awareness. It was impossible for any of the trial participants ever to be unaware of the presence of television cameras in court for the actual trial. [23] The snouts of the four television cameras protruded through the opening in the booth, and the cameras and their operators were not only readily visible but were impossible to ignore by all who were surveying the activities in this small courtroom. No one could forget that he was constantly in the focus of the "all-seeing eye." Although the law of Texas purportedly permits witnesses to object to being televised, it is ludicrous to place this burden on them. They would naturally accept the conditions of the [**1646] courtroom as the judge establishes them, and feel that it would be as presumptuous for them to object to the court's permitting television as to object to the court reporter's recording their testimony. Yet, it is argued that no witnesses objected to being televised. This is indeed a slender reed to rely on, particularly in view of the trial judge's failure, in the course of his self-exculpating statements justifying his decision to allow television, to advise the witnesses or the jurors that they had the right to object to being televised. Defense counsel, however, stated forcefully that he could not concentrate on the case because of the distraction caused by the cameras. And the trial judge's attention [*569] was distracted from the

trial since he was compelled to make seven extensive rulings concerning television coverage during the October proceedings alone, when he should, instead, have been concentrating on the trial itself.

23 See Appendix, Photograph 7.

[***LEdHR17] [17] It is common knowledge that "television . . . can . . . work profound changes in the behavior of the people it focuses on." [24] The present record provides ample support for scholars who have claimed that awareness that a trial is being televised to a vast, but unseen audience, is bound to increase nervousness and tension, [25] [***566] cause an increased [*570] concern about appearances, [26] and bring to the surface latent opportunism that the traditional dignity of the courtroom would discourage. Whether they do so consciously or subconsciously, all trial participants act differently in the presence of television cameras. And, even if all participants make a conscientious and studied effort to be unaffected by the presence of television, this effort in itself prevents them from giving their [**1647] full attention to their proper functions at trial. Thus, the evil of televised trials, as demonstrated by this case, lies not in the noise and appearance of the cameras, but in the trial participants' awareness that they are being televised. To the extent that television has such an inevitable impact it undercuts the reliability of the trial process.

24 Keating, "Not 'Bonanza,' Not 'Peyton Place,' But the U.S. Senate," N. Y. Times Magazine, April 25, 1965, 67, 72. See, *e. g.*, N. Y. Times, April 22, 1965, p. 43, col. 2 (in describing a televised stockholders' meeting the Times reported, "Some stockholders seemed very much aware they were on camera"); Tinkham, Should Canon 35 Be Amended? A Question of Proper Judicial Administration, 42 A. B. A. J. 843, 845 (1956) (in giving examples of how people react when they know they are on television, the author describes the reactions of a television audience when the camera was turned on it as "contorted, grimacing"); Gould, N. Y. Times, March 11, 1956, § 2, p. X 11, col. 2 ("The most experienced performers in show business know the horrors of stage fright before they go on TV. This psychological and emotional burden must not be placed on a layman whose testimony may have a bearing on whether, in a murder trial, another human being is to live or die.").

25 See, *e. g.*, Douglas, The Public Trial and the Free Press, 46 A. B. A. J. 840, 842 (1960). In *United States v. Kleinman, 107 F.Supp. 407 (D. C. D. C. 1952)*, the court refused to hold in contempt witnesses in a congressional hearing who refused to answer questions while television cameras were focused on them. The court stated:

"The only reason for having a witness on the stand, either before a committee of Congress or before a court, is to get a thoughtful, calm, considered and, it is to be hoped, truthful disclosure of facts. That is not always accomplished, even under the best of circumstances. But at least the atmosphere of the forum should lend itself to that end.

"In the cases now to be decided, the stipulation of facts discloses that there were, in close proximity to the witness, television cameras, newsreel cameras, news photographers with their concomitant flashbulbs, radio microphones, a large and crowded hearing room with spectators standing along the walls, etc. The obdurate stand taken by these two defendants must be viewed in the context of all these conditions. The concentration of all of these elements seems to me necessarily so to disturb and distract any witness to the point that he might say today something that next week he will realize was erroneous. And the mistake could get him in trouble all over again." *Id., at 408.*

26 See, *e. g.*, *Douglas, supra*, note 25, at 842; Yesawich, Televising and Broadcasting Trials, 37 Cornell L. Q. 701, 717 (1952).

In the early days of this country's development, the entertainment a trial might provide often tended to obfuscate its proper role.

"The people thought holding court one of the greatest performances in the range of their experience. . . . The country folks would crowd in for ten miles to hear these 'great lawyers' plead; and it was a secondary matter with the client whether he won or lost his case, so the 'pleading' was loud and long." [27]

"In early frontier America, when no motion pictures, no television, and no radio provided entertainment,

[*571] trial day in the county was like fair day, and from near and far citizens young and old converged on the county seat. The criminal trial was the theater and *spectaculum* of old rural America. Applause and cat calls were not infrequent. All too easily lawyers and judges became part-time actors at the bar . . . ." [28]

I had thought that these days of frontier justice were long behind us, but the courts below would return the theater to the courtroom.

27 Wigmore, A Kaleidoscope of Justice 487 (1941).

28 Mueller, Problems Posed by Publicity to Crime and Criminal Proceedings, 110 U. Pa. L. Rev. 1, 6 (1961).

The televising of trials would cause the public to equate the trial process with the forms of entertainment regularly seen on television and with the commercial objectives of the television industry. In the present case, tapes of the September 24 hearing were run in place of the "Tonight Show" by one station and in place of the late night movie by another. Commercials for soft drinks, soups, eyedrops and seatcovers were inserted when there was a pause in the proceedings. In addition, if trials were televised there would be a natural tendency on the part of broadcasters to develop the personalities of the trial participants, so as to give the proceedings more of an element of drama. This tendency was noticeable in the present case. Television commentators gave the viewing audience a homey, flattering sketch about the trial judge, obviously to add an extra element of viewer appeal to the trial:

"Tomorrow morning at 9:55 the [***567] WFAA T. V. cameras will be in Tyler to telecast live [the trial judge's] decision whether or not he will permit live coverage of the Billie Sol Estes trial. If so, this will be the first such famous national criminal proceeding to be televised in its entirety live. [The trial judge] [*572] was appointed to the bench here in Tyler in 1942 by [the Governor]. The judge has served every two years since then. This *very* beautiful Smith County Courthouse was built and dedicated in 1954, but before that [the trial judge] had made a reputation for himself that reached not only throughout Texas, but throughout the United States as well. It is said that [the trial judge], who is now 53 years old, has tried more cases than any other judge during his time in office."

The television industry might also decide that the bareboned trial itself does not contain sufficient drama to sustain an audience. It might provide expert commentary on the proceedings and hire persons with legal backgrounds to anticipate possible trial strategy, as the football expert anticipates plays for his audience. The trial judge himself stated at the September hearing that if he wanted [**1648] to see a ball game he would turn on his television set, so why not the same for a trial.

Moreover, should television become an accepted part of the courtroom, greater sacrifices would be made for the benefit of broadcasters. In the present case construction of a television booth in the courtroom made it necessary to alter the physical layout of the courtroom and to move from their accustomed position two benches reserved for spectators. [29] If this can be done in order better to accommodate the television industry, I see no reason why another court might not move a trial to a theater, if such a move would provide improved television coverage. Our memories are short indeed if we have already forgotten the wave of horror that swept over this country when Premier Fidel Castro conducted his prosecutions before 18,000 people in Havana Stadium. [30] But in the decision [*573] below, which completely ignores the importance of the courtroom in the trial process, we have the beginnings of a similar approach toward criminal "justice." This is not an abstract fear I am expressing because this very situation confronted the Nebraska Supreme Court in *Roberts v. State, 100 Neb. 199, 203, 158 N. W. 930, 931-932 (1916)*:

"The court removed the trial from the court-room to the theater, and stated as a reason therefor: 'By reason of the insufficiency of the court-room to seat and accommodate the people applying for admission . . . it is by the court ordered that the further trial of this cause be had at the Keith Theater, and thereupon the court was adjourned to Keith Theater, where trial proceeded.' The stage was occupied by court, counsel, jury, witnesses, and officers connected with the trial. The theater proper was crowded with curious spectators. Before the trial was completed it was returned to the court-room and concluded there. At the adjournment of court on one occasion the bailiff announced from the stage: 'The regular show will be tomorrow; matinee in the afternoon and another performance at 8:30. Court is now adjourned until 7:30.'"

29 Compare Appendix, Photograph 5, with

Appendix, Photograph 6.
30 N. Y. Times, Jan. 23, 1959, p. 1, col. 1.

There [***568] would be a real threat to the integrity of the trial process if the television industry and trial judges were allowed to become partners in the staging of criminal proceedings. The trial judge in the case before us had several "conferences [with] representatives of the news media." *Post*, p. 606. He then entered into a joint enterprise with a television station for the construction of a booth in his courtroom. The next logical step in this partnership might be to schedule the trial for a time that would permit the maximum number of viewers to watch and to schedule recesses to coincide with the need for station breaks. Should the television industry become an [*574] integral part of our system of criminal justice, it would not be unnatural for the public to attribute the shortcomings of the industry to the trial process itself. The public is aware of the television industry's consuming interest in ratings, and it is also aware of the steps that have been taken in the past to maintain viewer interest in television programs. Memories still recall vividly the scandal caused by the disclosure that quiz programs had been corrupted in order to heighten their dramatic appeal. Can we be sure that similar efforts would not be made to heighten the dramatic appeal of televised trials? Can we be sure that the public would not inherently distrust our system of justice because of its intimate association with a commercial enterprise?

Broadcasting in the courtroom would give the television industry an awesome [**1649] power to condition the public mind either for or against an accused. By showing only those parts of its films or tapes which depict the defendant or his witnesses in an awkward or unattractive position, television directors could give the community, state or country a false and unfavorable impression of the man on trial. Moreover, if the case should end in a mistrial, the showing of selected portions of the trial, or even of the whole trial, would make it almost impossible to select an impartial jury for a second trial. Cf. *Rideau v. Louisiana, 373 U.S. 723.* To permit this powerful medium to use the trial process itself to influence the opinions of vast numbers of people, before a verdict of guilt or innocence has been rendered, would be entirely foreign to our system of justice.

The sense of fairness, dignity and integrity that all associate with the courtroom would become lost with its commercialization. Thus, the televising of trials would not only have an effect on those participating in the trials that are being televised, but also on those who observe the trials and later become trial participants.

[*575] It is argued that television not only entertains but also educates the public. But the function of a trial is not to provide an educational experience; and there is a serious danger that any attempt to use a trial as an educational tool will both divert it from its proper purpose and lead to suspicions concerning the integrity of the trial process. The Soviet Union's trial of Francis Gary Powers provides an example in point. The integrity of the trial was suspect because it was concerned not only with determining the guilt of the individual on trial but also with providing an object lesson to the public. This divided effort undercut confidence in the guilt-determining aspect of the procedure and by so doing rendered [***569] the educational aspect self-defeating.

"Was it prejudicial to [Powers] that the trial took place in a special hall with over 2,000 spectators, that it was televised, that prominent representatives of many organizations in various countries were invited to attend, that simultaneous oral translations of the proceedings . . . were provided, and that detailed . . . reports of the case in various languages were distributed to the press before, during and after the trial?"

". . . The Soviet legal system . . . consciously and explicitly uses the trial, and indeed the very safeguards of justice themselves, as instruments of the social and political objectives of the state. . . .

". . . A Soviet trial is supposed to be correct, impartial, just, reasonable, and at the same time it is supposed to serve as an object-lesson to society, a means of teaching the participants, the spectators and the public generally to be loyal, obedient, disciplined fighters for Communist ideals. . . .

". . . The tension between the demands of justice and the demands of politics can never be entirely [*576] eliminated. The fate of the accused is bound to be influenced in one way or another when the trial is lifted above its individual facts and deliberately made an object-lesson to the public."

". . . The deliberate use of a trial as a means of political education threatens the integrity of the judicial process." [31]

31 Berman, Introduction to the Trial of the U 2 xiii, xii-xiii, xxix (1960).

Finally, if the televising of criminal proceedings were approved, trials would be selected for television coverage for reasons having nothing to do with the purpose of trial. A trial might be televised because a particular judge has gained the fancy of the public by his unorthodox [**1650] approach; or because the district attorney has decided to run for another office and it is believed his appearance would attract a large audience; or simply because a particular courtroom has a layout that best accommodates television coverage. [32] For the most part, however, the most important factor that would draw television to the courtroom would be the nature of the case. The alleged perpetrator of the sensational murder, the fallen idol, or some other person who, like petitioner, has attracted the public interest would find his trial turned into [*577] a vehicle for television. Yet, these are the very persons who encounter the greatest difficulty in securing an impartial trial, even without the presence of television. This Court would no longer be able to point to the dignity and calmness of the courtroom as a protection from outside influences. For the television camera penetrates this protection and brings into the courtroom tangible evidence of the widespread interest in a case -- an interest which has often been fanned by exhaustive reports in the newspapers, [***570] television and radio for weeks before trial. The present case presents a clear example of this danger. In the words of petitioner's counsel:

"The Saturday Evening Post, The Readers Digest, Time, Life all had feature stories upon [petitioner's] story giving in detail his life history and the details of . . . alleged fraudulent transactions . . . .

"The metropolitan papers throughout the country featured the story daily. Each day for weeks the broadcasts carried some features of the story." [33]

After living in the glare of this publicity for weeks, petitioner came to court for a legal adjudication of the charges against him. As he approached the courthouse he was confronted by an army of photographers, reporters and television commentators shoving microphones in his face. [34] When he finally made his way into the courthouse it was reasonable for him to expect that he could have a respite from this merciless badgering and have his case adjudicated in a calm atmosphere. Instead, the carnival atmosphere of the September hearing served only to increase the publicity surrounding petitioner and to condition further the public's mind against him. Then, upon his entrance into the courtroom for his actual trial he was [*578] confronted with the sight of the television camera zeroed in on him and the ever-present still photographers snapping pictures of interest. As he opened a newspaper waiting for the proceedings to begin, the close-up lens of a television camera zoomed over his shoulder in an effort to find out what he was reading. In no sense did the dignity and integrity of the trial process shield this petitioner from the prejudicial publicity to which he had been exposed, because that publicity marched right through the courtroom door and made itself at home in heretofore unfamiliar surroundings. We stated in *Gideon v. Wainwright, 372 U.S. 335, 344*, "From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law." This [**1651] principle was not applied by the courts below.

32 A revealing dialogue took place in the present case between defense counsel and one of the television executives present in the courtroom during the September 24 hearing.

"Q. The camera on the other side of the room has to look over a corner of the jury box and past the jurors to be aimed at the witness box, does it not?

"A. I think that is pretty clear, sir. I don't think the jurors would be in the way there.

"Q. You don't think the jurors would get in the way of your operations?

"A. I don't mean that exactly, sir."

33 Petition for writ of certiorari, 35a.

34 See Appendix, Photograph 4.

I believe petitioner in this case has shown that he was actually prejudiced by the conduct of these proceedings, but I cannot agree with those who say that a televised trial deprives a defendant of a fair trial only if "actual prejudice" can be shown. The prejudice of television may be so subtle that it escapes the ordinary methods of proof, [35] but it would gradually erode our fundamental conception of trial. [36] A defendant may be unable to prove that he was actually prejudiced by a

televised trial, just as he may be unable to prove that the introduction of a coerced confession at his trial influenced the jury to convict him when there was substantial evidence to support his conviction aside from the confession, *Payne v. Arkansas, supra*; that the jury refrained from making a [*579] clear-cut determination [***571] on the voluntariness question, *Jackson v. Denno, supra*; that a particular judge was swayed by a direct financial interest in his conviction, *Tumey v. Ohio, supra*; or that the jury gave additional weight to the testimony of certain prosecution witnesses because of the jury's repeated contacts with those witnesses during the trial, *Turner v. Louisiana, supra.* How is the defendant to prove that the prosecutor acted differently than he ordinarily would have, that defense counsel was more concerned with impressing prospective clients than with the interests of the defendant, that a juror was so concerned with how he appeared on television that his mind continually wandered from the proceedings, that an important defense witness made a bad impression on the jury because he was "playing" to the television audience, or that the judge was a little more lenient or a little more strict than he usually might be? And then, how is petitioner to show that this combination of changed attitudes diverted the trial sufficiently from its purpose to deprive him of a fair trial? It is no answer to say that an appellate court can review for itself tapes or films of the proceedings. In the first place, it is not clear that the court would be able to obtain unedited tapes or films to review. Even with the cooperation of counsel on both sides, this Court was unable to obtain films of this trial which were in any sense complete. In addition, time limitations might restrict the television companies to taking pictures only of those portions of the trial that are most newsworthy and most likely to attract the attention of the viewing audience. More importantly, the tapes or films, even if unedited, could give a wrong impression of the proceedings. The camera which takes pictures cannot take a picture of itself. In addition, the camera cannot possibly cover the actions of all trial participants during the trial. While the camera is focused on the [*580] judge who is apparently acting properly, a juror may be glancing up to see where the camera is pointing and counsel may be looking around to see whether he can confer with his client without the close-up lens of the camera focusing on them. Needless to say, the camera cannot penetrate the minds of the trial participants and show their awareness that they may at that moment be the subject of the camera's focus. The most the camera can show is that a formally correct trial took place, but our Constitution requires more than form.

35 See, *e. g., Douglas, supra*, note 25, at 844.

36 Cf. *Fay v. New York, 332 U.S. 261, 300* (dissenting opinion of Mr. Justice Murphy).

I recognize that the television industry has shown in the past that it can be an enlightening and informing institution, but like other institutions it must respect the rights of others and cannot demand that we alter fundamental constitutional conceptions for its benefit. We must take notice of the inherent unfairness of television [**1652] in the courtroom and rule that its presence is inconsistent with the "fundamental conception" of what a trial should be. My conviction that this is the proper holding in this case is buttressed by the almost unanimous condemnation of televised court proceedings by the judiciary in this country and by the strong opposition to the practice by the organized bar in this country. Canon 35 of the American Bar Association's Canons of Judicial Ethics prohibits the televising of court trials. [37] With only [***572] two, or possibly three exceptions, [38] the highest court of each [*581] State which has considered the question has declared that televised criminal trials are inconsistent with the Anglo-American conception of "trial." [39] Similarly, [**1653] *Rule 53 of the Federal* [***573] *Rules of Criminal Procedure* prohibits [*582] the "broadcasting" of trials, [40] and the Judicial Conference of the United States has unanimously condemned televised trials. [41] This condemnation rests on more than notions of policy; it arises from an understanding of the [*583] constitutional conception of the term "trial." Such a general consensus is certainly relevant to this Court's determination of the question. See *Mapp v. Ohio, 367 U.S. 643, 651.*

37 The Canon provides in pertinent part:

"Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted."

38 Colorado, *In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics, 296 P. 2d 465*

(Colo. Sup. Ct. 1956), and Texas permit televising of trials in the discretion of the trial judge. The current situation in Oklahoma is unclear. In *Lyles v. State, 330 P. 2d 734 (1958)*, the Criminal Court of Appeals of Oklahoma stated that the televising of proceedings was in the discretion of the trial judge. In 1959, however, the Supreme Court adopted a rule prohibiting television during actual proceedings. Okla. Stat. Ann., Tit. 5, at 65-66 (1963 Supp.). Nevertheless, in 1961 the court again stated that the televising of trials is a matter for the trial judge's discretion. *Cody v. State, 361 P. 2d 307 (Ct. Crim. App. Okla. 1961)*.

39 With the exceptions stated in note 38, *supra*, no State affirmatively permits televised trials. It has been stated that Canon 35 is in effect in 30 States. 48 J. Am. Jud. Soc. 80 (1964); Brief for Petitioner, p. 39. It is difficult to verify this figure because of the lack of uniformity among the States in reporting their court rules. However, the following States have clearly adopted Canon 35, or its equivalent: Alaska, Alaska Rules Crim. Proc. 48; Arizona, Ariz. *Sup. Ct. Rule 45*, *17* Ariz. Rev. Stat. Ann., at 40; Connecticut, Conn. Practice Book 27 (1963); Delaware, Del. *Sup. Ct. Rule 33*, *13* Del. Code Ann., at 23 (1964 Supp.) (adopted Canon 35 in its pre-1952 form, which does not explicitly prohibit television, but does prohibit "the taking of photographs" and "broadcasting of court proceedings"); Florida, Code of Ethics, Rule A35, 31 Fla. Stat. Ann., at 285 (1964 Supp.), see *Brumfield v. State, 108 So. 2d 33 (Fla. Sup. Ct. 1958)*; Hawaii, Hawaii Sup. Ct. Rule 16, 43 Haw. 450; Illinois, 1964 Ann. Rep. of the Ill. Judicial Conference 168-169, see *People v. Ulrich, 376 Ill. 461, 34 N. E. 2d 393 (1941)*, *People v. Munday, 280 Ill. 32, 117 N. E. 286 (1917)*; Iowa, Iowa Sup. Ct. Rule 119, 40 Iowa Code Ann., c. 610 (1964 Supp.); Kansas, Kansas Sup. Ct. Rule 117, 191 Kan. xxiv (1963) (does not refer specifically to television); Kentucky, Ky. Ct. App. Rule 3.170, Russell's Kentucky Practice and Service 21 (1964); Louisiana, Canon of Judicial Ethics XXIII, 242 La. LI (1960); Michigan, Canon of Judicial Ethics 35, Callaghan's Michigan Pleading and Practice, Rules at 422-423 (2d ed. 1962); New Jersey, Canon of Judicial Ethics 35, 1 Waltzinger, New Jersey Practice 299 (Rev. ed. 1954); New Mexico, N. M. *Sup. Ct. Rule 27*, *4* N. M. Stat. Ann., at 95 (1963 Supp.); New York, N. Y. Rules of the Administrative Board of the Judicial Conference, Rule 5, N. Y. Judiciary Law, at 320 (1964 Supp.); Ohio, 176 Ohio St. lxiv (1964), see *State v. Clifford, 162 Ohio St. 370, 123 N. E. 2d 8 (1954)*, cert. denied, *349 U.S. 929*; Tennessee, Tenn. Sup. Ct. Rule 38, 209 Tenn. 818 (1961); Virginia, 201 Va. cvii (1960) (prohibits taking of photographs and broadcasting, although it does not refer specifically to television); Washington, 61 Wash. 2d xxviii (1963); West Virginia, 141 W. Va. viii (1955).

In addition, Brand, Bar Associations, Attorneys and Judges (1956 and 1959 Supp.) reports that the Idaho Supreme Court adopted Canon 35 in its present form and the Supreme Courts of Oregon, South Dakota and Utah adopted the Canon when it merely prohibited "photographing" and "broadcasting" without specifically mentioning television. It has also been reported that the Supreme Court of Arkansas adopted Canon 35. 44 J. Am. Jud. Soc. 120 (1960).

Moreover, the Supreme Court of California assumed it was "improper" to televise criminal proceedings in *People v. Stroble, 36 Cal. 2d 615, 226 P. 2d 330 (1951)*, affirmed *343 U.S. 181*, rehearing denied *343 U.S. 952*; see the rule adopted by the Conference of California Judges, 24 Cal. State Bar J. 299 (1949); the Court of Appeals of Maryland in *Ex parte Sturm, 152 Md. 114, 122, 136 A. 312, 315 (1927)*, used language indicating that Maryland would probably bar television from the courtroom if faced with the problem; and the Supreme Court of Pennsylvania cited with approval Canon 35 in *Mack Appeal, 386 Pa. 251, 257, n. 5, 126 A. 2d 679, 681-682, n. 4 (1956)*, cert. denied, *352 U.S. 1002*, see 48 J. Am. Jud. Soc. 200 (1965).

40 *Rule 53* provides:

"The taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court."

41 "Resolved, That the Judicial Conference of the United States condemns the taking of

photographs in the courtroom or its environs in connection with any judicial proceedings, and the broadcasting of judicial proceedings by radio, television, or other means, and considers such practices to be inconsistent with fair judicial procedure and that they ought not to be permitted in any federal court." Annual Report of the Proceedings of the Judicial Conference of the United States, March 8-9, 1962, p. 10.

IV.

Nothing in this opinion is inconsistent with the constitutional guarantees of a public trial and the freedoms of speech and the press.

This Court explained in *In re Oliver, 333 U.S. 257, 266, 270*, that the public trial provision of the *Sixth Amendment* is a "guarantee to an accused" designed to "safeguard against any attempt to employ our courts as instruments of persecution." Clearly the openness of the proceedings provides other benefits as well: it arguably improves the quality of testimony, it may induce unknown witnesses to come forward with relevant testimony, it may move all trial participants to perform their duties conscientiously, and it gives the public the opportunity to observe the courts in the performance of their duties and to determine whether they are performing adequately. [42] But the guarantee of a public trial confers no special benefit on the press, the radio industry or the television industry. A public trial is a necessary component of an accused's right to a fair trial and the concept of public trial cannot be used to defend conditions which prevent the trial process from providing a fair and reliable determination of guilt.

42 See, *e. g.*, 3 Blackstone, Commentaries on the Laws of England 372-373 (15th ed. 1809); 6 Wigmore, Evidence 332-335 (3d ed. 1940).

[***LEdHR18] [18] [***LEdHR19] [19]To satisfy the constitutional requirement that trials be public it is not necessary to provide facilities large enough [*584] for all who might like to attend a particular trial, since to do so would interfere with the integrity of the trial process and make the publicity of trial proceedings an end in itself. Nor does the requirement that trials be public mean that observers are free to act as they please in the courtroom, for persons who attend trials cannot act in such a way as to interfere with the trial [**1654] process, see *Moore v. Dempsey, supra.* When representatives of the communications media attend trials they have no greater rights than other members of the public. Just as an ordinary citizen might be prohibited from using field glasses or a motion picture camera in the courthouse because by so doing he would interfere with the conduct of the trial, representatives of the press and broadcasting industries [***574] are subject to similar limitations when they attend court. Since the televising of criminal trials diverts the trial process from its proper end, it must be prohibited. This prohibition does not conflict with the constitutional guarantee of a public trial, because a trial is public, in the constitutional sense, when a courtroom has facilities for a reasonable number of the public to observe the proceedings, which facilities are not so small as to render the openness negligible and not so large as to distract the trial participants from their proper function, when the public is free to use those facilities, and when all those who attend the trial are free to report what they observed at the proceedings.

Nor does the exclusion of television cameras from the courtroom in any way impinge upon the freedoms of speech and the press. Court proceedings, as well as other public matters, are proper subjects for press coverage.

"A trial is a public event. What transpires in the court room is public property. If a transcript of the court proceedings had been published, we suppose [*585] none would claim that the judge could punish the publisher for contempt. And we can see no difference though the conduct of the attorneys, of the jury, or even of the judge himself, may have reflected on the court. Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it." [43]

So long as the television industry, like the other communications media, is free to send representatives to trials and to report on those trials to its viewers, there is no abridgment of the freedom of press. The right of the communications media to comment on court proceedings does not bring with it the right to inject themselves into the fabric of the trial process to alter the purpose of that process.

43 *Craig v. Harney, 331 U.S. 367, 374.* See

Bridges v. California, 314 U.S. 252; *Pennekamp v. Florida, 328 U.S. 331.*

In summary, television is one of the great inventions of all time and can perform a large and useful role in society. But the television camera, like other technological innovations, is not entitled to pervade the lives of everyone in disregard of constitutionally protected rights. [44] The television industry, like other institutions, has a proper area of activities and limitations beyond which it cannot go with its cameras. That area does not extend into an American courtroom. On entering that [*586] hallowed sanctuary, where the lives, liberty and property of people are in jeopardy, television representatives have only the rights of the general public, namely, to be present, to observe the proceedings, and thereafter, if they choose, to report them.

44 Compare *Olmstead v. United States, 277 U.S. 438, 471* (dissenting opinion of Mr. Justice Brandeis); *On Lee v. United States, 343 U.S. 747, 762* (dissenting opinion of MR. JUSTICE DOUGLAS); *Silverman v. United States, 365 U.S. 505*; *Lopez v. United States, 373 U.S. 427, 445-446* (opinion concurring in the result), 465 (dissenting opinion of MR. JUSTICE BRENNAN).

[For opinion of HARLAN, J., concurring, see *post*, p. 587.]

[SEE PHOTOS IN ORIGINAL]

[*587] [***583] [**1662] MR. JUSTICE HARLAN, concurring.

I concur in the opinion of the Court, subject, however, to the reservations and only to the extent indicated in this opinion.

The constitutional issue presented by this case is far-reaching in its implications for the administration of justice in this country. The precise question is whether the *Fourteenth Amendment* prohibits a State, over the objection of a defendant, from employing television in the courtroom to televise contemporaneously, or subsequently by means of videotape, the courtroom proceedings of a criminal trial of widespread public interest. The issue is no narrower than this because petitioner has not asserted any isolatable prejudice resulting from the presence of television apparatus within the courtroom or from the contemporaneous or subsequent broadcasting of the trial proceedings. On the other hand, the issue is no broader, for we are concerned here only with a criminal trial of great notoriety, and not with criminal proceedings of a more or less routine nature.

The question is fraught with unusual difficulties. Permitting television in the courtroom undeniably has mischievous potentialities for intruding upon the detached atmosphere which should always surround the judicial process. Forbidding this innovation, however, would doubtless impinge upon one of the valued attributes of our federalism by preventing the States from pursuing a novel course of procedural experimentation. My conclusion is that there is no constitutional requirement that television be allowed in the courtroom, and, at least as to a notorious criminal trial such as this one, the considerations against allowing television in the courtroom so far outweigh the countervailing factors advanced in its support as to require a holding that what was done in this case infringed the fundamental right to a fair trial assured by the *Due Process Clause of the Fourteenth Amendment.*

[*588] Some preliminary observations are in order: All would agree, I am sure, that at its worst, television is capable of distorting the trial process so as to deprive it of fundamental fairness. Cables, kleig lights, interviews with the principal participants, commentary on their performances, "commercials" at frequent intervals, special wearing apparel and makeup for the trial participants -- certainly such things would not conduce to the sound administration of justice by any acceptable standard. But that is not the case before us. We must judge television as we find it in this trial -- relatively unobtrusive, with the cameras contained in a booth at the back of the courtroom.

I.

[***LEdHR20] [20]No constitutional provision guarantees a right to televise trials. The "public trial" guarantee of the *Sixth Amendment*, which reflects a concept fundamental to the administration of justice in this Country, *In re Oliver, 333 U.S. 257*, certainly does not require that television be admitted to the courtroom. See *United Press Assns.* v. *Valente, 308 N. Y. 71, 123 N. E. 2d 777.* Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule,

that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings. *In re Oliver, supra, at 266-273.* [***584] A fair trial is the objective, and "public trial" is an institutional safeguard for attaining it.

Thus the right of "public trial" is not one belonging to the public, but one belonging to the accused, and inhering in the institutional process by which justice is administered. Obviously, the public-trial guarantee is not violated if an individual member of the public cannot gain admittance to a courtroom because there are no available seats. The guarantee will already have been met, for the "public" will be present in the form of those [**1663] persons [*589] who did gain admission. Even the actual presence of the public is not guaranteed. A public trial implies only that the court must be open to those who wish to come, sit in the available seats, conduct themselves with decorum, and observe the trial process. It does not give anyone a concomitant right to photograph, record, broadcast, or otherwise transmit the trial proceedings to those members of the public not present, although to be sure, the guarantee of public trial does not of itself prohibit such activity.

The free speech and press guarantees of the *First* and *Fourteenth Amendments* are also asserted as embodying a positive right to televise trials, but the argument is greatly overdrawn. Unquestionably, television has become a very effective medium for transmitting news. Many trials are newsworthy, and televising them might well provide the most accurate and comprehensive means of conveying their content to the public. Furthermore, television is capable of performing an educational function by acquainting the public with the judicial process in action. Albeit these are credible policy arguments in favor of television, they are not arguments of constitutional proportions. The rights to print and speak, over television as elsewhere, do not embody an independent right to bring the mechanical facilities of the broadcasting and printing industries into the courtroom. Once beyond the confines of the courthouse, a news-gathering agency may publicize, within wide limits, what its representatives have heard and seen in the courtroom. But the line is drawn at the courthouse door; and within, a reporter's constitutional rights are no greater than those of any other member of the public. Within the courthouse the only relevant constitutional consideration is that the accused be accorded a fair trial. If the presence of television substantially detracts from that goal, due process requires that its use be forbidden.

[*590] I see no force in the argument that to exclude television apparatus from the courtroom, while at the same time permitting newspaper reporters to bring in their pencils and notebooks, would discriminate in favor of the press as against the broadcasting services. The distinctions to be drawn between the accouterments of the press and the television media turn not on differences of size and shape but of function and effect. The presence of the press at trials may have a distorting effect, but it is not caused by their pencils and notebooks. If it were, I would not hesitate to say that such physical paraphernalia should be barred.

II.

The probable impact of courtroom television on the fairness of a trial may vary according to the particular kind of case involved. The impact of television on a trial exciting [***585] wide popular interest may be one thing; the impact on a run-of-the-mill case may be quite another. Furthermore, the propriety of closed circuit television for the purpose of making a court recording or for limited use in educational institutions obviously presents markedly different considerations. The Estes trial was a heavily publicized and highly sensational affair. I therefore put aside all other types of cases; in so doing, however, I wish to make it perfectly clear that I am by no means prepared to say that the constitutional issue should ultimately turn upon the nature of the particular case involved. When the issue of television in a non-notorious trial is presented it may appear that no workable distinction can be drawn based on the type of case involved, or that the possibilities for prejudice, though less severe, are nonetheless of constitutional proportions. Compare *Powell v. Alabama, 287 U.S. 45*; *Betts v. Brady, 316 U.S. 455*; *Gideon v. Wainwright, 372 U.S. 335.* The resolution of those further questions should await an appropriate [**1664] case; the [*591] Court should proceed only step by step in this unplowed field. The opinion of the Court necessarily goes no farther, for only the four members of the majority who unreservedly join the Court's opinion would resolve those questions now.

I do not deem the constitutional inquiry in this case ended by the finding, in effect conceded by petitioner's counsel, that no isolatable prejudice was occasioned by the manner in which television was employed in this case. [1] Courtroom television introduces into the conduct

of a criminal trial the element of professional "showmanship," an extraneous influence whose subtle capacities for serious mischief in a case of this sort will not be underestimated by any lawyer experienced in the elusive imponderables of the trial arena. In the context of a trial of intense public interest, there is certainly a strong possibility that the timid or reluctant witness, for whom a court appearance even at its traditional best is a harrowing affair, will become more timid or reluctant when he finds that he will also be appearing before a "hidden audience" of unknown but large dimensions. There is certainly a strong possibility that the "cocky" witness having a thirst for the limelight will become more "cocky" under the influence of television. And who can say that the juror who is gratified by having been chosen for a front-line case, an ambitious prosecutor, a publicity-minded defense counsel, and even a conscientious judge will not stray, albeit unconsciously, from doing what "comes naturally" into pluming themselves for a satisfactory television "performance"?

1 The trial judge ordered that there was to be no audio transmission of the witnesses' testimony. The witnesses, however, were present at the September hearing when everything was broadcast, and the record does not show affirmatively that they were aware that the microphone which confronted them during the actual trial was not being used for the same purpose.

[*592] Surely possibilities of this kind carry grave potentialities for distorting the integrity of the judicial process bearing on the determination of the guilt or innocence of the accused, and, more particularly, for casting doubt on the reliability of the fact-finding process carried on under such conditions. See Douglas, [***586] The Public Trial and the Free Press, 46 A. B. A. J. 840 (1960). To be sure, such distortions may produce no telltale signs, but in a highly publicized trial the danger of their presence is substantial, and their effects may be far more pervasive and deleterious than the physical disruptions which all concede would vitiate a conviction. A lively public interest could increase the size of the viewing audience immensely, and the masses of spectators to whom the trial is telecast would have become emotionally involved with the case through the dissemination of pretrial publicity, the usual concomitant of such a case. The presence of television would certainly emphasize to the trial participants that the case is something "special." Particularly treacherous situations are presented in cases where pretrial publicity has been massive [2] even when jurors positively state they will not be influenced by it; see *Rideau v. Louisiana, 373 U.S. 723*; *Irvin v. Dowd, 366 U.S. 717*. To increase the possibility of influence and the danger of a "popular verdict" by subjecting the jurors to the view of a mass audience whose approach to the case has been conditioned by pretrial publicity can only make a bad situation worse. The entire thrust of rules of evidence and the other protections attendant upon the modern trial is to keep extraneous influences out of the courtroom. *Turner v. Louisiana, 379 U.S. 466, 472-473*. [**1665] As we recently observed in *Turner*, "Mr. Justice Holmes stated no more than a truism when he observed that 'Any judge who has sat with juries knows that in spite of forms they [*593] are extremely likely to be impregnated by the environing atmosphere.' *Frank v. Mangum, 237 U.S. 309, at 349* (dissenting opinion)." *Id., at 472*. [3] The knowledge on the part of the jury and other trial participants that they are being televised to an emotionally involved audience can only aggravate the atmosphere created by pretrial publicity.

2 Petitioner in this case amassed 11 volumes of pretrial press clippings.

3 The Court had occasion to recognize in *Cox v. Louisiana, 379 U.S. 559, 565*, that even "judges are human" and not immune from outside environmental influences.

The State argues that specific prejudice must be shown for the Due Process Clause to apply. I do not believe that the *Fourteenth Amendment* is so impotent when the trial practices in question are instinct with dangers to constitutional guarantees. I am at a loss to understand how the *Fourteenth Amendment* can be thought not to encompass protection of a state criminal trial from the dangers created by the intrusion of collateral and wholly irrelevant influences into the courtroom. The Court has not hesitated in the past to condemn such practices, even without any positive showing of isolatable prejudice. In *Turner v. Louisiana, supra*, decided just this Term, we held that the "potentialities" for distortion of the trial created by a key witness serving as bailiff to a sequestered jury were sufficient to violate the *Due Process Clause of the Fourteenth Amendment*. In *Jackson v. Denno, 378 U.S. 368*, the Court made the judgment that a trial judge's determination of a coerced-confession issue is more

likely to avoid prejudice than a jury [***587] determination, a judgment which indeed overrode a long-standing contrary state practice. And in *Irvin v. Dowd, 366 U.S. 717*, we held that flamboyant pretrial publicity cast sufficient doubt on the impartiality of the jury to vitiate a conviction, even in the face of statements by all the jurors that they were not subject to its influence. See *366 U.S., at 729* (Frankfurter, J., concurring). Other examples of [*594] instances in which the Court has exercised its judgment as to the effects of one thing or another on human behavior are plentiful. See, *e. g., Griffin v. California, 380 U.S. 609*; *Tancil v. Woolls, 379 U.S. 19*; *Mapp v. Ohio, 367 U.S. 643* (compare *People v. Defore, 242 N. Y. 13, 150 N. E. 585*); *Avery v. Georgia, 345 U.S. 559*; *Brown v. Board of Education, 347 U.S. 483*; *Tumey v. Ohio, 273 U.S. 510*.

The judgment that the presence of television in the courtroom represents a serious danger to the trial process is supported by a vast segment of the Bar of this country, as evidenced by Canon 35 of the Canons of Judicial Ethics of the American Bar Association, counseling against such practices, [4] the views of the Judicial Conference of the United States (*infra*, p. 601), *Rule 53 of the Federal Rules of Criminal Procedure*, and even the "personal views" (*post*, pp. 601-602) of the Justices on the dissenting side of the present case.

4 The consistent position of the American Bar Association is set out in the Appendix.

The arguments advanced against the constitutional banning of televised trials seem to me peculiarly unpersuasive. It is said that the pictorial broadcasting of trials will serve to educate the public as to the nature of the judicial process. Whatever force such arguments might [**1666] have in run-of-the-mill cases, they carry little weight in cases of the sort before us, where the public's interest in viewing the trial is likely to be engendered more by curiosity about the personality of the well-known figure who is the defendant (as here), or about famous witnesses or lawyers who will appear on the television screen, or about the details of the particular crime involved, than by innate curiosity to learn about the workings of the judicial process itself. Indeed it would be naive not to suppose that it would be largely such factors that would qualify a trial for commercial television [*595] "billing," and it is precisely that kind of case where the risks of permitting television coverage of the proceedings are at their greatest.

It is also asserted that televised trials will cause witnesses to be more truthful, and jurors, judges, and lawyers more diligent. To say the least this argument is sophistic, for it is impossible to believe that the reliability of a trial as a method of finding facts and determining guilt or innocence increases in relation to the size of the crowd which is watching it. Attendance by interested spectators in the courtroom will fully satisfy the safeguards of "public trial." Once openness is thus assured, the addition of masses of spectators would, I venture to say, detract rather than add to the reliability of the process. See *Cox v. Louisiana, 379 U.S. 559, 562*. A trial in Yankee Stadium, even if the [***588] crowd sat in stony silence, would be a substantially different affair from a trial in a traditional courtroom under traditional conditions, and the difference would not, I think, be that the witnesses, lawyers, judges, and jurors in the stadium would be more truthful, diligent, and capable of reliably finding facts and determining guilt or innocence. [5] There will be no disagreement, I am sure, among those competent to judge that precisely the opposite would likely be the case.

5 There may, of course, be a difference in impact upon the atmosphere and trial participants between the physical presence of masses of people and the presence of a camera lens which permits masses of people to observe the process remotely. However, the critical element is the knowledge of the trial participants that they are subject to such visual observation, an element which is, of course, present in this case.

Finally, we should not be deterred from making the constitutional judgment which this case demands by the prospect that the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. If and when that day arrives the constitutional [*596] judgment called for now would of course be subject to re-examination in accordance with the traditional workings of the Due Process Clause. At the present juncture I can only conclude that televised trials, at least in cases like this one, possess such capabilities for interfering with the even course of the judicial process that they are constitutionally banned. On these premises I concur in the opinion of the Court.

APPENDIX TO OPINION OF MR. JUSTICE

HARLAN, CONCURRING.

The development of Canon 35 is set out at length in the *amicus curiae* brief of the American Bar Association, pp. 3-8, as follows:

"It [Canon 35] was originally adopted on September 30, 1937 by the House of Delegates [1] in the following form:

"'Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs [**1667] in the court room, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.' 62 A. B. A. Rep. 1134-35 (1937).

1 "The House of Delegates is not only the governing body of the American Bar Association; because of the presence of representatives of all State Bar Associations, the largest and most important local bar associations, and of other important national professional groups, it is in fact a broadly representative policy forum for the profession as a whole."

"A Special Committee on Cooperation Between Press, Radio and Bar, as to Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings had reported to the Association its grave concern with the dangers attendant upon the use of radio in connection with trials, particularly [*597] in light of the spectacular publicity and broadcast of the trial of Bruno Hauptmann. [2] The Committee specifically referred to the evil of 'trial in the air'. [3] 62 A. B. A. REP. 860 (1937).

2 "See *State v. Hauptmann, 115 N. J. L. 412, 180 Atl. 809* (Ct. Err. & App.), *cert. denied, 296 U.S. 649 (1935).*"

3 "Prior to the adoption of Judicial Canon 35, the impropriety of permitting radio broadcasts of court proceedings was recognized by the Committee on Professional Ethics and Grievances of the Association in its Opinion No. 67, March 21, 1932. The Committee had recourse to Judicial Canon 34 which provides that a judge should not administer his office 'for the purpose of advancing his personal ambitions or increasing his popularity.' The Committee found that radio broadcasting of a trial changes 'what should be the most serious of human institutions either into an enterprise for the entertainment of the public or of one for promoting publicity for the judge.' AMERICAN BAR ASSOCIATION, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES 163 (1957)."

"After [***589] the adoption of Judicial Canon 35, the direct radio broadcasting of court proceedings was disapproved by the Association's Committee on Professional Ethics and Grievances in its Opinion No. 212, March 15, 1941, as being specifically condemned. The Committee quoted with approval the following statement of the Michigan and Detroit Bar Associations:

"'Such broadcasts are unfair to the defendant and to the witnesses. The natural embarrassment and confusion of a citizen on trial should not be increased by a realization that his voice and his difficulties are being used as entertainment for a vast radio audience. The fear expressed by most persons when facing an audience or microphone is a matter of common knowledge, and but few defendants or witnesses can properly concentrate on facts and testify fully and fairly when so handicapped. . . . Such broadcasts are unfair to the Judge, who should be permitted to devote his undivided attention to the case, unmindful of the effect which his comments or decision may [*598] have upon the radio audience.' AMERICAN BAR ASSOCIATION, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES 426 (1957).

"In 1952, the growing prominence of television as a medium of mass communication was dealt with in a report of the Special Committee on Televising and Broadcasting Legislative and Judicial Proceedings [headed by the late John W. Davis]. 77 A. B. A. REP. 607 (1952). In condemning the practice of televising judicial proceedings, the Committee called attention to the fact that:

"'The attention of the court, the jury, lawyers and witnesses should be concentrated upon the trial itself and ought not to be divided with the television or broadcast audience who for the most part have merely the interest of curiosity in the proceedings. It is not difficult to conceive that all participants may become

over-concerned with the impression their actions, [**1668] rulings or testimony will make on the absent multitude.' *Id.* at 610.

"As a result of this report, and the recommendation of the Committee on Professional Ethics and Grievances, Judicial Canon 35 was amended by inserting a ban on the 'televising' of court proceedings and inserting the descriptive phrase 'distract the witness in giving his testimony' before the phrase 'degrade the court.' In addition, a second paragraph was added providing for the televising and broadcasting of certain ceremonial proceedings. *Id. at 110-11.*

"In October, 1954, the Board of Governors authorized the appointment of a Special Bar-Media Conference Committee on Fair Trial-Free Press to meet with representatives of the press, radio, and television. The views of both sides were thoroughly explored and were presented in detail in the September, [***590] 1956 issue of the American Bar Association Journal. [4] After extensive joint debate, [*599] no solutions or agreements were reached. 83 A. B. A. REP. 790-91 (1958). The Committee did report that it was convinced that

"'courtroom photographing or broadcasting or both would impose undue police duties upon the trial judge[,] . . . that the broadcasting and the photographing in the courtroom might have an adverse psychological effect upon trial participants, judges, lawyers, witnesses and juries[,] . . . [and] that partial broadcasts of trials, particularly on television, might influence public opinion which in turn might influence trial results. . . .' *Id. at 645.*

4 " 42 A.B.A.J. 834, 838, 843 (1956)."

"Following the presentation of the Bar-Media Conference Committee report and in connection with the consideration of a report and recommendation of a Special Committee of the American Bar Foundation created in July, 1955 (83 A. B. A. REP. 643-45 (1958)), the House of Delegates conducted a hearing as a 'Committee of the Whole' during its February, 1958 session at which proponents and opponents of Judicial Canon 35 were fully heard. 83 A. B. A. REP. 648-69 (1958). Thereafter, at the August, 1958 meeting of the House of Delegates, it was decided to have a Special Committee study Canon 35 and

"'conduct further studies of the problem, including the obtaining of a body of reliable factual data on the experience of judges and lawyers in those courts where either photography, televising or broadcasting, or all of them, are permitted. . . . The fundamental objective of the Committee and of all others interested must be to consider and make recommendations which will preserve the right of fair trial.' 83 A. B. A. REP. 284 (1958).

"The Special Committee filed an Interim Report and Recommendations with the House of Delegates in August, [*600] 1962 setting forth the 'Area and Perspective' of its survey and studies. The report included portions of testimony by media representatives taken at a hearing held in Chicago on February 18, 1962, as well as a summary of the Committee's informal conference with certain representatives from Colorado and Texas. In addition, the report included written comments by officers of State Bar Associations responding to a Committee survey, and certain general correspondence received by the Committee regarding Judicial Canon 35. The report also listed significant publications favoring either revision or retention of the Canon. . . . [Hereinafter cited *Int. Rep.*]

"The Special Committee thereafter submitted its final report and recommendations, concluding that the substantive provisions of Judicial Canon 35 remain valid and 'should be retained as essential safeguards of the individual's inviolate [**1669] and personal right of fair trial.' . . . The Committee did recommend certain minor deletions . . . and changes . . . which were adopted by the House of Delegates, after full debate, on February 5, 1963:

"'The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings [are calculated to] detract from the essential dignity of the proceedings, distract [the] *participants and witnesses* in giving [his] testimony, [degrade the court] and create misconceptions [***591] with respect thereto in the mind of the public and should not be permitted.' [5]

5 "The full text of Judicial Canon 35, as amended, is as follows:

"'IMPROPER PUBLICIZING OF COURT PROCEEDINGS

"'Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted.

"'Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization.'"

[*601] "A vast majority of the states have voluntarily adopted Judicial Canon 35 in one form or another, and it has been embodied in principle in *Rule 53 of the Federal Rules of Criminal Procedure*. In a recent Resolution of the Judicial Conference of the United States, the philosophy of Canon 35 was unanimously reaffirmed:

"'Resolved, That the Judicial Conference of the United States condemns the taking of photographs in the courtroom or its environs in connection with any judicial proceeding, and the broadcasting of judicial proceedings by radio, television, or other means, and considers such practices to be inconsistent with fair judicial procedure and that they ought not to be permitted in any federal court.' *Int. Rep.* p. 97."

(Footnotes numbered and partially omitted.)

DISSENT BY: STEWART; WHITE; BRENNAN

DISSENT

MR. JUSTICE STEWART, whom MR. JUSTICE BLACK, MR. JUSTICE BRENNAN, and MR. JUSTICE WHITE join, dissenting.

I cannot agree with the Court's decision that the circumstances of this trial led to a denial of the petitioner's *Fourteenth Amendment* rights. I think that the introduction of television into a courtroom is, at least in the present state of the art, an extremely unwise policy. It invites many constitutional risks, and it detracts from the inherent dignity of a courtroom. But I am unable to escalate this personal view into a *per se* constitutional [*602] rule. And I am unable to find, on the specific record of this case, that the circumstances attending the limited televising of the petitioner's trial resulted in the denial of any right guaranteed to him by the United States Constitution.

On October 22, 1962, the petitioner went to trial in the Seventh Judicial District Court of Smith County, Texas, upon an indictment charging him with the offenses of (1) swindling, (2) theft by false pretenses, and (3) theft by a bailee. After a week spent in selecting a jury, the trial itself lasted some three and a half days. At its conclusion the jury found the petitioner guilty of the offense of swindling under the first count of the indictment. The trial judge permitted portions of the trial proceedings [**1670] to be televised, under the limitations described below. He also gave news photographers permission to take still pictures in the courtroom under specified conditions.

The Texas Court of Criminal Appeals affirmed the petitioner's conviction, and we granted certiorari, [***592] limited to a single question. The question, as phrased by the petitioner, is this:

"Whether the action of the trial court, over petitioner's continued objection, denied him due process of law and equal protection of the laws under the *Fourteenth Amendment to the Constitution of the United States*, in requiring petitioner to submit to live television of his trial, and in refusing to adopt in this all out publicity case, as a rule of trial procedure, Canon 35 of the Canons of Judicial Ethics of the American Bar Association, and instead adopting and following, over defendant's objection, Canon 28 of the Canons of Judicial Ethics, since approved by the Judicial Section of the integrated (State agency) State Bar of Texas."

The two Canons of Judicial Ethics referred to in the petitioner's statement of the question presented are set [*603] out in the margin. [1] But, as the Court rightly says, the problem before us is not one of choosing between the conflicting guidelines reflected in these Canons of Judicial Ethics. It is a problem rooted in the *Due Process Clause of the Fourteenth Amendment*. We deal here with matters subject to continuous and unforeseeable change --

the [*604] techniques of public communication. In an area where all the [**1671] variables may be modified tomorrow, I cannot at this time rest my determination on hypothetical possibilities not present in the record of this case. There is no claim here based upon any right guaranteed by the [***593] *First Amendment.* But it is important to remember that we move in an area touching the realm of free communication, and for that reason, if for no other, I would be wary of imposing any *per se* rule which, in the light of future technology, might serve to stifle or abridge true *First Amendment* rights.

1 Canons of Judicial Ethics. American Bar Association: Judicial Canon 35. Improper publicizing of Court proceedings.

"Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted.

"Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization."

Canons of Judicial Ethics, Integrated State Bar of Texas: Judicial Canon 28. Improper Publicizing of Court Proceedings.

"Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings unless properly supervised and controlled, may detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public. The supervision and control of such trial coverage shall be left to the trial judge who has the inherent power to exclude or control coverage in the proper case in the interest of justice.

"In connection with the control of such coverage the following declaration of principles is adopted:

"(1) There should be no use of flash bulbs or other artificial lighting.

"(2) No witness, over his expressed objection, should be photographed, his voice broadcast or be televised.

"(3) The representatives of news media must obtain permission of the trial judge to cover by photograph, broadcasting or televising, and shall comply with the rules prescribed by the judge for the exercise of the privilege.

"(4) Any violation of the Court's Rules shall be punished as a contempt.

"(5) Where a judge has refused to allow coverage or has regulated it, any attempt, other than argument by representatives of the news media directly with the Court, to bring pressure of any kind on the judge, pending final disposition of the cause in trial, shall be punished as a contempt."

I.

The indictment was originally returned by a grand jury in Reeves County, Texas, and it engendered widespread publicity. After some preliminary proceedings there, the case was transferred for trial to Smith County, more than 500 miles away. The trial was set for September 24, 1962, but it did not commence on that date. Instead, that day and the next were spent in hearings on two motions filed by defense counsel: a motion to bar television and news cameras from the trial, and a motion to continue the trial to a later date. Those proceedings were themselves telecast "live," and news photographers were permitted to take pictures in the courtroom. The activities of the television crews and news photographers led to considerable disruption of the hearings. [2] At the conclusion [*605] of the hearings the motion for a continuance was granted, and the case reset

for trial on October 22. The motion to bar television and news photographers from the trial was denied. [3]

2 A contemporary newspaper account described the scene as follows:

"A television motor van, big as an intercontinental bus, was parked outside the courthouse and the second-floor courtroom was a forest of equipment. Two television cameras had been set up inside the bar and four more marked cameras were aligned just outside the gates.

"A microphone stuck its 12-inch snout inside the jury box, now occupied by an overflow of reporters from the press table, and three microphones confronted Judge Dunagan on his bench. Cables and wires snaked over the floor." The New York Times, September 25, 1962, p. 46, col. 4.

3 In ruling on the motion, the trial judge stated:

"In the past, it has been the policy of this Court to permit televising in the court room under the rules and supervision of the Court. Heretofore, I have not encountered any difficulty with it. I was unable to observe any detraction from the witnesses or the attorneys in those cases. We have watched television, of course, grow up from its infancy and now into its maturity; and it is a news media. So I really do not see any justified reason why it should not be permitted to take its proper seat in the family circle. However, it will be under the strict supervision of the Court. I know there has been pro and con about televising in the court room. I have heard some say that it makes a circus out of the Court. I had the privilege yesterday morning of sitting in my home and viewing a sermon by the First Baptist Church over in Dallas and certainly it wasn't any circus in that church; and I feel that if it is a proper instrument in the house of the Lord, it is not out of place in the court room, if properly supervised.

"Now, television is going to be televising whatever the scene is here. If you want to watch a ball game and that is what they televise, you are going to see a ball game. If you want to see a preacher and hear a sermon, you tune in on that and that is what you are going to get. If the Court permits a circus in this court room, it will be televised, that is true, but they will not be creating a circus.

"Now, the most important point is whether or not it would interfere with a fair and impartial trial of this Defendant. That is the most important point, and that is the purpose, or will be the primary purpose of the Court, to insure that he gets that fair trial.

. . . .

"There is not anything the Court can do about the interest in this case, but I can control your activities and your conduct here; and I can assure you now that this Court is not going to be turned into a circus with TV or without it. Whatever action is necessary for the Court to take to insure that, the Court will take it.

. . . .

"There has been one consideration that the Court has given and it is that this is a small court room and there will be hundreds of people trying to get into this court room to witness this trial. I believe we would have less confusion if they would stay at home and stay out of the court room and look in on the trial. With all of those people trying to crowd in and push into this court room, that is another consideration I have given to it."

[*606] On [***594] [**1672] October 1, the trial judge issued an order delineating what coverage he would permit during the trial. [4] As a result of that order and ensuing conferences between the judge and representatives of the news media, the environment for the trial, which began on October 22, was in sharp contrast to that of the September hearings. The actual extent of television and news photography in the [*607] courtroom was described by the judge, after the trial had ended, in certifying the petitioner's bill of exceptions. This description is confirmed by my understanding of the entire record and was agreed to and accepted by defense counsel:

"Prior to the trial of October 22, 1962, there was a booth constructed and placed in the rear of the courtroom painted the same or near the same color as the courtroom with a small opening across the top for the use of cameras

. . . .

"Live telecasting and radio broadcasting were not permitted and the only telecasting was on film without sound, and there was not any broadcasting of the trial by radio permitted. Each network, ABC, NBC, CBS and KRLD [KLTV] Television in Tyler was allowed a camera in the courtroom . . . . The telecasting on film of this case was not a continuous camera operation and only pictures being taken at intervals during the day to be used on their regular news casts later in the day. There were some days during the trial that the cameras of only one or two stations were in operation, the others not being in attendance upon the Court each and every day. The Court did not permit any cameras [***595] other than those that were noiseless nor were flood lights and [**1673] flash bulbs allowed to be used in the courtroom. The Court permitted one news photographer with [*608] Associated Press, United Press International and Tyler Morning Telegraph and Courier Times. However, they were not permitted inside the Bar; and the Court did not permit any telecasting or photographing in the hallways leading into the courtroom or on the second floor of the courthouse where the courtroom is situated, in order that the Defendant and his attorneys would not be hindered, molested or harassed in approaching or leaving the courtroom. The Court did permit live telecasting of the arguments of State's counsel and the returning of the verdict by the Jury and its acceptance by the Court. The opening argument of the District Attorney of Smith County was carried by sound and because of transmission difficulty, there was not any picture. The closing argument for the State by the District Attorney of Reeves County was carried live by both picture and sound. The arguments of attorneys for Defendant, John D. Cofer and Hume Cofer, were not telecast or broadcast as the Court granted their Motion that same not be permitted.

"There was not any televising at any time during the trial except from the booth in the rear of the courtroom, and during the argument of counsel to the jury, news photography was required to operate from the booth so that they would not interfere or detract from the attention of either the jurors or the attorneys.

"During the trial that began October 22nd, there was never at any time any radio broadcasting equipment in the courtroom. There was some equipment in a room off of the courtroom where there were periodic news reports given; and throughout the trial that began October 22nd, not any witness requested not to be televised or photographed while they were testifying. Neither did any juror, while being interrogated [*609] on voir dire or at any other time, make any request of the Court not to be televised."

4 "In my statement of September 24, 1962, admitting television and other cameras in the court room during the trial of Billie Sol Estes, I said cameras would be allowed under the control and direction of the Court so long as they did not violate the legal rights of the Defendant or the State of Texas.

. . . .

"In line with my statement of September 24, 1962, I am at this time informing both television and radio that live broadcasting or telecasting by either news media cannot and will not be permitted during the interrogation of jurors in testing their qualifications, or of the testimony given by the witnesses, as to do so would be in violation of Art. 644 of the Code of Criminal Procedure of Texas, which provides as follows: 'At the request of either party, the witnesses on both sides may be sworn and placed in the custody of an officer and removed out of the court room to some place where they can not hear the testimony as delivered by any other witness in the case. This is termed placing witnesses under rule.'

". . . Each television network and the local television station will be allowed one film camera without sound in the court room and the film will be made available to other television stations on a pool basis. Marshall Pengra, manager of Television Station KLTV, Tyler, will be in charge of the independent pool and independent stations may contact him. The same will be true of cameras for the press, which will be limited to the local press, Associated Press and United Press.

. . . .

"I am making this statement at this time in order that the two news media affected may have sufficient notice before the case is called on October 22nd.

"The rules I have set forth above concerning the use of cameras are subject to change if I find that they are too restrictive or not workable, for any reason."

Thus, except for the closing arguments for the prosecution and the return of the jury's verdict, there was no "live" telecasting of the trial. And, even for purposes of delayed telecasting on later news programs, no words or other sounds were permitted to be recorded while the members of the jury were being selected or while any witness was testifying. No witnesses and no jurors were televised or photographed over their objection. [5]

5 There were nine witnesses for the prosecution and no witnesses for the defense.

Finally, the members of the jury saw no telecasts and no pictures of anything that went on during the trial. In accord with Texas law, the jurors were sequestered, day and night, from the beginning of the trial until it ended. [6] The jurors were lodged each night in quarters provided for that purpose in the courthouse itself. On the evening of November 6, by agreement of counsel and special permission of the court, the members of the jury were permitted to watch the election returns on television for a short period. For this purpose a portable television was brought into the jury's quarters by a court officer, [***596] and operated by him. Otherwise the jurors were not permitted to watch television at any time during the trial. The only newspapers permitted the jury were ones from which all coverage of the trial had been physically removed.

6 Arts. 668, 745, and 725, Tex. Code Crim. Proc.

II.

It is important to bear in mind the precise limits of the question before us in this case. The petition for a writ of [**1674] certiorari asked us to review four separate constitutional claims. We declined to review three of them, among which was the claim that the members of the jury "had received through the news media damaging and prejudicial [*610] evidence . . . ." [7] We thus left undisturbed the determination of the Texas Court of Criminal Appeals that the members of the jury were *not* prejudiced by the widespread publicity which preceded the petitioner's trial. One ingredient of this pretrial publicity was the telecast of the September hearings. Despite the confusion in the courtroom during those hearings, all that a potential juror could have possibly learned from watching them on television was that the petitioner's case had been called for trial, and that motions had been made and acted upon for a continuance, and to exclude cameras and television. At those hearings, there was no discussion whatever of anything bearing on the petitioner's guilt or innocence. This was conceded by the petitioner's counsel at the trial. [8]

7 Petition for Writ of Certiorari, Question 3, p. 3.

8 "A. [Mr. Hume Cofer, counsel for petitioner] . . . . The publicity that was given this trial on the last occasion and the number of cameras here, I think was sufficient to spread the news of this case throughout the county, to every available juror; and it is my opinion that on that occasion, there were so many cameras and so much paraphernalia here that it gave an opportunity for every prospective juror in Smith County to know about this case.

"Q. Not about the facts of the case?

"A. No, sir; not about the facts, nor any of the evidence."

Because of our refusal to review the petitioner's claim that pretrial publicity had a prejudicial effect upon the jurors in this case, and because, insofar as the September hearings were an element of that publicity, the claim is patently without merit, that issue is simply not here. Our decision in *Rideau v. Louisiana, 373 U.S. 723*, therefore, has no bearing at all in this case. There the record showed that the inhabitants of the small Louisiana parish where the trial was held had repeatedly been exposed to a television film showing "Rideau, in jail, flanked by the sheriff and two state troopers, admitting in detail the commission of the robbery, kidnapping, and murder, in response to leading questions by the sheriff." *373 U.S., at 725.* [*611] We found that "any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." *Id., at 726.* See also *Irvin v. Dowd, 366 U.S. 717.*

The *Rideau* case was no more than a contemporary application of enduring principles of procedural due process, principles reflected in such earlier cases as *Moore v. Dempsey, 261 U.S. 86*; *Brown v. Mississippi, 297 U.S. 278*; and *Chambers v. Florida, 309 U.S. 227, 235-241.* "Under our Constitution's guarantee of due

process," we said, "a person accused of committing a [***597] crime is vouchsafed basic minimal rights. Among these are the right to counsel, the right to plead not guilty, and the right to be tried in a courtroom presided over by a judge." *373 U.S., at 726-727.* We had occasion to apply the same basic concepts of procedural due process earlier this Term in *Turner v. Louisiana, 379 U.S. 466.* "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." *379 U.S., at 472-473.*

[**1675] But we do not deal here with mob domination of a courtroom, with a kangaroo trial, with a prejudiced judge or a jury inflamed with bias. Under the limited grant of certiorari in this case, the sole question before us is an entirely different one. It concerns only the regulated presence of television and still photography at the trial itself, which began on October 22, 1962. Any discussion of pretrial events can do no more than obscure the important question which is actually before us.

III.

It is obvious that the introduction of television and news cameras into a criminal trial invites many serious constitutional hazards. The very presence of photographers [*612] and television cameramen plying their trade in a courtroom might be so completely and thoroughly disruptive and distracting as to make a fair trial impossible. Thus, if the scene at the September hearing had been repeated in the courtroom during this jury trial, it is difficult to conceive how a fair trial in the constitutional sense could have been afforded the defendant. [9] And even if, as was true here, the television cameras are so controlled and concealed as to be hardly perceptible in the courtroom itself, there are risks of constitutional dimensions that lurk in the very process of televising court proceedings at all.

9 See note 2.

Some of those risks are catalogued in the *amicus curiae* brief filed in this case by the American Bar Association: "Potential or actual jurors, in the absence of enforceable and effective safeguards, may arrive at certain misconceptions regarding the defendant and his trial by viewing televised pre-trial hearings and motions from which the jury is ordinarily excluded. Evidence otherwise inadmissible may leave an indelible mark. . . . Once the trial begins, exposure to nightly rebroadcasts of selected portions of the day's proceedings will be difficult to guard against, as jurors spend frequent evenings before the television set. The obvious impact of witnessing repeated trial episodes and hearing accompanying commentary, episodes admittedly chosen for their news value and not for evidentiary purposes, can serve only to distort the jurors' perspective. . . . Despite the court's injunction not to discuss the case, it seems undeniable that jurors will be subject to the pressure of television-watching family, friends and, indeed, strangers. . . . It is not too much to imagine a juror being confronted with his wife's television-oriented viewpoint. . . . Additionally, the jurors' daily television appearances may make them recognizable celebrities, likely to be stopped by passing [*613] strangers, or perhaps harried by intruding telephone [***598] calls. . . ." Constitutional problems of another kind might arise if a witness or juror were subjected to being televised over his objection.

The plain fact of the matter, however, is that none of these things happened or could have happened in this case. The jurors themselves were prevented from seeing any telecasts of the trial, and completely insulated from association with any members of the public who did see such telecasts. This case, therefore, does not remotely resemble *Turner v. Louisiana, 379 U.S. 466,* where, during the trial, the jurors were subjected outside the courtroom to unmeasured and unmeasurable influences by key witnesses for the prosecution.

In the courtroom itself, there is nothing to show that the trial proceeded in any way other than it would have proceeded if cameras and television had not been present. In appearance, the courtroom was practically unaltered. There was no obtrusiveness and no distraction, no noise and no special lighting. There is no indication anywhere in the record of [**1676] any disturbance whatever of the judicial proceedings. There is no claim that the conduct of the judge, or that any deed or word of counsel, or of any witness, or of any juror, was influenced in any way by the presence of photographers or by television.

Furthermore, from a reading of the record it is crystal clear that this was not a trial where the judge was harassed or confused or lacking in command of the proceedings before the jury. Not once, after the first

witness was called, was there any interruption at all of the trial proper to secure a ruling concerning the presence of cameramen in the courtroom. There was no occasion, during the entire trial -- until after the jury adjourned to reach its verdict -- for any cautionary word to members of the press in the courtroom. The only time a motion was made, the jury was not in the courtroom. The trial itself was a [*614] most mundane affair, totally lacking in the lurid and completely emotionless. The evidence related solely to the circumstances in which various documents had been signed and negotiated. It was highly technical, if not downright dull. The petitioner called no witnesses, and counsel for petitioner made only a brief closing argument to the jury. There is nothing to indicate that the issues involved were of the kind where emotion could hold sway. The transcript of the trial belies any notion that frequent interruptions and inconsistent rulings communicated to the jury any sense that the judge was unable to concentrate on protecting the defendant and conducting the trial in a fair manner, in accordance with the State and Federal Constitutions.

IV.

What ultimately emerges from this record, therefore, is one bald question -- whether the *Fourteenth Amendment of the United States Constitution* prohibits all television cameras from a state courtroom whenever a criminal trial is in progress. In the light of this record and what we now know about the impact of television on a criminal trial, I can find no such prohibition in the *Fourteenth Amendment* or in any other provision of the Constitution. If what occurred did not deprive the petitioner of his constitutional right to a fair trial, then the fact that the public could view the proceeding on television has no constitutional significance. The Constitution [***599] does not make us arbiters of the image that a televised state criminal trial projects to the public.

While no *First Amendment* claim is made in this case, there are intimations in the opinions filed by my Brethren in the majority which strike me as disturbingly alien to the *First* and *Fourteenth Amendments*' guarantees against federal or state interference with the free communication of information and ideas. The suggestion that there are limits upon the public's right to know what goes on in [*615] the courts causes me deep concern. The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of *First Amendment* freedoms. See *Speiser v. Randall, 357 U.S. 513, 525.* And the proposition that nonparticipants in a trial might get the "wrong impression" from unfettered reporting and commentary contains an invitation to censorship which I cannot accept. Where there is no disruption of the "essential requirement of the fair and orderly administration of justice," "freedom of discussion should be given the widest range." *Pennekamp v. Florida, 328 U.S. 331, 347*; *Bridges v. California, 314 U.S. 252.* Cf. *Cox v. Louisiana, 379 U.S. 559, 563.*

I do not think that the Constitution denies to the State or to individual trial judges all discretion to conduct criminal trials with television cameras present, no [**1677] matter how unobtrusive the cameras may be. I cannot say at this time that it is impossible to have a constitutional trial whenever any part of the proceedings is televised or recorded on television film. I cannot now hold that the Constitution absolutely bars television cameras from every criminal courtroom, even if they have no impact upon the jury, no effect upon any witness, and no influence upon the conduct of the judge.

For these reasons I would affirm the judgment.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN joins, dissenting.

I agree with MR. JUSTICE STEWART that a finding of constitutional prejudice on this record entails erecting a flat ban on the use of cameras in the courtroom and believe that it is premature to promulgate such a broad constitutional principle at the present time. This is the first case in this Court dealing with the subject of television [*616] coverage of criminal trials; our cases dealing with analogous subjects are not really controlling, cf. *Rideau v. Louisiana, 373 U.S. 723*; and there is, on the whole, a very limited amount of experience in this country with television coverage of trials. In my view, the currently available materials assessing the effect of cameras in the courtroom are too sparse and fragmentary to constitute the basis for a constitutional judgment permanently barring any and all forms of television coverage. As was said in another context, "we know too little of the actual impact . . . to reach a conclusion on the bare bones of the . . . evidence before us." *White Motor Co.* v. *United States, 372 U.S. 253, 261.* It may well be, however, that as further experience and informed judgment do become available, [***600] the use of

cameras in the courtroom, as in this trial, will prove to pose such a serious hazard to a defendant's rights that a violation of the *Fourteenth Amendment* will be found without a showing on the record of specific demonstrable prejudice to the defendant. Compare *Wolf v. Colorado, 338 U.S. 25*, with *Mapp v. Ohio, 367 U.S. 643*; *Betts v. Brady, 316 U.S. 455*, with *Gideon v. Wainwright, 372 U.S. 335*; *Stein v. New York, 346 U.S. 156*, with *Jackson v. Denno, 378 U.S. 368, 389-390.*

The opinion of the Court in effect precludes further opportunity for intelligent assessment of the probable hazards imposed by the use of cameras at criminal trials. Serious threats to constitutional rights in some instances justify a prophylactic rule dispensing with the necessity of showing specific prejudice in a particular case. *Rideau v. Louisiana, 373 U.S. 723, 727*; *Jackson v. Denno, 378 U.S. 368, 389.* But these are instances in which there has been ample experience on which to base an informed judgment. Here, although our experience is inadequate and our judgment correspondingly infirm, the Court discourages further meaningful study of the use of television at criminal trials. Accordingly, I dissent.

[*617] MR. JUSTICE BRENNAN.

I write merely to emphasize that only four of the five Justices voting to reverse rest on the proposition that televised criminal trials are constitutionally infirm, whatever the circumstances. Although the opinion announced by my Brother CLARK purports to be an "opinion of the Court," my Brother HARLAN subscribes to a significantly less sweeping proposition. He states:

"The Estes trial was a heavily publicized and highly sensational affair. I therefore put aside all other types of cases . . . . The resolution of [**1678] those further questions should await an appropriate case; the Court should proceed only step by step in this unplowed field. *The opinion of the Court necessarily goes no farther, for only the four members of the majority who unreservedly join the Court's opinion would resolve those questions now." Ante*, pp. 590-591. (Emphasis supplied.)

Thus today's decision is *not* a blanket constitutional prohibition against the televising of state criminal trials.

While I join the dissents of my Brothers STEWART and WHITE, I do so on the understanding that their use of the expressions "the Court's opinion" or "the opinion of the Court" refers only to those views of our four Brethren which my Brother HARLAN explicitly states he shares.

REFERENCES

Annotation References:

Pretrial publicity in criminal case as affecting defendant's right to fair trial. 10 L ed 2d 1243.

Right to public trial in criminal case. 4 L ed 2d 2128.

Broadcasting, recording, or photographing court proceedings. *100 ALR2d 1404.*

Exclusion of public during trial. *156 ALR 265, 48 ALR2d 1436.*

Legal aspects of television. *15 ALR2d 785.*

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